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Kelo v. City of New London, Tulare Lake Basin Water Storage District v. United States, and Washoe County v. United States: A Fifth Amendment Takings Primer.

Christopher L. Harris

Daniel J. Lowenberg

RECENT DEVELOPMENTS

KELO v. *CITY OF NEW LONDON, TULARE LAKE BASIN WATER STORAGE DISTRICT* v. *UNITED STATES,* AND *WASHOE COUNTY* v. *UNITED STATES:* A FIFTH AMENDMENT TAKINGS PRIMER

CHRISTOPHER L. HARRIS
DANIEL J. LOWENBERG

"A man's home may be his castle, but that does not keep the [g]overnment from taking it."

—*Hendler v. United States*[1]

"Whiskey is for drinking; water is for fighting over."

—Mark Twain[2]

1. Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991).

2. *See* Mark Twain Quotes, *at* http://www.twainquotes.com/waterwhiskey.html (last visited Feb. 17, 2005) (cautioning that "[t]his quote has been attributed to Mark Twain, but until the attribution can be verified, the quote should not be regarded as authentic").

I. INTRODUCTION

New York Times pundit Nicholas Kristof wants to give North Dakota back to the buffalo. According to Kristof, most of the Great Plains, including all or most of North Dakota, should be set aside by the federal government as a "Buffalo Commons"—"the world's largest nature park, drawing tourists from all over the world to see . . . buffalo, elk, grizzlies and wolves."[3] Does the Fifth Amendment to the United States Constitution[4] stand in the way of the federal government, *a la* Kristof, from conscription of private property for national zoological use?[5] Or, is the government's obligation to protect natural resources such as endangered species held in "the public trust" a preexisting claim that overrides private property rights?[6]

Similarly, the Supreme Court of the United States has long struggled with the interpretation of the Public Use Clause of the Fifth Amendment.[7] Critics question "the law of certain jurisdictions that permit condemnations for private economic development . . . [and] the propriety of condemning private property merely because a newly proposed use promises a greater public benefit than an existing use."[8] But others are criticizing the critics. According to constitutional scholar Bruce Fein, "Movement is afoot to make the Constitution pivot on Marxist-like class distinctions when private property is taken for public use."[9] *Kelo v. City of New London*,[10] a decision handed down by the Connecticut Supreme Court and recently granted writ of certiorari by the United States Su-

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3. Nicholas D. Kristof, *Make Way for Buffalo*, N.Y. TIMES, Oct. 29, 2003, at A25, *available at* 2003 WLNR 5664439.

4. U.S. CONST. amend. V.

5. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (complaining that the majority's opinion about the prohibition imposes unfairness).

6. *See* James S. Burling, *Protecting Property Rights in Aquatic Resources After Lucas*, *in* WATER LAW: TRENDS, POLICIES, AND PRACTICE 56, 68 (Kathleen Marion Carr & James D. Crammond eds., 1995) (summarizing the impact of environmental regulation and "no-growth" policies on private property rights in land).

7. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) (holding that the definition of "public use" expands to fit the scope of the state's police powers); Berman v. Parker, 348 U.S. 26, 32 (1954) (acknowledging that the police power is generally an indefinable concept, but holding that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive").

8. Kelo v. City of New London, 843 A.2d 500, 580 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

9. Bruce Fein, *Eminent Domain, Eminent Nonsense*, WASH. TIMES, Oct. 12, 2004, at A16, *available at* 2004 WLNR 808567.

10. 843 A.2d 500 (Conn. 2004).

preme Court,[11] addresses this controversy surrounding the constitutional definition of "public use."

In *Kelo*, the city of New London, Connecticut, exercised its eminent domain power in the name of economic development, offering "just compensation" to residents for "taking" their waterfront land for the "public use" of leasing the land to a private development corporation that would revitalize New London's downtown and waterfront areas.[12] The issue before the Court in *Kelo* was whether the city of New London's action constitutes legitimate "public use" of the property taken by the government—specifically, the scope of the government's constitutional right to condemn land under the rubric of "public use."[13] Eminent domain is a governmental right firmly rooted in the nation's history:

> In [the United States], the taking of private property for a public use was a well accepted principle in colonial times .... As the power was used more frequently, however, controversy ensued. Beginning with Pennsylvania and Vermont, in 1776 and 1777, states sought [to restrict the use of] eminent domain. Since that time, courts have sought, and sometimes struggled, to [define] the [term "public use"] in light of state regulations and changes in the nation's economy that have transformed our society in unforeseen ways.[14]

The government customarily condemns poor, decaying urban areas in the name of the public good—a taking of property that the Supreme Court of the United States held to be constitutional under the Fifth Amendment in 1954.[15] In a unanimous decision, the Court in *Berman v. Parker*[16] adopted a broad interpretation of the government's eminent domain power, holding that a legislative determination to redevelop blighted urban areas through the use of private enterprise deserves deference by the courts.[17] The Court thus concluded that "[t]he rights of . . .

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11. Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

12. *Id.* at 507.

13. *See id.* at 577 (Zarella, J., concurring in part and dissenting in part) (invoking "our nation's long-held commitment . . . to protect private property from unnecessary takings"). The plaintiff's petition for writ of certiorari was based on Justice Zarella's dissenting opinion. M. Robert Goldstein & Michael Rikon, *'Kelo': 'Economic Benefit to the Community' and 'Public Use'*, N.Y. L.J., Oct. 28, 2004, at 3.

14. *Kelo*, 843 A.2d at 577 (Zarella, J., concurring in part and dissenting in part) (citations omitted).

15. *See* Berman v. Parker, 348 U.S. 26, 33 (1954) (finding nothing in the Fifth Amendment that precludes the local government from deciding to ensure that the city is beautiful).

16. 348 U.S. 26 (1954).

17. Berman v. Parker, 348 U.S. 26, 33-34 (1954).

property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of [a] taking."[18] But in *Kelo*, the argument was made that the taking of middle class property (as opposed to urban eyesores) to generate economic revitalization does not qualify as a permissible "public use" under the Fifth Amendment.[19] The *Kelo* appellants persuasively argued that "'[a]ny business enterprise produces benefits to society at large,' and, consequently, 'there is virtually no limit to the use of condemnation to aid private businesses.'"[20]

On the other hand, reports on the demise of property rights may be premature. "It finally happened. For the first time, a court has held that restrictions imposed under the Endangered Species Act (ESA) constituted a Fifth Amendment taking of property."[21] In *Tulare Lake Basin Water Storage District v. United States*,[22] the government did not exercise its eminent domain power over private property, but limited the plaintiffs' water rights under the ESA,[23] a government regulation.[24]

The Takings Clause of the Fifth Amendment is a remedy available to citizens for the government's undue interference with private property rights. The Takings Clause operates similar to an affirmative defense in that it entitles citizens to "just compensation" when the government "takes" private property for "public use."[25] The Takings Clause thus embodies the idea that our society values the protection of private property; in the words of John Bingham, the principal author of the Fourth Amendment, the Constitution "protects not only life and liberty, but also property, the product of labor."[26]

The Supreme Court of the United States has stated that the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[27] As it applies to landowners, the Court extends the Takings Clause to account for *overregulation* of private prop-

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18. *Id.* at 36.

19. *Kelo*, 843 A.2d at 581 (Zarella, J., concurring in part and dissenting in part).

20. *Id.* at 580-81 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 464 (Mich. 1981) (Fitzgerald, J., dissenting)).

21. Melinda Harm Benson, *The* Tulare *Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 552 (2002).

22. 49 Fed. Cl. 313 (Fed. Cl. 2001).

23. 16 U.S.C. §§ 1531-44 (2000).

24. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 315-16 (Fed. Cl. 2001).

25. U.S. CONST. amend. V.

26. Kelo v. City of New London, 843 A.2d 500, 577 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

27. Armstrong v. United States, 364 U.S. 40, 49 (1960).

erty: A taking of private land may occur when it denies a landowner the opportunity to make economic use of the land.[28] Consequently, a takings claim is often a last resort when regulation precludes a landowner from development or improvement of land, or when the government "appropriates," in the public interest, the rights a landowner may hold in land, especially with regard to water use or commercial development.[29]

One such water-rights takings case is *Tulare Lake*, which has been called "a clear victory for champions of property rights, who have sought to rein in what they see as regulatory excesses committed in the name of the environment."[30] Water cases such as *Tulare Lake* are also changing the way Fifth Amendment takings are litigated.[31] In *Tulare Lake*, the United States Court of Federal Claims held that the federal government must pay for water appropriated from farmers for the purpose of preventing "harm" to the habitat of two species of fish protected under the Endangered Species Act.[32] Prior to *Tulare Lake*, Fifth Amendment water rights litigation "did not have a great history of success, so they tended to be funded by property rights groups, such as the Pacific Legal Foundation, that were willing to lose money for their cause. Tulare [sic] has

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28. *See* Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 31 (Fed. Cl. 1999) (explaining that "a . . . taking may be found where a regulation results in a deprivation of 'a substantial part but not essentially all of the economic use or value of [a] property'" (quoting Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994))).

29. United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945); *Fla. Rock*, 45 Fed. Cl. at 24-25.

> To hold that property cannot be partially taken by a regulation . . . would be to hold that the need for government regulation trumps the Takings Clause. Yet, the need for government regulation is why the Takings Clause was enacted as a vital protection. Any other reading would make that clause a virtual nullity. Rather, in a free society, property rights and regulation must exist together. Their ends are not inconsistent. In fact, the Takings Clause implies that property may be taken but that property owners must be compensated.

Fla. Rock, 45 Fed. Cl. at 24-25.

30. Seth Hettena, *California Ruling Threatens Species Protection*, CIN. POST, Feb. 12, 2004, at A22, *available at* 2004 WL 58452415.

31. *See* Marcia Coyle, *A Flood of Suits: Case Focuses on Collision of Interests when Government Diverts Water in Order to Save Endangered Species*, BROWARD DAILY BUS. REV., Dec. 29, 2004, at 4 (stating that "'because we have a property rights movement that's very eager to sort of test the limits of property rights against all sorts of government regulation, my own view is that Tulare will be taken around from state to state, for all kinds of regulations that adversely affect traditional uses. This is something states ought to be nervous about.'" (quoting Joseph Sax)).

32. *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (Fed. Cl. 2001) (ruling in favor of California water users who sought protection from the government's taking); *see also* Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed. Cl. 246, 266 (Fed. Cl. 2003) (calculating damages at $13,915,364.78, not including the interest accrued on the value of the water since 1992).

opened up the possibility of water takings suits as a profitable legal enterprise."[33]

Tulare Lake specifically dealt with water law issues and the ESA, but it implicated broader public policy concerns with regard to environmental regulation and Fifth Amendment takings of private lands. For example, one case pending in the United States Court of Federal Claims involves an allegation of a Fifth Amendment taking because the ESA deprived landowners of all or almost all economic benefit of owning the property; the landowners are claiming that the United States Fish and Wildlife Service used administrative procedure to indefinitely delay a decision to issue them a commercial development permit.[34] Under the Takings Clause, the government "may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[35] Consequently, a takings plaintiff could use *Tulare Lake* as precedent to find for a first-ever Fifth Amendment taking pursuant to the Endangered Species Act regulation—setting up possible findings of Fifth Amendment takings in arenas of environmental regulation besides the Endangered Species Act.[36]

Part II of this Article explores *Kelo*'s interpretation of the Public Use Clause in detail. The Connecticut Supreme Court ruled in favor of the city of New London; a reversal by the Supreme Court of the United States would place a clear limitation on the power of local government to condemn private property, as well as create a bright line rule for courts to follow in interpreting the Public Use Clause.

Tulare Lake is an unusual tree in the forest that comprises Takings Clause jurisprudence because of a California constitutional provision that restricts water rights to purposes that are "reasonable" and "beneficial" (such as the preservation of endangered fish).[37] Moreover, the "public trust doctrine" articulated by the California Supreme Court underscores

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33. Justin Scheck, *Thirsty Work: Historic Water Settlement Pumps New Life into Niche Legal Claims*, THE RECORDER, Jan. 5, 2005, at 1. On the other hand, observes one water rights lawyer, "It would take away from the substance of the argument if we're going to have a bunch of water rights ambulance chasers." *Id.*

34. *See* Mountain States Legal Foundation, GDF Realty, *et al.* v. United States, *at* http://www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=98 (last visited Feb. 17, 2005) (reporting on the takings claim filed in *GDF Realty v. United States*).

35. Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001).

36. *See* ROBERT MELTZ ET AL., THE TAKINGS ISSUE 396 (1999) (stating that no court has ever held that a Fifth Amendment taking occurred pursuant to Endangered Species Act regulation).

37. CAL. CONST. art. X, § 2; *cf.* United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126, 1134 (E.D. Cal. 1992) (holding that state water rights do not defeat the operation of the Endangered Species Act). "The Act provides no exemption from compliance to persons possessing state water rights, and thus the District's state water rights do not pro-

this rule of reasonable use, "affirm[ing] . . . the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[38] Part III discusses the Court of Claims' use of seminal takings law jurisprudence to find for a taking of contractually-conferred water rights in the face of fundamental water law doctrines. Part III also examines how both plaintiffs and defendants might incorporate the recent developments in takings law *vis-à-vis Tulare Lake* and *Washoe County v. United States*[39] (a case subsequent to *Tulare Lake* which distinguishes its decision from the *Tulare Lake* holding) into the business of litigating takings claims.

Tulare Lake and *Kelo* illustrate the importance of artful pleading, especially with regard to procedural issues such as ripeness, when it comes to bringing a takings claim.[40] In *Kelo*, "the argument is passionately made that to take stylish, as opposed to decrepit private property, to spark economic growth is not a constitutionally permissible 'public use' demanded by the Fifth Amendment."[41] In *Tulare Lake*, the plaintiff water district persuaded the court that an environmental regulation (the ESA) amounted to a *physical* (or *per se*) Fifth Amendment taking of property (the plaintiff's water), instead of a *regulatory* taking.[42]

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vide it with a special privilege to ignore the Endangered Species Act." *Glenn-Colusa*, 788 F. Supp. at 1134.

38. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 724 (Cal. 1983).

39. 319 F.3d 1320 (Fed. Cir. 2003).

40. An "unripe" takings claim means that a court may not prematurely determine whether or not the government has committed a taking when the government has not made a final decision on what to approve (such as whether a permit to develop property should or should not issue). *See* ROBERT MELTZ ET AL., THE TAKINGS ISSUE 48 (1999) (explaining how the ripeness doctrine derives in part from Article III of the Constitution, which defines the role of the judiciary). Accordingly, a landowner plaintiff's lawyer could plead that even though the government has not yet formally denied the landowner's request for a development permit, the permit has been denied *de facto* because the government's stalling tactics on the issue over the course of many years prevented the claim from being adjudicated, which caused the plaintiff to suffer undue hardship. *See also* GDF Realty v. Norton, 326 F.3d 622, 626-27 (5th Cir. 2003) (noting the occurrence of a district court's declaratory judgment that plaintiff GDF Realty was denied *de facto* a commercial development permit by the United States Fish & Wildlife Service under the ESA, which eventually led to GDF Realty's claim that ESA restrictions on its land amounted to a Fifth Amendment taking without just compensation).

41. Bruce Fein, *Eminent Domain, Eminent Nonsense*, WASH. TIMES, Oct. 12, 2004, at A16, *available at* 2004 WLNR 808567.

42. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318-19 (Fed. Cl. 2001).

Part IV concludes with some thoughts on how *Kelo* and *Tulare Lake*, when taken together, elucidate the Fifth Amendment's inherent tension in balancing private property rights and the government's constitutional authority to regulate. *Tulare Lake* stands for the proposition that absent the "'extraordinary case in which a particular activity is seen as so offensive to the public sensibility as to warrant no Constitutional protection,'"[43] the Takings Clause warrants just compensation for the taking of private property.[44] Conversely, *Kelo* shows that while the Fifth Amendment provides "just compensation" for the government's exercise of eminent domain, it also serves to "'lessen to some extent the freedom and flexibility of land-use planners.'"[45]

II. "FOR PUBLIC USE": *KELO V. CITY OF NEW LONDON*

A. *History*

In *Kelo*, private property was taken by eminent domain for the revitalization of an economically distressed municipality.[46] In 1978, a development corporation was created to assist the city of New London with the planning of economic development.[47] In January 1998, twenty years later, the city approved the issuance of state bonds to support the development corporation's plans, including the acquisition of property in the Fort Trumbull area.[48] In the same year, Pfizer, Inc., (Pfizer) announced that it would be constructing a new global research facility at the New London Mills site directly adjacent to the property in the Fort Trumbull area.[49] The New London city council then approved the issuance of more bonds and formally conveyed the New London Mills site to Pfizer.[50]

The development area at issue consisted of 115 parcels of land, both residential and commercial, and was located in New London next to Pfizer's research facility.[51] The development plan divides the land into

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43. Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 41 (Fed. Cl. 1999) (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1183 (1994)).

44. *See Tulare Lake*, 49 Fed. Cl. at 324 (holding that while the preservation of endangered fish is a legitimate state interest, the government "must simply pay for the water it takes to do so").

45. *Fla. Rock*, 45 Fed. Cl. at 42 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

46. Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

47. *Id.* at 508.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Kelo*, 843 A.2d at 509.

seven parcels.[52] In particular, Parcel 3, which contains four properties owned by three of the plaintiffs, is expected to consist of 90,000 square feet of office space and parking.[53] This office space and parking would be for research and development facilities, including those of Pfizer.[54] While other properties are to be taken under eminent domain, a private social club with its own building would remain intact on Parcel 3.[55]

As part of the agreement between the development corporation and the city council, the privately held development corporation would own all of the land located within the development area.[56] The development corporation would then, in turn, enter into leases of various parcels with private contractors.[57] It was expected that the development of this area would have a serious "socioeconomic impact on the New London region."[58]

> In its preface to the development plan, the development corporation stated that its goals were to create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area.

Id.

52. *Id.* Parcel 1 is along the waterfront. *Id.* It will include a hotel and conference center as well as marinas for both commercial fishing vessels and transient tourist boaters. *Id.* Parcel 1 will also have a walkway for the public along the waterfront. *Id.* Parcel 2 will be organized into urban neighborhoods and provide for approximately eighty new residences. *Id.* The entire urban neighborhood will be linked to the remainder of the development plan via public walkway. *Id.* Also on Parcel 2 there will be a United States Coast Guard Museum. *Id.* Parcel 3 is discussed in the text, above. Parcel 4 is divided into two smaller units labeled Parcel 4A and Parcel 4B. *Id.* Parcel 4A will contain a parking lot and retail services. *Id.* Parcel 4B will include an additional marina and provide slips for both commercial fishing vessels and recreational boaters. *Id.* It is important to note that eleven properties are owned by four of the plaintiffs. *Id.* The properties located on Parcel 4 are not at issue in this appeal. Parcel 5 is also subdivided and will include office space, parking, and retail space. *Id.* at 509-10. "Parcel 6 will be developed for a variety of water-dependent commercial uses." *Id.* at 510. Parcel 7 will be used for additional office space and/or research development space. *Id.*

53. *Id.*

54. *Id.* at 509.

55. *Id.*

56. *Kelo*, 843 A.2d at 510.

57. Kelo v. City of New London, 843 A.2d 500, 510 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

58. *Id.*

> The development plan is expected to generate . . . between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the city . . . .

Id. This massive increase in jobs and revenue will impact a city that was on the brink of economic disaster. *Id.*

The development corporation board and the city council both approved the development plan in early 2000, including the power to acquire all necessary properties through the use of eminent domain for property owners who refused to sell.[59] Later that year, the development corporation began acquiring properties through condemnation proceedings which gave rise to the current litigation.[60]

The property owners filed suit claiming the city violated both the United States Constitution and the Connecticut Constitution when it allowed a private company to use the power of eminent domain to acquire their (the property owners) properties.[61] The trial court disagreed and upheld the taking of Parcel 3.[62]

B. *Whether Economic Development Is a Public Use Under the Federal Constitution*

The principal issues on appeal to the United States Supreme Court are as follows: (1) whether economic development is a public use under the Federal Constitution; (2) "even if economic development is a [valid] public use," whether the condemnation proceedings "promote sufficient public benefit to pass constitutional muster"; and (3) whether the condemnation of Parcel 3 "lack[s] a reasonable assurance of future public use because private parties retain control over the parcel['s] use."[63]

The plaintiffs in this case contended that the city violated the Fifth Amendment to the United States Constitution[64] by allowing a private company to condemn property for economic development.[65] The Connecticut Supreme Court disagreed, however, and concluded "that [the] economic development projects . . . that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clause[ ] of the . . .

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59. *Id.* at 510-11.

60. *Id.* at 511.

61. *Id.* at 519.

62. *Kelo*, 843 A.2d at 511. While the plaintiffs in this case claim a number of different violations, this article will focus mainly on the claim that the city of New London violated the Takings Clause under the United States Constitution.

63. *Id.* at 519. While there are three main issues for appeal, this recent development will only cover the first issue.

64. The Fifth Amendment Takings Clause provides that "[n]o person shall be . . . deprived of life, liberty, or *property*, without due process of law; *nor shall private property be taken for public use, without just compensation.*" U.S. CONST. amend. V (emphasis added).

65. *Kelo*, 843 A.2d at 519-20. In particular, the plaintiffs believe that the trial court violated the Connecticut Supreme Court's prior rulings concerning the public use doctrine. *Id.* at 520. New London argued that on its face, economic development is a public use that justifies the exercise of eminent domain. *Id.*

federal constitution[ ]."[66] The court reached this decision by analyzing the broad treatment the United States Supreme Court has afforded the public use doctrine as it applies the Fifth Amendment.[67]

Basing its decision in part on its interpretation of *Berman* and *Hawaii Housing Authority v. Midkiff*,[68] the Connecticut Supreme Court concluded that "an economic development plan that the appropriate legislative authority rationally had determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions."[69] The court continued by stating the following:

> The "broad" definition provides that " 'public use' means 'public advantage.' Any eminent domain action which tends to enlarge resources, increase industrial energies, or promote the productive

66. *Id.*

67. The United States Supreme Court's broad interpretation of the federal public use clause can be seen in a number of different cases. In *Berman v. Parker*, the Supreme Court validated a legislative act which allowed for private companies to acquire land necessary to eliminate blight conditions. Berman v. Parker, 348 U.S. 26, 35 (1954). The Supreme Court, in this case, addressed the issue of whether the District of Columbia's Redevelopment Act, which was passed by Congress, was constitutional. *Id.* at 28. The act allowed the redevelopment agency to transfer acquired property to private companies. *Id.* at 31. The Supreme Court adopted a broad view of the eminent domain power and held that the power "is essentially the product of legislative determinations addressed to the purposes of government." *Id.* at 32. Accordingly, the Court determined "that, because the taking was for the public purpose of clearing blighted areas, the means of redevelopment through private enterprise did not violate the public use clause." *See Kelo*, 843 A.2d at 525-26 (discussing *Berman*). The Supreme Court further held that "[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Berman*, 348 U.S. at 36. In *Hawaii Housing Authority v. Midkiff*, the Supreme Court further expanded the public use doctrine. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984). In that case, the Hawaiian legislature authorized the housing authority to seize land in an area belonging to an overly concentrated land ownership scheme in an attempt to address economic problems. *Id.* at 232-33. Once the housing authority acquired the property, it was then authorized to sell or lease it to the existing tenant or other prospective purchaser. *Id.* at 229, 234. The Court held this action as a valid use of the state's police power in that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241. Basically the Court concluded that the taking does not have to be for a public use. "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Id.* at 243-44. The Court continued by stating that the government does not have to use the property itself for the taking to be legitimate, the legitimacy is found in the purpose of the taking. *Id.* at 244.

68. 467 U.S. 229 (1984).

69. Kelo v. City of New London, 843 A.2d 500, 528 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

> power of any considerable number of inhabitants of a state or community manifestly contributes to the general welfare and prosperity of the whole community and thus constitutes a valid public use."[70]

The plaintiffs further contended, citing to courts in Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina, and Washington, that economic development projects in and of themselves do not constitute public use.[71] In particular, the plaintiffs cited *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,[72] to support their contention.[73] The Connecticut Supreme Court, however, interpreted this case "as an illustration of when a court determines that an economic development plan cannot be said to be for the public's benefit."[74] The court continued stating that this was a fact specific interpretation of the Takings Clause and that it was merely a demonstration of "the far outer limit[s] of the use of the eminent domain power for economic development."[75] The court simply refused to believe that if a legislative

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70. *Id.* at 531 n.41 (quoting P. Nichols, author of the preeminent treatise on eminent domain).

71. *Id.* at 532; *see also* City of Little Rock v. Raines, 411 S.W.2d 486, 494 (Ark. 1967) (using a narrow interpretation of public use to determine that the taking of an industrial park did not satisfy the public use doctrine); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 458 (Fla. 1975) (per curiam) (holding that the taking of land for a parking garage for a private shopping mall does not constitute public use solely because of economic benefits); City of Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979) (stating that "the constitutional provisions involved clearly require that [a] finding of 'public purpose' does not satisfy the requirement of a finding of 'public use'"); Merrill v. City of Manchester, 499 A.2d 216, 218 (N.H. 1985) (requiring direct public use with regard to the public use doctrine); Karesh v. City Council, 247 S.E.2d 342, 345 (S.C. 1978) (holding that the city could not take land through condemnation proceedings and lease it to a developer for a convention center and parking garage); *In re* City of Seattle, 638 P.2d 549, 557 (Wash. 1981) (stating that a retail shopping center "contemplated a predominantly private, rather than public, use" when interpreting the public use doctrine).

72. 768 N.E.2d 1 (Ill. 2002).

73. Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002). In this case, the Illinois Legislature created a regional economic development authority to facilitate industrial and economic development. *Id.* at 3. The development authority was asked by a popular racetrack to use its powers of eminent domain to take land from a neighbor and transfer it to the racetrack for the development of a larger parking lot. *Id.* at 4. The legislature approved the use of eminent domain and concluded that the expanded parking lot would be for public use. *Id.* at 5. Eventually, condemnation proceedings were instituted by the Illinois trial court. *Id.* On appeal, however, the Illinois Supreme Court reversed the trial court stating that there exists a fine line between "public use" and "public purpose." *Id.* at 8. The court emphasized that "economic development is an important public purpose[, but] . . . 'to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement.'" *Id.* at 9 (citations omitted) (quoting Gaylord v. Sanitary Dist. of Chicago, 68 N.E. 522, 524 (Ill. 1903)).

74. *Kelo*, 843 A.2d at 535.

75. *Id.*

body had determined that an economic development plan would have a public benefit (i.e., increasing employment, taxes, other revenues, and the revitalization of an economically distressed city), that alone would invalidate a public taking under the use of eminent domain.[76] Through the use of reasonable judicial oversight, any errors that may arise with the use of eminent domain under the guise of a benefit to the public (such as in *Southwestern Illinois Development Authority*) would be quelled.

The dissent, however, argued that the private economic development was outside the scope of "public use" primarily for two different reasons. "First, traditional takings almost always are followed by an immediate or reasonably foreseeable public benefit."[77] Compare this to large-scale private developments which can take years to complete. The New London city project was projected to take, at a minimum, thirty years.[78] "Accordingly, there may be much more uncertainty as to when and how the public may benefit when property is condemned for private economic development."[79]

Second, the dissent argued that with past conventional takings, the public benefit typically stemmed from the taking party.[80] However, with private parties defining public use, there are potential areas of divergent interests as so stated by the dissent.

> In contrast, [when the public interest is private economic development,] the taking party [must] transfer ownership of the condemned land to private developers who subsequently execute a plan to accomplish the public purpose. Because public agencies must work hand in glove with private developers to achieve plan objectives, [there always is the possibility that] the taking agency may employ the power to favor purely private interests.[81]

The dissent's opinion rests on the foundation that while the public benefit and private development can coincide, that is not typically the case. Private companies will work to achieve their own bottom line regardless of the public benefit.[82]

The Connecticut Supreme Court thus held in *Kelo* that economic development, even if performed by a privately held company, constituted a

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76. *Id.*

77. *Id.* at 578.

78. *Id.* at 545.

79. *Kelo*, 843 A.2d at 578-79.

80. *Id.* at 579.

81. *Id.*

82. Kelo v. City of New London, 843 A.2d 500, 579 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

valid public use under the Takings Clause.[83] *Kelo*'s broad interpretation of "public use" is a disadvantage to property rights advocacy, but the broad interpretation of the Fifth Amendment's Takings Clause in *Tulare Lake* and *Washoe County* is a boon for property rights proponents.

III. "WITHOUT JUST COMPENSATION": *TULARE LAKE* AND *WASHOE COUNTY*

A. *Tulare Lake Basin Water Storage District v. United States*

Tulare Lake involved California water consumers who sought Fifth Amendment compensation when the federal government restricted their contractual rights to water use under the ESA.[84] The United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively, the government) sought protection for the winter-run Chinook salmon and the delta smelt by restricting water release to private users from California water sources.[85] This "taking for public use," at-odds with water rights contractually-conferred on county water management districts, culminated in the *Tulare Lake* decision.[86]

California operates a complex water sharing system: Using various state water projects and aqueduct systems managed by the state Department of Water Resources (DWR), operated in conjunction with federal water projects managed by the Bureau of Reclamation (BOR), water gets pumped and distributed from northern California to consumers in waterless southern California.[87] However, the BOR and DWR must obtain water permits from an oversight agency, the State Water Resources Control Board (the Board), which has final decision-making power in all California water distribution concerns.[88] Following approval by the Board, the BOR and DWR do business with county water districts such as Tulare Lake Basin Water Storage District (one of several co-plaintiffs in the case), granting them contractual rights to use a specified amount of acre-feet of water per year.[89]

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83. *Id.* at 547.

84. *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (Fed. Cl. 2001) (stating that the "[p]laintiffs are California water users who claim that their contractually-conferred right to the use of water was taken from them . . . [by] restrictions [imposed] under the Endangered Species Act").

85. *Id.*

86. *Id.*

87. *Id.* at 314-15.

88. *Id.* at 315.

89. *Tulare Lake*, 49 Fed. Cl. at 315.

Enter the Endangered Species Act, a law intended "to halt and reverse the trend toward species extinction, whatever the cost."[90] Consequently, the ESA mandates that before any federal agency takes action on or authorizes funding for any project, it must confer with the Secretary of the Interior to make sure the project does not pose a threat to the survival of any endangered or threatened species.[91]

Pursuant to its duties under the ESA, the government (over a two-year period) consulted with the BOR and the DWR about the impact that water-release contracts would have on the winter-run Chinook salmon and the delta smelt.[92] Both agencies issued biological opinions and "reasonable and prudent alternative" findings (RPA) that water release targeted for several county projects jeopardized the existence of these endangered fish.[93] The RPAs placed significant restrictions on pumping water from the Sacramento-San Joaquin Delta to fulfill the water release contracts at issue—thus limiting water that otherwise would be available to county water districts.[94]

The Board, exercising its oversight authority, ordered the BOR and DWR to comply with the RPA directives, giving rise to the plaintiffs' takings claim that the RPA restrictions deprived them of massive quantities of water over a three-year period, water to which they were otherwise entitled under contracts with the BOR and DWR.[95] "Successful takings claims," writes a water law attorney, "are likely to occur when perfected water rights are converted from the property owner's beneficial use to public instream flow uses, such as for fish, wildlife, aesthetic, water pollution dilution, and recreational purposes."[96]

The government defended its actions under the argument that the doctrine of public trust, the doctrine of reasonable use, and the law of nuisance limited the plaintiffs' contractual right to the water supply, "all of which provide for the protection of fish and wildlife."[97] Because the intent of the RPA recommendations was to advance the public interest in this way, the government argued that takings protections are unavailable, especially when it comes to the conditional nature of water rights, given that a state's "public trust" responsibilities include ecological preserva-

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90. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

91. 16 U.S.C. § 1536(a)(2) (2000).

92. *Tulare Lake*, 49 Fed. Cl. at 315-16.

93. *Id.*

94. *Id.* at 316 n.3.

95. *Id.* at 316.

96. Gregory J. Hobbs, Jr., *Ecological Integrity and Water Rights Takings in the Post-*Lucas *Era*, *in* WATER LAW: TRENDS, POLICIES, AND PRACTICE 74, 74 (Kathleen Marion Carr & James D. Crammond eds., 1995).

97. *Tulare Lake*, 49 Fed. Cl. at 320.

tion.[98] Barton Thompson comments that "there is something quite troubling about this argument standing by itself—can states exempt themselves from the Constitution's takings protections merely by declaring that they are the ultimate 'owner' of a resource that, for all practical purposes, the states treat as a privately owned resource?"[99]

Barton's objection seems to be to the spirit in which the United States Court of Federal Claims rendered its decision in *Tulare Lake*. The court disagreed with the premise that the doctrines of public trust, reasonable use, and nuisance constituted an inherent limit on the plaintiff's water contract rights: "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."[100] In a separate 2003 ruling on damages, the court awarded Tulare Lake and the other plaintiff water districts the market value of the water as well as the market rate of interest accrued on that amount since the date of the taking.[101]

B. *Washoe County v. United States*

Fifth Amendment takings plaintiffs in the neighboring state of Nevada—also water consumers—did not fare as well as the *Tulare Lake* plaintiffs. In *Washoe County*, the Federal Bureau of Land Management (BLM) denied county water consumers and water development companies an easement across BLM land to transport water from an isolated source to the Reno-Sparks metropolitan area.[102]

Based on objections by a United States Army Depot and the Pyramid Lake Tribe of Indians (who learned of the Washoe County plan to build a water pipeline after the BLM issued an Environmental Impact Statement on the project), Washoe County did not get its permit and could not proceed with the planned pipeline construction.[103] Washoe County and its co-plaintiffs then filed a Fifth Amendment takings claim that the denial of their application for an easement amounted to "taking" its water rights without just compensation.[104]

Relying on *Tulare Lake*, the *Washoe County* plaintiffs argued that the BLM denial of a right-of-way permit allowed the Army to use "their"

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98. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 320 (Fed. Cl. 2001).

99. Barton H. Thompson, Jr., *Takings and Water Rights*, *in* WATER LAW: TRENDS, POLICIES, AND PRACTICE 43, 47 (Kathleen Marion Carr & James D. Crammond eds., 1995).

100. *Tulare Lake*, 49 Fed. Cl. at 324.

101. Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed. Cl. 246, 266 (Fed. Cl. 2003).

102. Washoe County v. United States, 319 F.3d 1320, 1323 (Fed. Cir. 2003).

103. *Id.*

104. *Id.*

water, thus "constituting a literal taking of their water-rights property for government use."[105] However, the court rejected the *Tulare Lake* analogy, observing that in *Tulare Lake* the government essentially appropriated the plaintiffs' water for its own use (i.e., protecting endangered species).[106] In *Washoe County*, the government did not physically seize or physically reduce the amount of water available to the plaintiffs from the water source in question.[107] Furthermore, the court noted that the plaintiffs were not foreclosed from *any* access to their water rights—only from permission to use government land to utilize those rights.[108]

C. *Per Se Takings*

A hypothetical property owner—let's call her "Lisa Landowner"—helps to illustrate the implications of *Tulare Lake* and *Washoe County* in a takings suit. What can Lisa do if the government denies her a permit to develop virtually any portion of her 144 acres of land because it is home to a federally protected endangered species? In this hypothetical scenario, Lisa wants to lease a few of her acres to Wal-Mart, Inc., for construction of a large new superstore, but the government decides that commercial development of her land would do irreparable harm to a species of amphibian—the one-inch long *Loco Estudiante de Leyes* Toad—recently discovered on her property by wildlife biologists. The government makes an assertion (contradicted by Lisa's expert witnesses) that any commercial development of her property would amount to a "taking" of the endangered toad. Additionally, the government has repeatedly denied her applications for a permit to develop her property, despite taking measures that would protect the toad's habitat from the potentially adverse impact of commercially developing her property.[109] The ESA bars the "take" of an endangered species, a term broadly defined to include "harm" to any animal listed under the Act.[110] In particular, Lisa's development plans have been frustrated because the United States Fish and Wildlife Service (FWS), as administrator of the ESA, used its rulemaking power to further define "harm" to species under the "take" provision as "significant habitat modification" that "kills or injures [endangered] wildlife by significantly impairing essential behavioral pat-

105. *Id.* at 1325.

106. *Id.* at 1326-27.

107. *Washoe County*, 319 F.3d at 1327.

108. *Id.*

109. *See* GDF Realty v. Norton, 326 F.3d 622, 625-27 (5th Cir. 2003) (providing facts upon which this hypothetical is loosely based). Like Lisa Landowner, the *GDF Realty* plaintiffs brought a Fifth Amendment Takings claim based on ESA regulations. *Id.* at 626.

110. 16 U.S.C. § 1532(19) (2000).

terns."[111] Similarly in *Tulare Lake*, the government, under the ESA, acted on its concern that water use would harm the Chinook salmon and the delta smelt.[112]

Lisa must first make sure that her takings claim is "ripe": Under the ripeness doctrine, the government can argue her claim should be dismissed as "not ripe" because the ESA restrictions on her land, to which Lisa objects, technically speaking, have already been consented to by virtue of the fact that she purchased the land knowing that it contained a federally regulated endangered species.[113] Contrast this with *Tulare Lake*, in which the plaintiffs' claim was ripe because the Endangered Species Act interfered with *previously established* water-rights ownership.[114] In *Washoe County*, the plaintiffs' takings claim was ripe because they had allowed the BLM recourse to take all "reasonable and necessary" steps in acting on their right-of-way permit application before filing suit.[115] So, a takings claim is ripe "'once . . . the permissible uses of the property are known to a reasonable degree of certainty'" and the claimant "'follow[s] reasonable and necessary steps to allow regulatory agencies to exercise their full discretion' so that the extent of the restriction on the property is known."[116]

As a result, Lisa's attorney may counsel against filing a takings claim because of the ripeness issue.[117] Lisa must confront the ripeness issue with facts demonstrating governmental action with regard to her property which amounts to nothing less than a "total or near-total elimination of economic use [of her property] demanded by contemporary takings law."[118]

The courts distinguish physical (also called *per se*) takings from regulatory takings (also called "inverse condemnation").[119] A physical taking

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111. 50 C.F.R. § 17.3 (2002).

112. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (Fed. Cl. 2001).

113. ROBERT MELTZ ET AL., THE TAKINGS ISSUE 396 (1999).

114. *See Tulare Lake*, 49 Fed. Cl. at 315 (adding that "[a]gainst this backdrop of water transportation and entitlements, Congress passed the Endangered Species Act in 1973").

115. Washoe County v. United States, 319 F.3d 1320, 1324 (Fed. Cir. 2003).

116. *Id.* (citations omitted) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 620-21 (2001)).

117. ROBERT MELTZ ET AL., THE TAKINGS ISSUE 396 (1999).

118. Id.

119. *See id.* at 3 (distinguishing "condemnation" from "inverse condemnation" as procedurally distinct Takings Clause issues). Inverse condemnation (i.e., regulatory takings) "[is] the mirror image of condemnation. . . . In this instance, the government encroaches upon a property interest but emphatically *denies* any taking. . . . Takings actions are far more likely than condemnation actions to be lightning rods; they have a David (property owner) versus Goliath (government) aspect to them." *Id.* at 3-4.

requires actual governmental occupation or invasion of private land.[120] Additionally, the legal definition of a *per se* physical taking of property extends to non-invasive government activity that amounts to the "practical ouster" of rightful owners from possession or use of their land.[121] In *Lucas v. South Carolina Coastal Council*,[122] the Supreme Court ruled that a physical disturbance of this nature—no matter how small the intrusion onto private property or how important the public policy reason for the intrusion—is a *per se* taking which mandates "just compensation."[123]

Lucas also held that a government regulation's depriving private land of *all* potential for economically beneficial or productive use is the functional equivalent of a physical taking.[124] If sufficient proof exists for complete deprivation of economic use, this by itself justifies compensation for a taking (as distinct from the additional scrutiny required of regulatory takings claims, where land is deprived of *nearly* all economic use). "[F]or what is the land but the profits thereof[?]"[125] So reasons Justice Scalia in expanding the definition of a *per se* taking to encompass regulation that divests land of any economic viability whatsoever.[126] Thus, if Lisa Landowner can present clear and convincing evidence that the government completely deprived her land of "the profits thereof," it will be enough to bring her claim within the ambit of a *per se* takings analysis.

One problem: *Complete* deprivation of all economically viable use is a high evidentiary burden, difficult to prove because an argument can be made that some profit, however small, can be extracted from the land.[127] Alternatively, Lisa Landowner could use *Tulare Lake* to argue for the occurrence of a *per se* taking by virtue of any *contractual* right Lisa Landowner owns in connection with the economic development of her land, a contractual right appropriated for "public use" such as protection of endangered wildlife. This is the doctrine of contract appropriation, which the *Tulare Lake* court uses to support its holding, by which "the contract

120. *See id.* at 3 (explaining that traditional condemnation actions occur when "the government concedes it is taking the property, formally invoking its sovereign power of eminent domain as the plaintiff in a lawsuit against the property or property owner. . . . Usually the only seriously contested issue is how much the government must pay for the property as 'just compensation.'").

121. *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318 (Fed. Cl. 2001).

122. 505 U.S. 1003 (1992).

123. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (noting that this is a general rule, at least with regard to permanent invasions).

124. *Id.* at 1019.

125. *Id.* at 1017 (quoting E. Coke).

126. *Id.* at 1017-19.

127. *See id.* at 1015-16 (holding government restrictions which deprive private land of *any* economic or productive value to be the functional equivalent of a physical taking).

holder can recover only if the government has actually appropriated the contract itself, *i.e.*, stepped into the shoes of the contracting party and assumed the rights and responsibilities under the contract."[128]

Under this theory, Lisa Landowner has a "bundle of rights" in her land, including the right to enter into contracts for sale, lease, and development of the land, rights which the government is now using for "public use" by enforcing the Endangered Species Act on Lisa. Lisa Landowner can point out that the government is not merely regulating the scope of her rights to enter into valuable real estate sales, leases, or development contracts, but that the government accomplishes a *per se* taking by "stepping into her shoes" and appropriating the value of the land for its own purposes.[129] The value of Lisa Landowner's property is in commercial development—building apartment complexes, parking lots, office buildings, Super Wal-Marts, etc.[130] Conversely, the value of her land to the federal government (representing the national public interest) is in leaving the land undeveloped in the interest of protecting endangered species habitats.

However, Lisa Landowner faces yet another obstacle at this point in justifying Fifth Amendment compensation: The baseline rule of contract appropriation theory from the United States Supreme Court in *Omnia Commercial Co. v. United States*[131] is that no Fifth Amendment taking occurs when a legitimate exercise of federal authority merely frustrates contractual expectations.[132] At issue in *Omnia* was a long-term contract entered into between Omnia and Allegheny Steel Company in 1917, giving Omnia the next year's right of priority to buy steel plate at below-market prices.[133] Before Allegheny delivered any steel to Omnia, the federal government requisitioned Allegheny's entire inventory of steel manufactured in the year 1918.[134] Omnia filed suit, charging the government with a Fifth Amendment taking of its contractual right of priority to

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128. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 317-18 (Fed. Cl. 2001).

129. *See id.* at 319 (holding that the government's unreasonable subordination of private property rights to public policy interests may "constitute an appropriation of property for which compensation should be made" (quoting Peabody v. United States, 231 U.S. 530, 538 (1913))).

130. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992) (defining a Fifth Amendment taking of land as a deprivation of the profits thereof).

131. 261 U.S. 502 (1923).

132. *See* Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923) (providing that the Fifth Amendment "'has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power'" (quoting Knox v. Lee, 79 U.S. (12 Wall.) 457, 551 (1870))).

133. *Id.* at 507.

134. *Id.*

the steel—steel the government needed for fighting World War I.[135] The Court ruled against Omnia, holding that the government did not appropriate Omnia's contractual right because the contract between Allegheny and Omnia ended when the government made its requisition.[136] "'The subject-matter of this contract has been seized by the state acting for the general good. "Salus populi suprema lex" [let the safety of the people be the supreme law] is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it.'"[137]

The government can use *Omnia* against Lisa Landowner's takings claim and argue that just as the government lawfully requisitioned steel in a time of national crisis, it acted lawfully and in the public interest by "requisitioning" Lisa's land as a development-free zone to protect endangered species and to effectuate congressional intent under the ESA.[138] Thus, denying Lisa the right to develop her land can be characterized as a *frustration*, not an *appropriation*, of her contractual expectation in her property.[139]

Yet the *Omnia* defense is of limited use to the government. The *Tulare Lake* court notes that "*Omnia* addresses those situations in which a litigant claims a contract right with regard to the property (*e.g.*, the right to buy it at a certain price) but cannot claim ownership of the property, since title to the property has not yet passed to the party seeking compensation."[140] Unlike the plaintiff in *Omnia*, who could only claim a contract expectancy and not ownership of the steel, Lisa Landowner actually holds title to her land, "a property interest sufficiently matured to take it out of the realm of an *Omnia* analysis."[141]

To shore up this weakness in the government's *Omnia* defense, it can argue that there are reasonable and necessary limitations on Lisa Landowner's contract expectancy, pointing out that Lisa had constructive notice of the ESA and its strict regulatory regime. The government could argue that when she purchased the land, she assumed the risk that it would be difficult to secure approval from the government for developing the land, as long as the government's requirements for approval have a rational relationship to a legitimate governmental interest.[142]

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135. *Id.* at 507-08.

136. *Id.* at 513.

137. *Omnia*, 261 U.S. at 513 (quoting *In re* Shipton, 3 K.B. 676, 683-84 (1915)).

138. *Id.* at 512-13.

139. *Cf.* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 317 (Fed. Cl. 2001) (distinguishing frustration of contract from appropriation of contract).

140. *Id.*

141. *Id.* at 318.

142. *See id.* (stating that under regulatory takings case law, a plaintiff's contract expectations may be held to be "necessarily limited by regulatory concern over fish and wild-

Accordingly, from the plaintiff's point of view, Lisa will have to show that the government's regulatory requirements are unreasonably intrusive. She can do this by analogizing the governmental impact on the economic viability of her land to the famous Supreme Court takings case *United States v. Causby*.[143] In *Causby*, a landowner lost his chicken farming business because it was located on the landing approach of a neighboring military airbase.[144] The approach of low-flying aircraft was fatal to many of the farmer's fowl, which died "by flying into the walls from fright."[145] Noting the frequency of the overflights and the proximity of landing planes to the farmer's property ("close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off"), the Supreme Court held that a taking occurred because the intrusion was "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."[146]

The Court characterized the governmental activity claimed to be a taking in *Causby* as a physical invasion.[147] The Court pointedly distinguished its facts from a situation in which governmental policy merely impairs the use of the land.[148] The losses incurred by the chicken farmer, said the Court, were "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."[149]

Like the presence of the airplanes, if the presence of endangered species on Lisa Landowner's property amounts to an intrusion on her land, which deprives her of all economically viable use, *Causby* characterizes this as a taking.[150] Even though animals are natural and airplanes are artificial, a complete occupation of Lisa's property, if shown to mirror the invasion in *Causby*, may demonstrate a *per se* taking of land for public use without just compensation because "the government has essentially substituted itself as the beneficiary of the contract rights with regard to that [land] and totally displaced the contract holder."[151]

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life"); *see also* Good v. United States, 39 Fed. Cl. 81, 114 (Fed. Cl. 1997) (ruling that reasonable investment-backed expectations will not compel Fifth Amendment compensation when a plaintiff takes a speculative investment risk in a regulated environment).

143. 328 U.S. 256 (1946).

144. *See* United States v. Causby, 328 U.S. 256, 258-59 (1946) (detailing the facts of the case).

145. *Id.* at 259.

146. *Id.* at 259, 265.

147. *Id.* at 265.

148. *Id.*

149. *Causby*, 328 U.S. at 261.

150. *Id.*

151. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001).

D. *Regulatory Takings*

In contrast to a *per se*, physical Fifth Amendment taking of property, a regulatory property taking amounts to unreasonable governmental restriction on the use of private land.[152] Regulation that falls short of either a *per se* physical taking or is found not to deprive private land of *all* economically feasible use per *Lucas*, may nevertheless justify Fifth Amendment compensation in certain circumstances.[153] Strictly speaking, a regulatory taking claim seems to be a more attractive option than a *per se* takings claim because it is unburdened with the need to prove either physical appropriation of the land by the government or deprivation of *all* economic use of the land.

Furthermore, as *Washoe County* demonstrates, the claimant must take care to establish that government action is at issue in the claim.[154] "For example, the government did not limit the Appellants' access to their wells, restrict the amount of groundwater they could pump, or dictate what they could do with the water. Rather, the government was acting as a landowner whose neighbor sought permission to lay a pipeline across its property."[155] The government was not acting as a regulatory entity, but as a neighbor, and thus had no Fifth Amendment duty to pay just compensation, especially because the State of Nevada—not the federal government—promulgates and enforces Nevada water law.[156]

Florida Rock Industries, Inc. v. United States[157] is a contrast to *Washoe County* with regard to a cognizable regulatory takings claim. In *Florida Rock*, the Army Corps of Engineers refused landowners' requests for Clean Water Act (CWA) permits in order to conduct limestone mining operations on a 98 acre portion of their 1560 acre parcel in South Florida.[158] The CWA, which was passed *after* the plaintiffs purchased the property, regulates dredging operations and the discharge of industrial by-products into navigable waters and wetlands areas.[159] The court found that the Florida Rock mine owners "suffered a severe economic

152. Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 24 (Fed. Cl. 1999).

153. *See id.* (analyzing that "[t]o hold that property cannot be partially taken by a regulation . . . would be to hold that the need for government regulation trumps the Takings Clause. Yet, the need for government regulation is why the Takings Clause was enacted as a vital protection.").

154. *See* Washoe County v. United States, 319 F.3d 1320, 1327 (Fed. Cir. 2003) (stating that "[a]ppellants . . . have not established a regulatory taking because regulation of private property was not at issue here").

155. *Id.* at 1327-28.

156. *Id.* at 1328.

157. 45 Fed. Cl. 21 (Fed. Cl. 1999).

158. *Fla. Rock*, 45 Fed. Cl. at 25.

159. *Id.*

impact when the Corps denied plaintiff's application for a dredge and fill permit. The value of its 98 acre parcel of land, for which the permit was denied, was diminished by almost three fourths."[160] In particular, government regulation served to frustrate the plaintiff's "reasonable investment-backed expectations" in the land because

> Florida Rock had no reason when it purchased its property to expect that its rights to mine or develop the land were open to question. The Clean Water Act was passed after Florida Rock already owned the land, and the Army Corps did not have jurisdiction under the Act over wetlands like those owned by Florida Rock until July 1, 1977.[161]

Florida Rock shows that while environmental public policy concerns often may doom a regulatory takings claim from the outset, such policy considerations do not necessarily detract from a sound legal argument. The strategy is first to establish solid constitutional ground for the claim; the second, more difficult task is to overcome the policy concerns that militate against the finding of a taking without just compensation.[162]

If the only permissible use of Lisa Landowner's property is for "public use" as a nature preserve, public space, or municipal development purposes (as in *Kelo*)—completely depriving her of its economic viability—a taking may have occurred despite the fact that governmental regulation of the property is legal and proper.[163] Here is where *Penn Central Transportation Co. v. New York*[164] controls.

Penn Central is the Supreme Court's landmark regulatory takings decision, and it formulates a three-part balancing test against which courts now assess the merits of regulatory takings claims. The test considers: (1) the character of the government action; (2) the economic impact of that action; and (3) the reasonableness of the property owner's invest-

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160. *Id.* at 38.

161. *Id.* at 39-40.

162. *See id.* at 23 (finding "that the government action was a legitimate exercise of governmental power designed to enhance the public stock of wetlands. . . . In some circumstances, such as acts of war, emergency measures, or the abatement of a nuisance, the character of the government action might prevent a taking from being found. That is not the case here.").

163. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 699 (1999) (finding a taking without just compensation where land containing a "sensitive buckwheat habitat which could not be disturbed blocked the development of any portion of the property").

164. 438 U.S. 104 (1978).

ment-backed expectations in deciding whether a government land-use restriction merits compensation under the Takings Clause.[165]

The economic impact of government action on property is difficult to minimize by the government, especially where there is a clear disparity between the estimated market value of the property *after* the imposition of government restrictions on the one hand, and Lisa Landowner's indebtedness with regard to purchase and investment in the land on the other. Another critical issue is whether Lisa reasonably expected to profit from her investment in the property, because the government can also use *Florida Rock* to show that the plaintiff's reasonable investment-backed expectations were not frustrated. In *Florida Rock*, the fact that Congress passed the Clean Water Act well *after* Florida Rock Industries purchased 1,560 acres in South Florida was a significant factor in the court's decision that Florida Rock's investment-backed expectation in the land was reasonable, and therefore compensable.[166] In this regard, *Florida Rock* is a potential liability for the takings plaintiff.

IV. CONCLUSION

Since *Penn Central*, the Court has further clarified the "character of government action" prong in its three-pronged regulatory takings test. The Court propounded in *Lucas* that "the Fifth Amendment is violated when land-use regulation 'does not *substantially* advance legitimate state interests.'"[167] This language seems to comport with the Court's holding in *Pennsylvania Coal Co. v. Mahon*,[168] a case which explicitly acknowledged that regulation which exceeds the boundaries of reasonableness can affect a taking.[169]

The Supreme Court views the "character of government action" unfavorably, especially where regulations "leave the owner of land without economically beneficial or productive options for its use . . . by requiring land to be left substantially in its natural state[,] . . . [suggesting] that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[170]

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165. *See* Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124-25 (1978) (outlining factors that have particular significance in determining if a taking has occurred).

166. Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 39-40 (Fed. Cl. 1999).

167. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) (emphasis added) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

168. 260 U.S. 393 (1922).

169. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (stating that as a general principle, property may be regulated, but if the regulation goes too far, it will be deemed a taking).

170. *Lucas*, 505 U.S. at 1018.

Correspondingly, the *Lucas* Court noted that one of the South Carolina Legislature's justifications for a construction ban that prevented Mr. Lucas from building single-family homes on his property was to preserve "'habitat for numerous species of plants and animals, several of which are threatened or endangered.'"[171] Was the South Carolina statute intended to ameliorate a public threat by preventing "harm" to plants and animals through prohibition of habitat modification? The Court observed that the statutory ban on construction was "benefit-conferring" as opposed to "harm-preventing," pointing to the underlying legislative intent of the statute to create "a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being."[172] The Court pointed to this distinction as a critical component of its takings analysis; in the absence of an urgent governmental interest in prohibiting *all* human activity on a regulated property, such draconian land-use regulation is likely to be compensable under the Fifth Amendment.

In *Tulare Lake*, the government sought to deny the plaintiffs their water release entitlements, acting in the public interest to prevent harm to the federally protected delta smelt and Chinook salmon.[173] But *Lucas* clearly holds that Fifth Amendment compensation may not be denied merely because governmental regulation purports to prevent some harm, "[s]ince such a justification can be formulated in practically every case, . . . the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations" to deny compensation for a regulatory taking.[174]

The success of a takings claim thus seems to hinge on a court's strict application of the *Lucas* approach. When it comes to an endangered species takings claim as was at issue in *Tulare Lake*, if a court allows for a generous evaluation of the "character of the governmental action," the claim is doomed because of the respect accorded by courts to the Supreme Court precedent that endangered species must be protected regardless of the economic impact of that protection. Furthermore, if the government does not *completely* deny the plaintiff landowner the right to economically profit from the land, the plaintiffs are likely foreclosed from

171. *Id.* at 1025 n.11 (quoting S.C. CODE ANN. § 48-39-250(1)(c) (Law. Co-op. Supp. 1991)).

172. *Id.* at 1025 (quoting S.C. CODE ANN. § 48-39-250(1)(d) (Law. Co-op. Supp. 1991)).

173. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (Fed. Cl. 2001).

174. *Id.* at 1026 n.12.

invoking the Court's "categorical rule that total regulatory takings must be compensated."[175]

Conversely, under the *Lucas* approach, a court will take notice of the *faulty* character of the government's actions. A reasonable court will likely view as compensable any evidence of bad faith in imposing governmental restrictions on a landowner's property rights.

In *Kelo*, the Connecticut Supreme Court unanimously affirmed that the Constitution allows the use of eminent domain to stimulate economic growth, as long as owners are paid a fair market value for the taking of their properties, and as long as the properties taken are put to "public use."[176] The disagreement by the dissent was over whether the condemnations were constitutional "in light of the [absence of] clear and convincing evidence [in the record] to establish that the properties actually will be developed to achieve a public purpose."[177]

The argument of the dissent (adopted by the petitioners in *Kelo*) boils down to the disagreement that the city of New London's taking of private properties did not really put those properties to "public use." But this argument is perhaps flawed; as Adam Smith wrote in *The Wealth of Nations*, public and private interests are indistinguishable in free market economies:

> [E]very individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.[178]

The *Kelo* and *Tulare Lake* cases illustrate the expansive powers of the Takings Clause. As the Supreme Court continues to hand down decisions interpreting this small clause of the Constitution, the power of the United States Government continues to ebb and flow. Weighed in the balance, the *Tulare Lake* decision validated the Constitution's emphasis on prop-

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175. *Id.* at 1026.

176. *See* Kelo v. City of New London, 843 A.2d 500, 592 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108) (stating that "I agree with the majority that the legislative determination of public use, as expressed in chapter 132 of the General Statutes, is constitutional. I also agree that the primary purpose of the takings is to benefit the public.").

177. *Id.*

178. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 351-52 (C.J. Bullock ed., P.F. Collier & Son 1909).

erty rights; in contrast, in *Kelo* the Court can augment the power of the government to take property under the rubric of public use.