CITE AS
34 *Energy & Min. L. Inst.* 3 (2013)

Chapter 3

Regulatory Takings in the Oil, Gas and Mineral Context

David K. Brooks[1]
Energy, Minerals and Natural Resources Department
State of New Mexico
Santa Fe, New Mexico

Synopsis

---

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

§ 3.01. Introduction.

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

2 U.S. Const. Amendment V.

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

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

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

§ 3.02. Origin, History and Significance.

[1] — Origin.

The jurisprudence of regulatory takings began with the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*[5] where Justice Oliver Wendell

---

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

4 *Id*.

5 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).