

Chapter 3

Regulatory Takings in the Oil, Gas and Mineral Context

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Synopsis

§ 3.01. Introduction	58
§ 3.02. Origin, History and Significance.....	59
[1] — Origin	59
[2] — Development of Regulatory Takings Jurisprudence Prior to <i>Lucas v. South Carolina Coastal Council</i>	60
[3] — Current Importance of Takings in One Word: “Fracking”	61
§ 3.03. Regulatory Takings According to <i>Lucas</i>	61
[1] — The “Total” or “ <i>Lucas</i> ” Taking.....	63
[a] — The Denominator Issue	63
[b] — The Nuisance Exception.....	63
[2] — The “Partial” or “ <i>Penn Central</i> ” Taking.....	64
§ 3.04. U.S. Supreme Court Decisions Since <i>Lucas</i>	67
[1] — <i>Palazzolo v. Rhode Island</i> — What It Does and Does Not Say About the Denominator and About Investment-Backed Expectations.....	67
[a] — The Denominator	68
[b] — Investment-Backed Expectations	68
[2] — <i>Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> — Does It Preclude All Temporary Total Takings?.....	71
[3] — <i>Lingle v. Chevron</i> — A Footnote?.....	72
[4] — The Silence of the Supreme Court Since <i>Palazzolo</i>	73
§ 3.05. Developments in Other Appellate Courts	74

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.

- [1] — Total Takings — Identifying “the Denominator”..... 74
 - [a] — Can the Mineral Estate Be Considered Separately?..... 75
 - [b] — Can a Contiguous Tract Owned By a Claimant Ever Be Divided?..... 82
 - [c] — When Must Non-contiguous Tracts Owned By the Same or Related Claimants Be Aggregated? 86
 - [d] — The “Parcel as a Whole” in the Fourth Dimension..... 89
- [2] — Total Takings — The Nuisance Exception..... 91
- [3] — Partial Takings — When, If Ever, Do They Occur? 98
 - [a] — Hardship for the Claimant — Does It Mean Anything Different from “Investment-Backed Expectations”? 100
 - [i] — How Tough Must It Get?..... 100
 - [ii] — Mitigation..... 102
 - [b] — What Are “Investment-Backed Expectations” and When Do They Matter?..... 105
 - [i] — When Do They Matter? 105
 - [ii] — What Are “Distinct Investment-backed Expectations”?..... 106
 - [iii] — “Character of the Taking” — Does It Import the Police Power?111
- § 3.06. Practical Considerations..... 116**
 - [1] — Why Are So Many Cases Brought?.....116
 - [2] — A Tale of Two Counties116
 - [3] — Speculations About the Future of Regulatory Takings.....119

§ 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).