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**REGULATORY TAKING OF PUBLIC WATER
AND LAND RESOURCE DEVELOPMENT RIGHTS AFTER LUCAS**

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**Regulatory Takings and Resources:
What are the Constitutional Limits?**

**Natural Resources Law Center
University of Colorado School of Law
June 13-15, 1994**

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and Land Resource Development Rights After Lucas**

I. Introduction

Although Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992), is viewed by many as simply further littering the jurisprudential landscape concerning "regulatory takings", its treatment of (1) the "investment backed expectations" justification for finding a protected property right and (2) the importance of limitations on protection which "inhere in the title itself" may have a significant impact in the western public resources field.

II. Investment Backed Expectations

A. Justice Scalia's opinion for the Court and Justice Kennedy's concurring opinion reinforce the importance of "investment backed expectations" first announced in Penn Central Trans. Co. v. New York City, 438 U.S. 104, 124 (1978):

"The economic impact of regulation on the claimant and, particularly, the extent to which regulation has interfered with distinct investment backed expectations are, of course, relevant considerations."

B. Western state and federal statutes allocating public water and land resources almost uniformly have as their basic objective the encouragement of investment in development of the resource.

C. State and federal programs to preserve or promote other environmental values are a more recent overlay to those development statutes and the attempt to accommodate the two policies is at the root of regulatory takings issues.

D. Professor Sax discerns a subliminal message in Lucas drawing a line in the sand protecting traditional development rights against growing environmentalist

encroachment that would require property owners to elevate protection of the natural values of their land over its exploitation, without compensation. Sax, "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council," 45 Stan. L. Rev. 1433 (1993).

III. Limitations Which "Inhere in the Title Itself"

- A. Justice Scalia's opinion qualified the Court's "expectations" factor as follows, 112 S.Ct. 2899, 2900 (emphasis added):

"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. . . . Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."

Professor Sax concludes that "though the Lucas majority does not say so explicitly, its adoption of a standard based upon historically bounded nuisance and property law reflects a sentiment that a state should compensate landowners who, through no fault of their own, lose property rights because of scientific or social transformation." Sax, supra at 1449. In short, if changing social values require adjustment or curtailment of existing property interests for the benefit of the

"general public", the government should bear the cost of any economic impacts on the property owner. This plainly is "the historical compact recorded in the Takings Clause that has become part of our constitutional culture" referred to by Justice Scalia. 112 S.Ct. at 2900, note 15.

B. The search for "restrictions" and "background principles" is easier in public natural resources law than it is for other kinds of property interests. Allocation statutes and the administrative instruments dispensing development rights are a readily available and reliable source for defining the scope of such rights, although other background principles may sometimes come into play, e.g., nuisance principles for certain kinds of development activities.

1. Public resource allocation statutes or instruments usually contain express limitations, such as prohibitions on "waste" of water and requirements for its "beneficial use", requirements for "diligent development" of mineral resources, maintenance of specified range or forest conditions, and other express limitations which "inhere in the title itself" and presumably may be enforced without compensation. See Sax, "Rights That 'Inhere in the Title Itself': The Impact of the Lucas Case on Western Water Law," 26 Loyola LA 943 (1993).

2. Such statutes and instruments do not usually contain limitations reserving unilateral authority to alter the allocated development right on "public trust", "new societal values", and similar grounds which some courts have discovered elsewhere. Consequently, it seems unlikely that the Lucas Court would permit retroactive judicial or legislative redefinition of express elements of grants of development rights reflecting an approach of

"shooting first and painting a bullseye around the bullet hole." Compare Summa Corp. v. California ex rel. State Lands Comm, et al., 466 U.S. 198 (1984) (sovereign public trust rights not reserved in land patent or asserted in patent confirmation proceedings do not burden the patent) and Hughes v. Washington, 389 U.S. 290, 296 (1967) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that it never existed." (Concurring opinion)) with Texaco, Inc. v. Short, 454 U.S. 516 (1982) (a state may prospectively terminate dormant severed mineral interests without compensation after a reasonable period, even without personal notice to mineral owners (5-4 decision)) and United States v. Locke, 471 U.S. 84 (1985) (Congress may impose reasonable filing requirements on existing mining claims and provide for forfeiture of such claims without compensation for failure to comply).

3. The critical questions about the scope of protection of public resource development rights reflected in the dispositive statute or instrument should be: "What did the user reasonably know and when did he or she know it?"
- C. Expectations which fly in the face of clear limitations in development rights are not reasonable, whether or not backed by investment, and should not be the basis for a protected legal right to compensation, although in some cases they arguably should trigger equitable protection where justifiable reliance is placed on agency interpretation or knowledgeable acquiescence in user interpretation of ambiguous terms.
 - D. The Court will have to address the issues of whether resource development rights are protected by the princi-

ples announced in Lucas for "land" as opposed to "personal property", 112 S.Ct. at 2899-2900, and the corpus of the affected interest in "partial" vs. "total" curtailment of such rights. Id. at 2894, note 7.

IV. Future Legislative and Administrative Policy

A. Responsible legislatures and administrative agencies have the ability, and many would say the duty to provide clear, adequate and certain provisions regarding development rights tenure, e.g., duration, operating conditions, time for periodic adjustments, etc. "Catchall" savings provisions, such as those subjecting the development right to "all future regulations" or the agency's authority to make unilateral changes "in the public interest" should be discouraged. The Public Land Law Review Commission addressed the general issue in its 1970 report, One Third of the Nation's Lands (page 133, emphasis added):

Under the existing leasing system, administrators have considerable authority through regulation and practice to modify operating conditions unilaterally. This has led to misunderstandings and a lack of confidence in lease tenure, particularly among producers of leasable minerals other than oil and gas. We recommend that, as nearly as practicable, all rights and obligations, including those related to maintenance of the environment, of mineral explorers and developers be clearly defined at the outset of their undertakings, and the unilateral authority to modify operational and payment requirements should be limited under guidelines to be specified by the Congress. It is unfair for one party to an arrangement to have the unilateral power to impose higher royalty obligations or more

stringent operating conditions on the other party, particularly when no standards are specified for such changes.

- B. Correspondingly, when tenure provisions are overridden because of other public interest considerations, compensation should be provided either monetarily or possibly by enhancement of other aspects of the adjusted development right:

Statutory provision [should] be made to assure that when public lands or their resources are made available for use, firm tenure and security of investment be provided so that if the use must be interrupted because of a Federal Government need before the end of the lease, permit, or other contractual arrangement, the user will be equitably compensated for the resulting losses.

Id. at 4. See also, Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981) (stipulation in permit to drill on a federal oil and gas lease prohibiting drilling for certain periods during the lease term requires equivalent extension of lease term).