

# Journal of Environmental and Sustainability Law

---

Missouri Environmental Law and Policy Review  
Volume 7  
Issue 3 1999-2000

Article 4

---

2000

## To Rule or Not to Rule: Ripeness as a Prerequisite to Ruling in Federal Regulatory Takings Cases. *Hendler v. United States*

Todd C. Werts

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Todd C. Werts, *To Rule or Not to Rule: Ripeness as a Prerequisite to Ruling in Federal Regulatory Takings Cases. Hendler v. United States*, 7 Mo. Env'tl. L. & Pol'y Rev. 152 (2000)

Available at: <https://scholarship.law.missouri.edu/jesl/vol7/iss3/4>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## CASENOTE

## TO RULE OR NOT TO RULE: RIPENESS AS A PREREQUISITE TO RULING IN FEDERAL REGULATORY TAKINGS CASES

*Hendler v. United States*<sup>1</sup>

## I. INTRODUCTION

*Hendler VI* demonstrates how federal environmental law can yield harsh results to plaintiff-landowners. Even though the plaintiffs were found to have suffered a "physical taking," they were awarded the "just compensation" of zero-dollars.<sup>2</sup> In *Hendler VI*, this harsh result is due to the nature of regulatory takings generally and the federal set-off rule for takings damages specifically. However, *Hendler VI* additionally shows how an appellate court will, at times, ignore dispositive issues in order to reach the merits.

This casenote will briefly outline the jurisprudence of both physical and regulatory takings. Then, it will look at the method used to calculate damages in this case. Finally, this casenote will look at the aforementioned jurisdictional issues arising in this case within the context of modern regulatory takings law.

## II. FACTS AND HOLDING

The controversy in *Hendler VI* arose over a September 1983 administrative order ("the Order") issued by the EPA.<sup>3</sup> The Order, issued in aid of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),<sup>4</sup> granted the EPA and the State of California ("State") access to a 100-acre parcel of land owned by the plaintiffs.<sup>5</sup> Plaintiffs' owned the land as an investment property and were holding it to be profitably sold later.<sup>6</sup> The purpose of the ordered access was to drill wells to monitor the migration of pollution from the neighboring Stringfellow Acid Pits ("Stringfellow") through the underground water table.<sup>7</sup>

The EPA first sought plaintiffs' voluntary cooperation.<sup>8</sup> After plaintiffs resisted, though, the Order was issued on September 20, 1983, and drilling began the next morning.<sup>9</sup> Maintenance of the wells subsequently required the EPA or the State to enter periodically upon the plaintiff's land.<sup>10</sup>

The Order also authorized the EPA and the State to enter upon the land to conduct other tests deemed necessary.<sup>11</sup> The Order remained in effect until it was formally terminated in 1994.<sup>12</sup>

<sup>1</sup> 175 F.3d 1374 (Fed. Cir. 1999) [hereinafter *Hendler I*].

<sup>2</sup> *Hendler v. United States*, 36 Fed. Cl. 574, 583-84 (1996) [hereinafter *Hendler II*], *Hendler v. United States*, 38 Fed. Cl. 611, 627 (1997) [hereinafter *Hendler I*].

<sup>3</sup> See *Hendler VI*, 175 F.3d at 1376-77. The Order did not name all of the owners of the land in question. *Hendler IV*, 36 Fed. Cl. at 578 n.3. Further, the Order did not name all of the assessors' parcels on which wells were later drilled nor specify a time limit for the access. *Id.* at 579. See also *infra* note 5 and accompanying text regarding the co-ownership and assessors' designations of the land in question.

<sup>4</sup> 42 U.S.C. § 9601-9675 (1994).

<sup>5</sup> *Hendler VI*, 175 F.3d at 1376-77. The real estate in question comprises nine assessors' parcels and is co-owned by Henry Hendler (undivided 1/4 interest), Irving Gronsky (undivided 1/4 interest), and the Garrett-Hendler Trust (undivided 1/2 interest). *Hendler IV*, 36 Fed. Cl. at 576. Hendler is also a trustee of the Garrett-Hendler Trust. *Hendler IV*, 36 Fed. Cl. at 576. *Id.*

<sup>6</sup> See *Hendler VI*, 175 F.3d at 1376 (citing *Hendler IV*, 36 Fed. Cl. at 576-77. Plaintiffs, though, never intended to develop the property themselves). *Id.*

<sup>7</sup> See *Hendler VI*, 175 F.3d at 1376-77. "[I]n response to public health threats posed by such sites as Stringfellow, Congress passed [CERCLA]." *Hendler IV*, 36 Fed. Cl. at 577.

<sup>8</sup> *Hendler VI*, 175 F.3d at 1377.

<sup>9</sup> *Hendler IV*, 36 Fed. Cl. at 579, *Hendler v. United States*, 952 F.2d 1364, 1369 (Fed. Cir. 1991) [hereinafter *Hendler III*]. The EPA and State subsequently drilled and maintained a total of 20 monitoring wells. *Hendler IV*, 36 Fed. Cl. at 579. "Sixteen wells were drilled by contractors working for the State Department of Health Services, not for the EPA." *Id.*

<sup>10</sup> See *Hendler IV*, 36 Fed. Cl. 574, 579 (1996).

<sup>11</sup> See *id.* at 578. The Order granted, in part, "access to the Trust Property to conduct any and all other activities necessary to investigate, monitor, survey, test and perform information gathering . . ." *Hendler IV*, 36 Fed. Cl. at 578. The tests conducted "included electrical resistivity testing, seismic refractory testing, and soil gas sampling." *Id.* at 579 n.7.

Plaintiffs filed suit<sup>13</sup> against the United States (“the Government”) seeking just compensation pursuant to the Fifth Amendment Takings Clause.<sup>14</sup> Specifically, plaintiffs claimed that the Order and later activities of the EPA and the State of California constituted both a “physical taking”<sup>15</sup> and a “regulatory taking.”<sup>16</sup> Underlying these two counts was a dispute between the parties as to what extent the United States was liable for the actions of the State.<sup>17</sup>

Both parties subsequently filed cross-motions for summary judgment on both counts.<sup>18</sup> The trial court granted the Government’s motion regarding plaintiffs’ claim that the mere issuance of the Order constituted a regulatory taking.<sup>19</sup> The court also denied plaintiff’s motion concerning the alleged physical takings.<sup>20</sup> Finally, the court held as a matter of law that the State was not an agent of the United States for the purposes of plaintiffs’ claims.<sup>21</sup>

Three years later, the claims court dismissed plaintiffs’ claim for failure to comply with discovery orders pursuant to the Rules of the United States Claims Court (“RUSCC”), Rule 37.<sup>22</sup> The Federal Circuit Court of Appeals reversed and remanded the case in 1991.<sup>23</sup> In its opinion, the court held that (1) the rulings in *Hendler I* were within its scope of review;<sup>24</sup> (2) the claims court’s ruling that the mere issuance of the Order did not constitute a regulatory taking was not in error;<sup>25</sup> (3) the Government’s actions did constitute a physical taking;<sup>26</sup> (4) the Government was liable for the State’s actions regarding its use of plaintiffs’ property pursuant to the Order;<sup>27</sup> and (5) the dismissal of the case in *Hendler II* was an abuse of discretion.<sup>28</sup>

The trial court bifurcated the trial upon remand as is traditionally done in similar cases.<sup>29</sup> During the liability phase,<sup>30</sup> the court found that (1) the Government had physically taken an easement to an area around each well and an access corridor;<sup>31</sup> and (2) that plaintiffs’ regulatory taking claim was defeated by the nuisance doctrine<sup>32</sup> and that even if the regulatory taking claim were not defeated, plaintiffs had not suffered a sufficient economic impact to constitute a regulatory taking.<sup>33</sup> Furthermore, the trial court held that plaintiffs’ regulatory taking claim “must be dismissed” because plaintiffs did not act reasonably to determine what economic uses of the Land remained.<sup>34</sup>

<sup>12</sup> See *Hendler VI*, 175 F.3d 1374, 1377 (Fed. Cir. 1999). Under the terms of the termination order, the EPA no longer wanted access to the land without plaintiffs’ consent. See *Hendler IV*, 36 Fed. Cl. at 580-81. “The State of California, however apparently [wanted] to retain access to four of the wells. . . .” *Id.*

<sup>13</sup> Plaintiffs first filed their complaint on September 5, 1984. *Hendler III*, 952 F.2d at 1370. Subsequently, “they filed a first amended complaint on September 10, 1984 and a second amended complaint on August 19, 1985.” *Id.* at 1370 n.4.

<sup>14</sup> See *Hendler VI*, 175 F.3d at 1377. The Fifth Amendment provides, in part, “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

<sup>15</sup> See *Hendler IV*, 36 Fed. Cl. at 581. See *infra* notes 50-60 and accompanying text regarding “physical takings.”

<sup>16</sup> See *Hendler IV*, 36 Fed. Cl. at 581. See *infra* notes 61-80 and accompanying text regarding “regulatory takings.”

<sup>17</sup> See *Hendler IV*, 36 Fed. Cl. at 581.

<sup>18</sup> See *Hendler v. United States*, 11 Cl. Ct. 91 (1986) [hereinafter *Hendler I*], for the claims court’s opinion.

<sup>19</sup> *Id.* at 96.

<sup>20</sup> *Id.* at 97.

<sup>21</sup> *Id.* at 99-100.

<sup>22</sup> *Hendler VI*, 175 F.3d at 1377. See *Hendler v. United States*, 19 Cl. Ct. 27 (1989) [hereinafter *Hendler II*] for the claims court’s dismissal. “RUSCC is identical to Federal Rules of Civil Procedure.” *Id.* at 37.

<sup>23</sup> *Hendler VI*, 175 F.3d at 1377, *Hendler III*, 952 F.2d at 1370.

<sup>24</sup> See *Hendler III*, 952 F.2d at 1369.

<sup>25</sup> See *Hendler III*, 952 F.2d at 1375. The court noted, though, that the only issue decided was that the Order alone did not constitute a regulatory taking. *Id.* However, the question of whether the Order and the subsequent actions of the State and the EPA constituted a regulatory taking remained in the case. *Id.*

<sup>26</sup> *Id.* at 1378.

<sup>27</sup> *Id.* at 1379.

<sup>28</sup> *Id.* at 1383.

<sup>29</sup> *Hendler VI*, 175 F.3d at 1378. See also *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 896 (Fed. Cir. 1986) (“The “liability” and “damages” phases of the litigation were severed according to immemorial custom of [Claims Court]. . . .”).

<sup>30</sup> *Hendler IV*, 36 Fed. Cl. at 574.

<sup>31</sup> See *Hendler IV*, 36 Fed. Cl. at 584 (“The court finds each well easement comprises a 50 by 50 foot square area for activities related to the well(s) contained therein with a 16 foot wide access corridor to a public right of way”).

<sup>32</sup> See *infra* notes 68-71 and accompanying text regarding the “nuisance doctrine.”

<sup>33</sup> *Hendler IV*, 36 Fed. Cl. at 588-89.

<sup>34</sup> *Hendler IV*, 36 Fed. Cl. at 589. “After initiating the present litigation, plaintiffs never consulted the EPA or the State of California to confirm their assumptions about their legal rights with respect to a potential sale or development.” *Id.* at 580.

In the damages portion of the trial,<sup>35</sup> the claims court held that (1) the nuisance doctrine exception to regulatory takings was applicable;<sup>36</sup> (2) federal law should be used to determine special benefits in a takings case;<sup>37</sup> and (3) the special benefits received by plaintiffs outweighed any damages owed them from the physical taking.<sup>38</sup>

Plaintiffs appealed on two grounds.<sup>39</sup> Their first contention was that the trial court erred in neither granting compensation for the land that was actually taken nor severance damages for the part not taken.<sup>40</sup> Plaintiffs also contended that the trial court erred in finding that a regulatory taking had not occurred.<sup>41</sup> The court held that the Government's action did not amount to a regulatory taking and that plaintiffs were owed neither severance damages nor actual damages for the physical taking because any damages suffered were outweighed by the special benefits conferred to the Land by the Government's actions.<sup>42</sup>

### III. LEGAL BACKGROUND

In enacting CERCLA, Congress gave the President power to issue orders to carry out the act<sup>43</sup> and to enter onto private property to conduct investigations regarding the release of hazardous materials.<sup>44</sup> This power causes CERCLA to come into conflict with the Fifth Amendment.

The Fifth Amendment does not prevent the government from taking private property for public use; it serves only to condition such takings upon the payment of "just compensation" for the property taken.<sup>45</sup> A formal eminent domain proceeding is not necessary for the Government to effect a taking that would require just compensation.<sup>46</sup> If the government takes property without a formal proceeding, then the owner may bring an action for "inverse condemnation."<sup>47</sup> There are two types of inverse condemnation—"physical takings"<sup>48</sup> and "regulatory takings."<sup>49</sup>

#### A. Physical Takings

Traditionally, plaintiffs sought "just compensation" under the theory of "permanent physical occupation."<sup>50</sup> Physical takings jurisprudence is simpler than regulatory takings jurisprudence,<sup>51</sup> because physical takings deal with

<sup>35</sup> *Hendler I*, 38 Fed. Cl. at 611.

<sup>36</sup> *Hendler I*, 38 Fed. Cl. at 617.

<sup>37</sup> *Id.* (citing *Bartz v. United States*, 633 F.2d 571, 576-77 (Ct. Cl. 1980)).

<sup>38</sup> *Id.* at 626.

<sup>39</sup> *Hendler I*, 175 F.3d at 1378.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1385-86.

<sup>43</sup> 42 U.S.C. § 9606 (1994): "... The President may also, after notice to the affected State, take other action under this section, including, but not limited to, *issuing such orders as may be necessary to protect public health and welfare and the environment.*" [emphasis added]. 42 U.S.C. § 9606(a) (1994). Since CERCLA was enacted, the President has delegated this power to the EPA. See, e.g., Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

<sup>44</sup> "Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following: . . . (D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter." 42 U.S.C. § 9604(e)(3) (1994).

<sup>45</sup> See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 314-15 (1987) and the cases cited therein. The Fifth Amendment requirement of just compensation "is applied to the States through the Fourteenth Amendment." *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 481 n.10 (1987), (citing *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897)).

<sup>46</sup> 6A NICHOLS ON EMINENT DOMAIN § 2902[1][a], p. 29-1 (1997).

<sup>47</sup> *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984). See also *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980) (distinguishing between eminent domain and "inverse condemnation").

<sup>48</sup> The trial court in *Hendler IV* found that the EPA had taken what amounted to an easement. See *supra* notes 30-34 and the accompanying text. The question of what governmental action rises to the level of a physical taking was not in question in this case and is therefore beyond the scope of this casenote. The only questions raised by plaintiffs in *Hendler VI* regarding physical takings concerned the amount of damages awarded. See *supra* notes 40-42 and the accompanying text. See also NOTE, Stephen Daren Blevit, *A Tale of Two Amendments: [footnote omitted] Property Rights and Takings in the Context of Environmental Surveillance*, 68 S. CAL. L. REV. 885 (1995) for a discussion of *Hendler III* and the effect of modern environmental regulation upon takings jurisprudence.

<sup>49</sup> *Hendler III*, 952 F.2d at 1373-74.

<sup>50</sup> *Hendler III*, 652 F.2d at 1375-76 (quoting, in part, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

<sup>51</sup> See *infra* notes 61-80 and accompanying text regarding regulatory takings.

actual invasions, by the government, of a person or entity's property.<sup>52</sup> While the degree to which the government's action intrudes upon the property rights of a property holder do have an impact in the determination of damages,<sup>53</sup> it is not a factor in determining whether a taking has occurred.<sup>54</sup>

In the leading physical takings case, *Loretto v. Manhattan Teleprompter CATV Corp.*,<sup>55</sup> the Supreme Court found that the placing of a small electronic box, about the size of a bread box, upon the side of a building resulted in a physical taking.<sup>56</sup> In that case the court stated that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."<sup>57</sup>

However, "'permanent' does not mean forever."<sup>58</sup> In *Kaiser Aetna v. United States*,<sup>59</sup> the Supreme Court found that even intermittent occupation by the government could result in a taking.<sup>60</sup>

### B. Regulatory Takings

The doctrine of regulatory takings goes back to Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.<sup>61</sup> The doctrine of regulatory taking prevents "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."<sup>62</sup>

In *Pennsylvania Central Transportation Co. v. City of New York*,<sup>63</sup> the Supreme Court strongly emphasized that there was no mathematical formula to determine when a governmental action amounts to a regulatory taking;<sup>64</sup> however, the Court noted three factors with "particular significance" in determining whether a regulatory taking has occurred: (1) the economic impact on the claimant; (2) the extent of interference with investment-backed expectations; and (3) the character of the governmental action.<sup>65</sup> Additionally, the Court said that the "necessity" of a governmental regulation and the harshness of the impact upon the property owner should also be considered.<sup>66</sup> More recent cases have elaborated on what governmental action "goes too far" and what does not.<sup>67</sup>

<sup>52</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). While takings litigation has seen a resurgence in recent years, it dates back over one hundred years. See, e.g., *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 180-81 (1871) (holding that a flooding of plaintiff's land constituted an unconstitutional taking of property without compensation).

<sup>53</sup> See *infra* notes 81-92 and accompanying text regarding calculation of damages in a takings case.

<sup>54</sup> *Loretto*, 458 U.S. at 430 (citing, *inter alia*, *Southwestern Bell Telephone Co. v. Webb*, 393 S.W.2d 117, 121 (Mo. Ct. App. 1965), *Lovett v. West Va. Central Gas Co.*, 65 S.E. 196 (1909), and 2 J. SACKMAN, NICHOLS' LAW OF EMINENT DOMAIN § 6.21 (rev. 3d ed. 1980).

<sup>55</sup> 458 U.S. 419 (1982).

<sup>56</sup> *Loretto*, 458 U.S. at 438.

<sup>57</sup> *Id.* at 426.

<sup>58</sup> *Hendler III*, 952 U.S. at 1376.

<sup>59</sup> 444 U.S. 164 (1979).

<sup>60</sup> *Id.* at 180 (holding that "even if the Government physically invades only an easement of property, it must nonetheless pay just compensation"). See also *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) (citing affirmatively *Loretto* and *Kaiser Aetna* regarding the taking of an easement).

<sup>61</sup> 260 U.S. 393 (1911). "if [a] regulation goes too far it will be recognized as a taking . . . this is a question of degree—and therefore cannot be disposed of by general propositions." *Id.* at 415-16 [emphasis added].

<sup>62</sup> *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>63</sup> 438 U.S. 104, 124 (1978) [hereinafter *Penn Central*].

<sup>64</sup> *Penn Central*, 438 U.S. at 124 (citing *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)). The Court also pointed out that regulatory takings cases are generally *fact-specific inquiries*. [emphasis added], *Penn Central*, 438 U.S. at 124 (citing *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) and *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952)).

<sup>65</sup> *Penn Central*, 438 U.S. at 124.

<sup>66</sup> *Id.* at 127.

It is, of course implicit in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose. see *Nectow v. Cambridge*, [277 U.S. 183 (1928)], cf. *Moore v. East Cleveland*, 431 U.S. 494, 513-514 . . . (1977) (Stevens, J., concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property.

*Id.* at 127.

<sup>67</sup> See, e.g., *Keystone Bituminous Coal Assoc., v. DeBenedictis*, 480 U.S. 470 (1987) (state mining regulation found not to be a taking), *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (regulation of pension funds under the Multiemployer Pension Plan Amendments Act of 1980 found not to be a taking), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (zoning ordinance found not to be a taking). Cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (federal regulation under the Rivers and Harbors Appropriation Act found to be a taking).

In *Lucas v. South Carolina Coastal Council*<sup>68</sup> the Supreme Court enumerated two situations where the usual fact-specific inquiry into the public interest advanced by the restraint is not required.<sup>69</sup> Under *Lucas*, if a regulation causes a property owner to suffer a physical invasion or if the regulation denies all economically beneficial or productive use of the land then it is *per se* a taking.<sup>70</sup> There are instances in which a sovereign can avoid liability for a categorical regulatory taking, but only if it can show that the impaired use is a nuisance under common-law property and tort principles.<sup>71</sup>

Within the framework outlined above, there are two types of challenges to regulatory takings—“facial” and “as applied” challenges.<sup>72</sup> Facial challenges attack the mere promulgation of the regulation in question, and the plaintiff has the burden of showing the regulation is, on its face, a “categorical regulatory taking.”<sup>73</sup> However, because the court makes no fact-specific investigations with facial challenges, they are more difficult. Additionally, a facial challenge claim must overcome a presumption that government regulation is constitutional.<sup>74</sup>

The more common type of claim is an “as applied” regulatory taking claim.<sup>75</sup> In an “as applied” claim, the court will look into the specific facts of how the law in question was applied to the property in question.<sup>76</sup> However, “as applied claims” have an additional jurisdictional requirement of “ripeness.”<sup>77</sup>

To establish ripeness, the plaintiff must first show that a final decision has been made concerning the uses to which the land in question may be put.<sup>78</sup> Also, the plaintiff must have sought relief through any procedures that have been provided by the sovereign.<sup>79</sup> If a plaintiff has not satisfied both of these conditions, the case is “unripe” for judicial review, and the court will dismiss the “as applied” regulatory takings claim.<sup>80</sup>

### C. Damages and Set-off

After the plaintiff has proven that a taking has occurred—either physical or regulatory—the court must calculate “just compensation” for the property taken.<sup>81</sup> The Supreme Court has held that just compensation should normally be measured according to the fair market value of the property as of the time of the taking.<sup>82</sup> Courts have stressed that there

<sup>68</sup> 505 U.S. 1003 (1992).

<sup>69</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992).

<sup>70</sup> *Id.* The Court refers to these types of takings as “categorical regulatory takings.” *Id.*

<sup>71</sup> *Id.* at 1029-32.

<sup>72</sup> 8A NICHOLS, *supra*. at § 24.02[3], p.24-10.1 n.30. “Facial challenges seek to determine the general constitutionality of the regulation, while as applied challenges seek to determine the specific constitutionality of the regulation as applied to the claimant’s property.” *Id.*

<sup>73</sup> *Keystone Bituminous Coal*, 480 U.S. 495, 8A Nichols, *supra*, § 24.05[4], pp. 24-42 to 24-43. See *supra* note 71 and the accompanying text for the definition of “categorical regulatory taking.” See also Blevit, *supra* note 48, at 922-27 (discussing the framework of facial challenges).

<sup>74</sup> Facial challenges face an “uphill battle.” *Suitem v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736n.10 (1997), (quoting *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1981)). See also generally 8A NICHOLS, *supra*. at § 24.05[4], pp. 24-42 to 24-44.

<sup>75</sup> See also Blevit, *supra* note 48, at 927-28 (discussing the framework of as-applied challenges).

<sup>76</sup> The fact-specific inquiry is necessary because “a court cannot determine whether a regulation has gone “too far” unless it know how far the regulation goes.” *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

<sup>77</sup> 8A NICHOLS, *supra*. § 24.05[3][a], 24-37 to 24-38. The requirement of ripeness stems from the constitutional requirement of standing. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) for a discussion of the requirements of standing. Ripeness addresses the concern that the injury in fact must be actual and not conjectural. *Id.* at 560. This allows both parties to know what, if any, injuries are to be redressed. *Id.*

<sup>78</sup> *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Cf. *First Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 320, n.10 (1987) (stating that *Williamson County* was not contrary to the proposition that it “would require considerable extension of [*Danforth v. United States*, 308 U.S. 271 (1939) and *Agins v. Tiburon*, 447 U.S. 255 (1980)] to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid”).

<sup>79</sup> *Id.* at 194. The second element of ripeness is not an issue in this case as suit was filed under the Tucker Act, 28 U.S.C. § 1491 (1994), which is the procedure to receive relief in federal takings cases. See *Hamilton Bank*, 473 U.S. at 195.

<sup>80</sup> *E.g.*, *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981).

<sup>81</sup> The government can no longer claim as a defense to paying money damages that a regulation only temporarily affected the value of a piece of property. See *First English*, 482 U.S. at 318-20 (“Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a ‘temporary’ one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.”).

<sup>82</sup> *United States v. 50 Acres of Land*, 469 U.S. 24, 30 (1984) (“Deviation from this measure of just compensation has been required only when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.” [internal quotation marks omitted]) (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) and *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984)). See also *United States v. 564.54 Acres of Land*, 441 U.S. 506, 518 (1979) (an alternative to the fair market value method—the “cost of substitute facilities doctrine”).

is no set formula to determine just compensation in every case, but that “fairness and equity” must be considered in making the award.<sup>83</sup>

When only a portion of the property is taken, the government must compensate not only for the property actually taken but also for any damages sustained as a result by the part not taken.<sup>84</sup> These so-called “severance damages” are usually calculated using the “before-and-after rule.”<sup>85</sup> Accordingly, the court determines the amount of the severance damage award by evaluating the value of the property not taken before the governmental action in question and subtracting the value of the property not taken after the action.<sup>86</sup>

If the government’s action, instead of devaluing the property, grants a special benefit to the property owner, then court will off-set any compensation due by the amount of the special benefit.<sup>87</sup> This rule originated in the Supreme Court’s decisions in *United States v. River Rouge Improvement Co.*<sup>88</sup> and *Bauman v. Ross*<sup>89</sup> where Congress had statutorily provided for the set-off of special benefits in the calculation of compensation for eminent domain. Federal courts have expanded the set-off rule to apply to all takings cases, regardless of whether Congress has statutorily provided for set-off.<sup>90</sup>

The amount of the set-off is limited, however, to benefits that specifically benefit the landowner and arise from the project for which the land was taken.<sup>91</sup> “Special benefits,” therefore, are those which are “direct and peculiar to the particular property.”<sup>92</sup>

#### IV. INSTANT DECISION

The court began its analysis by laying out the procedural posture<sup>93</sup> and facts of the case.<sup>94</sup> Next, it outlined the standard of review.<sup>95</sup> Then, the court discussed plaintiffs’ claims.<sup>96</sup>

<sup>83</sup> *Yaist v. United States*, 17 Cl. Ct. 246, 257 (1989) (citing *United States v. Cors*, 337 U.S. 325, 332 (1949), *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949), and *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)). The Supreme Court has also stated that, “compensation means the full and perfect equivalent in money of the property taken [footnote omitted]. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken [footnote omitted].” *United States v. Miller*, 317 U.S. 369, 373 (1943).

<sup>84</sup> *Miller v. United States*, 620 F.2d 812, 828 (Ct. Cl. 1980). This rule originated in *Bauman v. Ross*, 167 U.S. 548 (1897) and *United States v. Grizzard*, 219 U.S. 180 (1911).

<sup>85</sup> See *Aaron v. United States*, 340 F.2d 655, 659 (1964) (citing *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 632 (1961), *United States v. Miller*, 317 U.S. 369, 374 (1943), and *Olson v. United States*, 292 U.S. 246 (1934)). However, the before-and-after rule is not the only way in which to calculate severance damages. See, e.g., *Miller v. United States*, 620 F.2d 812 (1980) and *Aaron v. United States*, 340 F.2d 655, 659 (1964).

<sup>86</sup> See *United States v. Miller*, 317 U.S. 369, 376 (1943). *Id.* at 376 n.20 and the cases cited therein. See also *Laughlin v. United States*, 22 Cl. Ct. 85, 112 (1990) (outlining method for calculating severance damages).

<sup>87</sup> See *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939) (“if governmental activities inflict slight damages upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty”) and *Bauman v. Ross*, 167 U.S. 548 (1897). See generally 26 AM. JUR. 2D § 425, 8A NICHOLS, *supra*, §8A.05, p.57 n.6 (set-off allowed against the part taken as well as severance damages in federal cases).

<sup>88</sup> 269 U.S. 411, 414 (1926) (applying a provision of the Rivers and Harbors Act of 1918 that provided that “special and direct benefits to the remainder arising from the improvement” should be used to off-set the just compensation award).

<sup>89</sup> 167 U.S. 548, 587 (1897) (applying a federal highway statute authorizing set-off).

<sup>90</sup> See *Aaronson v. United States*, 79 F.2d 139 (D.C. Cir. 1935), *Dick v. United States*, 144 Ct. Cl. 424, 428 (1959).

<sup>91</sup> See *City of Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983) (only special benefits should be considered); *United States v. Miller* 317 U.S. 369, 376-77 (1943) (“owners ought not to gain by speculated on probable increase in value due to the Government’s activities”).

<sup>92</sup> *United States v. Trout*, 386 F.2d 216, 221-22 (5th Cir. 1967) (quoting *United States v. 2,477.79 Acres of Land*, 259 F.2d 23, 28 (5th Cir. 1958)) [internal quotation marks omitted]. Cf. 8A NICHOLS, *supra*, § 8A.04[2] (“[A] special benefit need not be peculiar to the land in question but must differ in kind rather than in degree from the benefits which are shared by the public at large.”) (citing *United States v. 2,477.79 Acres of Land*, 259 F.2d 23 (5th Cir. 1958)).

<sup>93</sup> *Hendler VI*, 175 F.3d at 1377-78. See *supra* notes 13-39 and accompanying text for overview of Case’s procedural history.

<sup>94</sup> See *supra* notes 3-12 and accompanying text for factual overview. See generally *Hendler II*, 175 F.3d at 1376-77.

<sup>95</sup> Findings of fact were reviewed for “clear error.” *Hendler VI*, 175 F.3d at 1378. (citing *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1171 (Fed. Cir. 1991), *Loesch v. United States*, 645 F.2d 905, 913 (Ct. Cl. 1981)). Legal conclusions were subjected to “full and independent review.” *Hendler VI*, 175 F.3d at 1378-79 (quoting *Gardner v. TEC Sys., Inc.*, 725 F.2d 1338, 1344 (Fed. Cir. 1984) (en banc)) [internal quotes omitted].

<sup>96</sup> *Hendler VI*, 175 F.3d at 1378. Plaintiffs asserted.

The court began its legal analysis by reviewing the trial court's determination that plaintiffs were entitled to no compensation for the easement physically taken because the part not taken had received special benefits which outweighed the value of the easement.<sup>97</sup> After discussing the legal framework of the set-off of special benefits to damages,<sup>98</sup> the court turned to the trial court's assessment of the benefits received by plaintiffs.<sup>99</sup> The court found there was no basis in the record for finding the trial court's valuation of the "characterization" and "remediation" benefits to be clear error.<sup>100</sup> Furthermore, the court noted that even if it disregarded both of these, the "investigation" benefit outweighed the valuation of the easement taken.<sup>101</sup>

Plaintiffs' challenge of the investigation benefit was not direct toward its valuation.<sup>102</sup> Rather, they claimed that the investigation was a general benefit and not a special benefit that could set-off the compensation owed by the Government.<sup>103</sup> The court affirmed the trial court's determination that plaintiffs received a special benefit because the Government's investigation precluded plaintiffs from having to complete environmental studies prior to any development.<sup>104</sup> The court then approved of the trial court's use of the value of the "investigation" benefit to set-off the damages for the easement taken.<sup>105</sup> The court also noted that set-off would not have been available had the United States Government caused the pollution.<sup>106</sup>

Next, the court turned to the plaintiffs' claim concerning severance damages. Noting that a regulatory taking had not occurred,<sup>107</sup> the court stated that the only severance damages available to plaintiffs would have to stem from the physical taking of the easement.<sup>108</sup> Plaintiffs claimed that the Government's use of their taken easement stigmatized the property as polluted and thus made it unmarketable.<sup>109</sup> However, the trial court had found, as a *matter of fact*, that Stringfellow caused the stigma.<sup>110</sup> The court held that the trial court's determination concerning the stigmatization of plaintiffs' land was not clearly erroneous since this finding had support in the record.<sup>111</sup>

Plaintiffs' second claim for severance damages was that the Government's easement prevented development of the property.<sup>112</sup> The trial court had found, however, that the easement did not materially interfere with development of the land.<sup>113</sup> This finding was supported by the fact that both the Governments' and even one of plaintiffs' experts testified that both the wells and the easement could be incorporated into a development plan.<sup>114</sup> Again, since this finding of fact was supported in the record, the court did not hold that it was clearly erroneous.<sup>115</sup>

---

that the trial court erred in denying them compensation for the partial physical taking of their land, both for the value of the part taken and severance damages to the remainder. Plaintiffs also assert that the trial court erred in determining that there has not been a regulatory taking of their land.

*Id.*

<sup>97</sup> *Id.* at 1379.

<sup>98</sup> *Hendler VI*, 175 F.3d at 1380. Plaintiffs agreed that the Federal set-off rule applied. *Id.*

<sup>99</sup> *Id.* at 1381. The trial court found that the taking of the easement gave plaintiffs the benefit of the investigation, the characterization, and the remediation of the groundwater. *See Hendler V*, 38 Fed. Cl. at 626-27.

<sup>100</sup> *Hendler VI*, 175 F.3d at 1380.

<sup>101</sup> *Id.* at 1381.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1381-82.

<sup>104</sup> *Id.* at 1382.

<sup>105</sup> *Hendler VI*, 175 F.3d at 1383 ("Simply put, because the court did not err in determining that the value, however measured, of the easements taken is outweighed by the special benefits conferred to the remainder, we affirm the denial of compensation for the value of those easements."). The court did, though, acknowledge the harshness of the federal set-off rule, but stated in dicta that it was up to Congress to change the rule. *Id.*

<sup>106</sup> *Id.* at 1383. *See also* United States v. Stringfellow, No. CV - 83-2501, 1995 WL 450856, at \*5-6 (C.D.Cal. Jan.24, 1995) (unreported order) ("owners of Stringfellow and the State of California are liable for costs associated with the site).

<sup>107</sup> *See infra* notes 116-118 and the accompanying text.

<sup>108</sup> *Hendler VI*, 175 F.3d at 1384.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* *See also Hendler V*, 38 Fed. Cl. at 621.

<sup>112</sup> *Hendler VI*, 175 F.3d at 1384.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1384-85 (citing *Hendler II*, 36 Fed. Cl. at 588).

<sup>115</sup> *Hendler VI*, 175 F.3d at 1384. The court also noted that even if it would have come to a different conclusion than the trial court, that that was not enough to reverse. *See id.* at 1385 (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)).



Turning to the plaintiffs' regulatory takings claim, the court noted that in *Hendler III*, it had remanded the claim for "fact-specific findings" regarding the economic impact of the Order.<sup>116</sup> Plaintiffs' regulatory taking claim mirrored their claim for severance damages under the physical taking—that the land was stigmatized and unfit for development.<sup>117</sup> Citing their analysis concerning the severance damages, the court held that the trial court did not err in finding that a regulatory taking had not occurred.<sup>118</sup>

The court concluded its opinion by stating that it need not reach the trial court's findings regarding the "nuisance" exception.<sup>119</sup> However, the court stated that the exception was available in appropriate cases, but that it was not necessary in this case since there was no regulatory taking.<sup>120</sup>

## V. COMMENT

*Hendler VI* exemplifies how modern regulatory takings jurisprudence, with its many twists and turns, can turn a factually simple case into a 15-year nightmare. Everything else aside, what happened in *Hendler I-VI* was that plaintiffs did not want the Government to drill wells on their land, but the Government did so anyway. Quite clearly, this was a physical taking of plaintiffs' land.<sup>121</sup> However, the case gets much less clear regarding plaintiffs' regulatory taking claim, but, as explained below, the court in *Hendler VI* should not have ruled on that claim because it was not properly before them.

The Federal Circuit Court of Appeals overlooked the ripeness issue because, when it remanded the case in *Hendler III*, it held that the Order itself did not constitute a regulatory taking.<sup>122</sup> However, the issue of whether the EPA's subsequent actions could constitute a taking remained with the case.<sup>123</sup>

Upon remand, the trial court should have focused on whether the EPA ever made a final decision regarding plaintiffs' use of the land. Since a final decision was never made, the claim was unripe for review and should have been dismissed for want of jurisdiction.<sup>124</sup> The trial court did this, but only after ruling on both the *Lucas*-nuisance exception and the fact-specific inquiry outlined in *Penn Central* and other cases.

The Federal Claims Court has been more willing than most other courts to hear regulatory takings claims of questionable ripeness.<sup>125</sup> However, this willingness has been based primarily upon the premise that it is not necessary to exhaust procedures that would clearly be futile.<sup>126</sup> However, procedural exhaustion is not required.

*Whitney Benefits* involved the effects of a federal mining statute.<sup>127</sup> The court in that case reasoned that an administrative hearing was not required to find that the statute applied specifically to a certain piece of property.<sup>128</sup> This is different from *Hendler*, in that the statute applied to the entire United States, whereas the Order in *Hendler* only applied to plaintiffs' property.

<sup>116</sup> *Hendler VI*, 175 F.3d at 1385. "We note, however that the ruling says nothing about whether subsequent events, in light of the character of the Government's action and plaintiffs' distinct investment-backed expectations, might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking." *Hendler III*, 952 F.2d at 1375.

<sup>117</sup> *Hendler VI*, 175 F.3d at 1385-86.

<sup>118</sup> *Id.* at 1386.

<sup>119</sup> *Hendler VI*, 175 F.3d at 1386.

<sup>120</sup> *Id.*

<sup>121</sup> *Hendler III*, 952 F.2d at 1377-78.

<sup>122</sup> *Hendler III*, 952 F.2d at 1375. Thus, plaintiffs' facial challenge was defeated. See *infra* notes 73-74 and accompanying text regarding facial challenges.

<sup>123</sup> *Id.* (Plaintiffs' "as applied" challenge).

<sup>124</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1041 (1992) (Blackmun, J. dissenting) (citing *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633 (1981) and *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>125</sup> Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 14n.48 (1995), (citing *e.g.*, *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *corrected*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991) ["Whitney Benefits"]; *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988), *aff'd* 28 F.3d 1171 (Fed. Cir. 1994) ["Loveladies"]; *Florida Rock Industries v. United States*, 8 Cl. Ct. 160 (1985), *aff'd in part and vac'd in part*, 791 F.2d 893 (Fed. Cir. 1986), *vac'd*, 18 F.3d 1560 (Fed. Cir. 1994).

<sup>126</sup> *Loveladies*, 18 Cl. Ct. at 407.

<sup>127</sup> *Whitney Benefits*, 18 Cl. Ct. at 407.

<sup>128</sup> *Id.*

In *Loveladies*, the ripeness question centered over whether submission of one development plan was enough to constitute the exhaustion of administrative remedies.<sup>129</sup> This is clearly different from *Hendler*, in that the *Loveladies*' plaintiffs never asked what they could do—they made assumptions.<sup>130</sup>

What is odd about *Hendler VI* is that the court does not mention the fact that plaintiffs did not fulfill the ripeness requirements of an "as applied" regulatory takings challenge.<sup>131</sup> The court also never recounts any of the facts that should have led it to dismiss the case on a jurisdictional basis. The court wanted to reach the merits of the claim, and that is precisely what it did. In the alternative, if the court thought plaintiffs' attempt to change the zoning of the land was sufficient to ripen the claim, it should have said so.<sup>132</sup> However, if an appellate court rules on a claim that was "dismissed" by the trial court, it should acknowledge that they are overruling the dismissal.<sup>133</sup>

Although the regulatory takings claim in *Hendler* should have been dismissed for want of jurisdiction, there are arguments for the court reviewing the claim even if it was not perfectly ripe. In *MacDonald, Sommer & Frates v. Yolo County*,<sup>134</sup> the Supreme Court stated in a footnote that property owners would not be subjected to "piecemeal litigation" to settle their claims.<sup>135</sup> Had the court in *Hendler III* dismissed plaintiffs' "as applied" regulatory taking claim for want of jurisdiction but remanded the physical taking claim, such a "piecemeal litigation" would have occurred.

Additionally, it should be noted that *Hendler VI* was 15 years old and on the second appeal. It would be very judicially uneconomical for the court in *Hendler VI* to dismiss the regulatory takings claim for want of jurisdiction after that much litigation.

## VI. CONCLUSION

In addition to the jurisdictional issues discussed herein, *Hendler v. United States* is an interesting case jurisprudentially for larger reasons. The litigation of this case has spanned the recent revival of regulatory takings in the 1980s and 1990s.<sup>136</sup> Additionally, this is a case where the plaintiffs spent fifteen years in litigation, met their burden to show that the Government effected a physical taking of their property, and still finished the day with nothing to show for their litigation efforts except fifteen years worth of legal expenses.<sup>137</sup> Courts should remember the context in which *Hendler v. United States* was decided before relying on it too heavily as precedent.

TODD C. WERTS



<sup>129</sup> *Loveladies*, 15 Cl. Ct. at 385.

<sup>130</sup> *Hendler IV*, 36 Fed. Cl. at 580.

<sup>131</sup> See *supra* notes 75-77 and the accompanying text.

<sup>132</sup> *Hendler IV*, 36 Fed. Cl. at 580. ("[Plaintiffs] did attempt, unsuccessfully, to have the zoning of the property changed to permit either commercial/ industrial or high density residential use of the land.").

<sup>133</sup> See, e.g., *supra* note 34 and the accompanying text.

<sup>134</sup> 477 U.S. 340 (1986).

<sup>135</sup> *Id.* at 350 n.7.

<sup>136</sup> For a discussion of recent developments in regulatory takings law see generally Maurice J. Holland, *Ill-Assorted Musings About Regulatory Takings and Constitutional Law*, 77 OR. L. REV. 949 (1998).

<sup>137</sup> See *Lucas*, 505 U.S. at 1019 n.8 ("Takings law is full of these "all-or-nothing" situations.").