Montana Law Review

Volume 55
Issue 2 *Summer 1994*

Article 10

July 1994

Montana Supreme Court Unnecessarily Misconstrues Takings Law

John L. Horwich
Professor of Law, University of Montana

Hertha L. Lund

COMMENTS

MONTANA SUPREME COURT UNNECESSARILY MISCONSTRUES TAKINGS LAW

John L. Horwich*
Hertha L. Lund**

I. INTRODUCTION

In the recent Montana Supreme Court case, *Kudloff v. City of Billings*,[1] the court engaged in a takings analysis that over-simplified and inaccurately portrayed takings jurisprudence under both the federal and state constitutions. The court's foray into substantive takings jurisprudence was especially unfortunate, because it was not necessary. Moreover, the court's unwarranted pronouncements on the standards governing takings law in Montana risk further confusing an already complex area of law.[2]

But for the unnecessary discussion of substantive takings law, *Kudloff* would merit little attention. The court identified sufficient grounds to affirm the district court's summary judgment dismissal of Kudloff's claims without regard to substantive takings law.[3] However, the court chose to discuss substantive takings law, and its mischaracterization of federal and state precedents should not go unchallenged.[4] This comment sets out the facts in *Kudloff*, ex-

---

* Associate Professor of Law, University of Montana School of Law; A.B., 1972, Princeton University; J.D., 1975, Cornell Law School.

** B.A., 1989, Temple University; Candidate for J.D. 1995, University of Montana School of Law.

1. 260 Mont. 371, 860 P.2d 140 (1993).

2. For a thorough discussion of the current state of federal and Montana takings jurisprudence, see Page Carroccia Dringman, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245 (1994). *See also* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

3. *See infra* notes 23-24, 31-34 and accompanying text.

4. This commentary is not a comprehensive discussion of takings jurisprudence. The reader is referred to Dringman, *supra* note 2, and articles referred to therein for the history

plains the Montana Supreme Court's inaccurate portrayal of *Lucas v. South Carolina Coastal Council*[5] and *Penn Central Transportation Co. v. New York City*,[6] and discusses Montana precedent that conflicts with the court's reasoning in *Kudloff*.

II. *KUDLOFF v. CITY OF BILLINGS*

A. *Facts and Procedure*

In 1973, Don Kudloff (Kudloff) purchased 133 acres near the Billings airport.[7] Throughout the years, Kudloff had plans to develop part of his property as a ski area, water slide, motel development or golf course.[8] In 1974, he received a special exception from the Yellowstone County Board of Adjustments allowing him to develop a portion of the property as a ski area.[9]

Kudloff set aside a parcel of land west of the proposed ski area for development as a commercial subdivision. To provide water and sewer service for his planned commercial subdivision, Kudloff requested that the City of Billings annex that portion of his property. The City of Billings annexed the parcel and zoned it for commercial development.[10] The annexation of the commercial subdivision did not affect the special exception permitting the ski area.[11] Despite substantial efforts, Kudloff was unable to secure financing for his ski development.[12] The land was never used as a ski area and remained undeveloped.[13]

In 1989, the Billings city council voted to annex several wholly-surrounded parcels within the Billings city limits, including Kudloff's proposed ski development.[14] Kudloff, through his attorney, protested the annexation at the city council meeting because of the "proposed outdoor recreational use."[15]

In March 1990, Kudloff filed a complaint alleging that the City of Billings, its city council members, and the mayor annexed

---

and current status of takings jurisprudence.

5. 112 S. Ct. 2886 (1992).
6. 438 U.S. 104 (1978).
7. Brief for Respondent at 7, *Kudloff* (No. 93-046) [hereinafter Respondent's Brief].
8. Respondent's Brief, *supra* note 7, at 7.
9. Respondent's Brief, *supra* note 7, at 8.
10. Respondent's Brief, *supra* note 7, at 8.
11. Respondent's Brief, *supra* note 7, at 8.
12. Respondent's Brief, *supra* note 7, at 8-9.
13. Respondent's Brief, *supra* note 7, at 10.
14. Respondent's Brief, *supra* note 7, at 10-11.
15. Respondent's Brief, *supra* note 7, at 10. The Montana statutes prohibit the annexation of land under the "wholly surrounded" procedure if the land to be annexed is used "for the purpose of maintaining or operating . . . a place for public or private outdoor entertainment or any purpose incident thereto." MONT. CODE ANN. § 7-2-4503(2) (1993).

his parcel in violation of state statutes and in contravention of his constitutional rights.[16] The City of Billings moved for summary judgment on the grounds that: the mayor and council members were immune from suit; the annexation complied with statutory procedures; the constitutional claims were improper collateral attacks on the annexation; and, even if such collateral attacks were allowed, the City of Billings had not taken property without just compensation.[17] In December 1991, the district court granted summary judgment to the city council members and the mayor based on immunity[18] and granted summary judgment to the City of Billings on Kudloff's constitutional claims. The court denied summary judgment on the validity of the annexation itself, treating Kudloff's complaint as a petition for court review under section 7-2-4741 of the Montana Code.[19]

In June 1992, the City of Billings filed a second motion for summary judgment, alleging that Kudloff lacked standing to challenge the annexation because he had sold the property in September, 1991. In November 1992, the district court granted the City of Billing's motion, thus disposing of all issues in favor of the City of Billings.[20]

B. Holding and Reasoning

The Montana Supreme Court affirmed the summary judgment dismissal of Kudloff's claims.[21] The court upheld dismissal of the wrongful annexation claims because, more than two years after the original complaint was filed, Kudloff changed the nature of his action without providing the required notice to the defendants.[22] When Kudloff sold the property while his lawsuit was pending, the nature of his action changed from a request to set aside the annexation as void to a claim for damages. The court held that while Kudloff might have standing to pursue damages for a wrongful annexation, his current action was properly dismissed because he had never amended his complaint to apprise the defendants of the changed nature of the claim and relief sought.[23]

The court then addressed Kudloff's claim that the annexation

16. *Kudloff*, 260 Mont. at 373, 860 P.2d at 141.
17. Respondent's Brief, *supra* note 7, at 2-3.
18. *Kudloff*, 260 Mont. at 373, 860 P.2d at 141.
19. *Id.* (citing MONT. CODE ANN. § 7-2-4741 (1993)).
20. *Id.* at 374, 860 P.2d at 142.
21. *Id.* at 378, 860 P.2d at 144.
22. *Id.* at 374-75, 860 P.2d at 142.
23. *Id.*

was a taking of his property. Justice Nelson, delivering the opinion of the court, relied on two United States Supreme Court cases: *Penn Central Transportation Co. v. New York City*[24] and *Lucas v. South Carolina Coastal Council*.[25] Justice Nelson cited *Penn Central* for the proposition that "a regulatory taking of property by a municipality is allowed even if the value of that property and its usefulness is diminished."[26] Next, he cited *Lucas* for the proposition that "[i]t is only when the owner of the real property has been called upon to sacrifice all economically beneficial use of that property in the name of the common good that a constitutionally-protected taking has occurred."[27]

The court said *Kudloff* was similar to *Penn Central* because the annexation of Kudloff's property may have reduced its value and usefulness.[28] But, the court said, the reduction in value of the property did not rise to the level of *Lucas*, which would require compensation. The court noted that the record indicated that the special exception allowing ski-related uses survived annexation. Additionally, the court found no evidence that Kudloff ever attempted to ascertain whether he could use the property for ski-related purposes after the annexation.[29]

The court also upheld dismissal of Kudloff's final two constitutional claims.[30] Kudloff had asserted that his constitutional rights were violated because the annexation of the proposed ski area violated the Montana statute that prohibits annexation of land used for the purpose of maintaining or operating a place for public or private outdoor entertainment.[31] Since Kudloff had never developed his ski area, the court stated that the land could hardly be characterized as being used for these purposes.[32] Also, the court summarily dismissed Kudloff's claim that the increased tax burden imposed by annexation violated his constitutional rights. The court stated, "Montana law is clear that the levying of future taxes after an annexation does not constitute a taking of property."[33]

---

24. 438 U.S. 104 (1978).
25. 112 S. Ct. 2886 (1992).
26. *Kudloff*, 260 Mont. at 375, 860 P.2d at 142.
27. *Id.* at 375, 860 P.2d at 142.
28. *Id.* at 377, 860 P.2d at 144.
29. *Id.*
30. *Id.* at 378, 860 P.2d at 144.
31. *Id.* (quoting MONT. CODE ANN. § 7-2-4503 (1993)).
32. *Id.*
33. *Id.*

III. ANALYSIS

The result reached in *Kudloff* is sound. However, both the manner and substance of the court's handling of the constitutional taking claim is flawed. The court did not have to address the substantive constitutional issues to reach the result, and its analysis of those issues is inaccurate.

The court correctly noted that Kudloff never requested a zoning change or special variance to permit ski-related uses after the annexation. The court also remarked that the record indicated that the 1974 special exception, which permitted the ski area, survived the 1989 annexation.[34] Thus, adequate grounds existed to dismiss any alleged taking simply on the basis that Kudloff had failed to show that the permitted uses of his property were any more limited after the annexation than before. Even if an issue existed regarding the survival of the special exception, Kudloff had not sought a zoning change or variance to permit his proposed use. Ample precedent exists to dismiss a takings claim under these circumstances alone.[35]

Unfortunately, the court did not rely on these grounds to dismiss the takings claim. Instead, the court held Kudloff's claim did not rise to the level of a compensable taking because the regulation did not deprive Kudloff of all economically beneficial uses of his property.[36] The court's holding is a mischaracterization of both federal and Montana takings jurisprudence.

A. The Federal Precedents of Penn Central and Lucas

Federal case law interpreting the Fifth Amendment's prohibition on the taking of private property for a public purpose without just compensation is voluminous and complex.[37] This commentary makes no attempt to summarize or analyze all the federal case law on the subject. The volume and complexity of federal takings jurisprudence make it risky to provide a summary characterization of the law. The Montana Supreme Court succumbed to the desire to find simple principles to apply to a takings analysis. Unfortunately, the federal law on takings cannot be reduced to simple principles. The Montana court's suggestion that it can risks misdirecting the future of takings analysis in Montana.

---

34. *Id.* at 378, 860 P.2d at 144.

35. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-88 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 (1981); Agins v. Tiburon, 447 U.S. 255, 260 (1980).

36. *Kudloff*, 260 Mont. at 377, 860 P.2d 144.

37. *See* Dringman, *supra* note 2.

The Montana Supreme Court accurately identified *Penn Central*[38] and *Lucas*[39] as leading cases in the federal takings jurisprudence. But *Penn Central* and *Lucas* are just two cases in a long history of federal takings cases. Although *Lucas* is the Supreme Court's most recent takings case, and *Penn Central* is widely recognized as a landmark Fifth Amendment case,[40] numerous other Supreme Court cases are essential to a full understanding of the federal law of takings.[41] Even more significant than the Montana Supreme Court's failure to acknowledge the rich mix of Supreme Court cases that comprise federal takings jurisprudence today is the Montana court's mischaracterization of the holdings of *Penn Central* and *Lucas*, which leads to a misapplication of federal takings jurisprudence. Relying exclusively on *Penn Central* and *Lucas*, the court in *Kudloff* boils down the law of regulatory takings into a few succinct statements:

> [A] regulatory taking of property by a municipality is allowed even if the value of that property and its usefulness is diminished. *Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104, 131. It is only when the owner of the real property has been called upon to sacrifice all economically beneficial use of that property in the name of the common good that a constitutionally-protected taking has occurred. *Lucas v. South Carolina Coastal Council* (1992), 112 S. Ct. 2886, 2895.[42]
>
> . . . .
>
> The state is required to compensate a property owner only if it seeks to sustain a regulation that deprives the property owner of all economically beneficial uses of his property . . . . *Lucas*, 112 S. Ct. at 2899.[43]

Neither *Penn Central* nor *Lucas*, nor the balance of federal case law on takings, supports this description of the threshold for a

---

38. 438 U.S. 104.

39. 112 S. Ct. 2886.

40. *See* Laura McKnight, *Regulatory Takings: Sorting Out Supreme Court Standards After Lucas v. South Carolina Coastal Council*, 41 U. KAN. L. REV. 615, 623 (1993); E. George Rudolph, *Let's Hear It for Due Process—An Up to Date Primer on Regulatory Takings*, 23 LAND & WATER L. REV. 355, 362-63 (1988); Michael Simon, *The Supreme Court's 1987 "Takings" Triad: An Old Hat in a New Box or a Revolution in Takings Law?*, 1 U. FLA. J.L. & PUB. POL'Y 103 (1987).

41. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Agins v. Tiburon, 447 U.S. 255 (1980); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

42. *Kudloff*, 260 Mont. at 375, 860 P.2d at 142.

43. *Id.* at 377, 860 P.2d at 143.

compensable regulatory taking.[44]

In 1922, Justice Holmes established the general rule that continues to govern regulatory takings: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[45] In the seventy years since that decision, the courts have struggled to identify when regulation "goes too far."[46] The Montana court in *Kudloff* suggests the struggle is over: regulation only goes too far when it deprives the property owner of all economically beneficial uses of his property.[47] This conclusion is not supported by *Penn Central*, *Lucas*, or Supreme Court precedent.[48]

In *Penn Central*, the Supreme Court ultimately upheld a New York City landmark ordinance in the face of a Fifth Amendment challenge, even though the ordinance reduced the value of Penn Central's property. However, that holding is a far cry from establishing the general rule that the *Kudloff* court attributes to the case. The *Kudloff* court characterized the rule from *Penn Central* as: "a regulatory taking of property by a municipality is allowed even if the value of that property and its usefulness is diminished."[49] This characterization, particularly when combined with the Montana Supreme Court's characterization of *Lucas*, suggests that a regulatory taking will not be found when the property is reduced in value, unless the regulation denies the owner all economically beneficial use of the property.[50]

The *Kudloff* court's characterization of *Penn Central* ignores what has become *Penn Central's* legacy: the multi-factor balancing test.[51] If *Penn Central* stood for the straightforward proposition that no regulatory taking exists unless the owner is deprived of all economically beneficial use of the property, the majority opinion in that case should have consumed many fewer than 32 pages, and courts would not be citing *Penn Central* for the multi-factored balancing test. *Penn Central's* issue was not whether the New York City landmark ordinance deprived Penn Central Transportation Company of all economically beneficial use of the Grand Central

---

44. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) (applying *Lucas*, *Penn Central*, and other precedent Supreme Court cases on takings); *see* discussion *infra* notes 65-71 and accompanying text.

45. *Pennsylvania Coal*, 260 U.S. at 415.

46. *See* Dringman, *supra* note 2, at 251-52.

47. *Kudloff*, 260 Mont. at 376-77, 860 P.2d at 143-44.

48. *See supra* note 41; *see also Florida Rock*, 18 F.3d at 1568-69.

49. *Kudloff*, 260 Mont. at 375, 860 P.2d at 142.

50. *Id.*; *see also infra* notes 74-76 and accompanying text.

51. *See* Dringman, *supra* note 2, at 254-57. The multi-factor balancing test is discussed *infra* text accompanying note 56.

Terminal.[52] The issue was whether the regulation's impact on the property owner, which fell well short of denying all economically beneficial use of the property, went "far enough" to constitute a compensable taking.[53]

The Court in *Penn Central* acknowledged that: "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."[54] The Court admitted that it had been unable to develop any "set formula" for determining when a regulation goes so far as to require compensation.[55] The Court then proceeded to identify the factors that have been significant in the Court's previous regulatory takings cases: the economic impact of the regulation on the claimant (especially as regards the claimant's distinct investment-backed expectations); the character of the governmental action; whether the governmental action is reasonably necessary to effect a substantial public purpose; and whether the government action can be characterized as the acquisition of a resource to facilitate a uniquely public function.[56] Since *Penn Central*, courts refer to these factors as the multi-factored balancing test.

How these "multi-factors" apply to particular government actions is fairly debatable. However, a complete reading of *Penn Central* can leave no doubt that the Supreme Court did not conceive the issue of regulatory taking to be simply whether the regulation deprived the owner of all economically beneficial use of the property.

The Montana court's characterization of *Lucas* is as misleading as its characterization of *Penn Central.* Although the regulation in *Lucas* did deprive the property owner of virtually all economically beneficial uses of the property,[57] the Court was careful to highlight that such an impact was not essential to find a taking.[58] The Montana court misunderstood Justice Scalia's attempt to create some order out of the takings jurisprudence chaos.

Justice Scalia divided takings claims into those that are comparatively simple and those that are complex. Historically, the Su-

52. The Court stated: "[Penn Central] accept[s] for present purposes . . . that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return . . . ." *Penn Central*, 438 U.S. at 129.

53. *Id.* at 130, 136.

54. *Id.* at 123.

55. *Id.* at 124.

56. *Id.* at 124-28.

57. *Lucas*, 112 S. Ct. at 2896. The trial court found Lucas's two beachfront lots had been rendered valueless by Respondent's enforcement of the coastal-zone construction ban. *Id.*

58. *Id.* at 2894-95.

preme Court's cases have identified two simple categories of claims: those in which the regulation compels the property owner to suffer a physical invasion of the property and those in which the regulation denies all economically beneficial or productive use of land.[59] With rare exceptions, regulations fitting within these categories will constitute a compensable taking.[60] Lucas's situation fits within the second category, and thus that category was the focus of the Court's opinion.[61] Justice Scalia, however, carefully pointed out that these two forms of "categorical" taking did not exhaust the potential circumstances in which a party may be entitled to Fifth Amendment compensation as a result of government regulation.[62]

Indeed, Justice Scalia's majority opinion addresses the possibility of a partial taking, which is the area of the Montana Supreme Court's misconception, in a footnote responding to Justice Stevens' dissent:

> Justice Stevens criticizes the 'deprivation of all economically beneficial use' rule as 'wholly arbitrary', in that '[the] landowner whose property is diminished in value 95% recovers nothing,' while the landowner who suffers a complete elimination of value 'recovers the land's full value.' This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).[63]

While *Lucas* singles out, for simplified, categorical treatment, a regulation that deprives an owner of all economically beneficial use of the property, *Lucas* does not suggest that such a deprivation is a prerequisite to a valid claim for compensation under the Fifth Amendment.

Recently, the Federal Circuit Court of Appeals addressed the status of federal takings jurisprudence where federal regulation de-

---

59. *Id.* at 2893.

60. One of those rare exceptions, as discussed in *Lucas*, would be where the proscribed use interests were never a part of the owner's title to begin with; for example, where the state's common law of nuisance has proscribed such uses. *Id.* at 2899.

61. *See supra* note 59-60 and accompanying text.

62. *Lucas*, 112 S. Ct. at 2894-95 & n.7.

63. *Id.* at 2895 n.8.

nied a property owner of some, but not all, economically beneficial use of the property.[64] In a decision laden with citations to *Penn Central* and *Lucas*, the court left no doubt that under federal takings law, a regulation may constitute a taking even where the owner suffers only a partial loss of economic use of the property.[65]

The court in *Florida Rock* discussed the Supreme Court's "teaching" in *Lucas* that where a regulation prohibits all economically beneficial use of land, a compensable taking has occurred without further inquiry.[66] The court went on to note, however, that where the effect of a regulation is to prohibit less than all economically beneficial use of the land and cause at most a partial destruction of its value, a taking requiring government compensation may still exist.[67] Such a case falls outside the straightforward "categorical" total taking that the Supreme Court applied in *Lucas*, but it may constitute a taking nonetheless.

The *Florida Rock* court stated that where a regulation deprives an owner of some, but not all, economic value in the property, "there remains . . . the difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.' "[68] No bright line answer exists to that question; it depends on the particular facts and case-by-case adjudication.[69] For guidance on the particular facts relevant to that inquiry, the court turned to the factors identified in *Penn Central*.[70]

B. The Montana Precedents

While the current state of takings law under the Montana

64. *Florida Rock*, 18 F.3d 1560. Florida Rock was denied a permit under section 404 of the Clean Water Act which was necessary to allow Florida Rock to mine limestone that lay underneath a wetland. Florida Rock asserted that denial of the permit constituted a regulatory taking, entitling Florida Rock to compensation. *Id.* at 1562-63.

65. *Id.* at 1567-70.

66. *Id.* at 1564.

67. *Id.* The court in *Florida Rock* stated: "Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits uncompensated taking of private property without reference to the owner's remaining property interests." *Id.* at 1568. "Nothing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings, nor has the Supreme Court or this court so held." *Id.* at 1570.

68. *Id.*

69. *Id.*

70. *Id.* at 1567. Interestingly, while the dissenting judge disagreed with the majority concerning the scope and application of "partial takings" jurisprudence, she agreed that a taking may nonetheless arise even where less than all economically beneficial or productive use of land is lost by reason of governmental regulation. *Id.* at 1577. She also agreed that in such a case the court must revert to a case-by-case, ad hoc inquiry. *Id.*

Constitution is far from clear,[71] existing precedents do not support the *Kudloff* court's insistence on a total deprivation of economically beneficial use. The court's past interpretations of the Montana Constitution differ from the court's ruling in *Kudloff*.[72]

In contrast to the federal Constitution, the Montana Constitution provides that private property shall not be taken *or damaged* for public use without just compensation.[73] The constitutional language suggests that the state may owe compensation in circumstances where a regulation has deprived the owner of less than all economically viable use of the property.

In 1982, the Montana Supreme Court defined "taken or damaged" in *Knight v. Billings*.[74] In that case, a group of property owners alleged that the City's residential zoning of their properties constituted a taking because their properties were no longer suitable for residential use. Based on the showing that the plaintiffs suffered a twenty to thirty percent reduction in their property values as residential properties, the court held that the impact of the City's zoning fell within the "or damaged" language of the Montana Constitution, entitling the plaintiffs to compensation for the diminution in value.[75] The court's decision in *Knight*, granting compensation for a twenty to thirty percent reduction in market value, is in sharp contrast to the *Kudloff* court's threshold of depriving the owner of "all economically beneficial uses of his property."[76]

In 1991, the court again decided a takings case based upon a different threshold than a total deprivation of "all economically beneficial uses of his property." In *McElwain v. County of Flathead*, the court denied the inverse condemnation claim of the owner of property along the Flathead River who asserted Flathead County's floodplain regulations decreased the market value of her property by two-thirds.[77] The plaintiff, naturally, pointed to *Knight* in which the court had upheld a taking claim based upon a mere twenty to thirty percent reduction in value.[78] The court responded by pointing to United States Supreme Court precedents

71. *See* Dringman, *supra* note 2, at 257-67.

72. *See infra* notes 74-83 and accompanying text.

73. "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." MONT. CONST. art. II, § 29.

74. 197 Mont. 165, 642 P.2d 141 (1982).

75. *Knight v. Billings*, 197 Mont. at 172-74, 642 P.2d at 145-46.

76. *Kudloff*, 260 Mont. at 377, 860 P.2d at 143.

77. 248 Mont. 231, 811 P.2d 1267 (1991).

78. *McElwain v. County of Flathead*, at 238, 811 P.2d at 1271.

in which diminutions in value of amounts much greater than two-thirds had been held not to constitute a taking.[79] The court noted that diminution in market value by itself is not sufficient to establish a taking.[80] Even this principle, however, could not lead to the court's conclusion in *Kudloff* that "a regulatory taking . . . is allowed even if the value of that property and its usefulness is diminished."[81] Although diminution in market value alone may not be sufficient to determine whether a taking has occurred,[82] that is not to say the impact of a regulation on value or usefulness is irrelevant unless all economically beneficial uses are denied, as the court suggested in *Kudloff*. Indeed, the court in *McElwain* alluded to the more complex analysis it rejected in *Kudloff*: "The issue of economic viability must be resolved by focusing on the remaining use available to the landowner and the nature of the interference with the overall rights in the property, in addition to any reduction in value."[83] The issue is not simply whether the regulation has deprived the owner of all economically beneficial uses of the property.

IV. CONCLUSION

The Montana Supreme Court is not alone in struggling with takings jurisprudence. The topic remains complex and confusing; the yearning for certainty and simplicity is understandable. That yearning, however, does not justify the denial of constitutional rights. Recent federal and state cases reveal that no bright line test or simple standard exists in federal or state takings law. While the "categorical" construct of Justice Scalia in *Lucas* provides a relatively simple formula for finding a taking in limited circumstances,[84] no comparable formula exists for finding that a taking *has not* occurred. That determination continues to require complex analysis.

Substantial state and federal precedent exists to guide that

79. *Id.* at 238, 811 P.2d at 1272 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915)). The *McElwain* court did not address the "or damaged" language which distinguishes the Montana Constitution from the federal constitution, and which the court relied on in *Knight*.

80. *Id.* at 238, 811 P.2d at 1271.

81. *Kudloff*, 260 Mont. at 375, 860 P.2d at 142.

82. One could argue that Montana's constitutional "or damaged" provision and the court's decision in *Knight* support the proposition that mere diminution in market value is sufficient to find a taking.

83. *McElwain*, 248 Mont. at 238, 811 P.2d at 1272 (emphasis added) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987)).

84. *See supra* notes 59 and accompanying text.

analysis. Going forward, the Montana court should acknowledge and embrace the complexity inherent in takings jurisprudence, rather than grasp at simple solutions. Fundamental constitutional rights are worth the additional analysis and even the additional uncertainty.