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Does The Oil Pollution Act Of 1990 Rise To The Level Of A Taking? How The Court Missed The Boat In Maritrans, Inc. v. United States

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DOES THE OIL POLLUTION ACT OF 1990 RISE TO THE LEVEL OF A TAKING? HOW THE COURT MISSED THE BOAT IN *MARITRANS, INC. V. UNITED STATES*

*Mary A. Denison**

"The more often the government must pay for exercising control over private property, the less control there will be. That is the reality . . . ownership of property carries responsibilities to the community as a whole as well as privileges."[1]

I. INTRODUCTION

A recent case in the Court of Federal Claims was the first test by owners of oil tankers and tank barges of section 4115[2] of the Oil Pollution Act of 1990 (OPA 90), otherwise known as the vessel construction requirement.[3] The Court held that Maritrans, Inc., owners of thirty-seven tank barges affected by the Act's double hull requirement, was premature in claiming that the requirement exacted a regulatory taking of their property.[4] The court used a standard of review that deviated in part from U.S. Supreme Court takings guidelines and instead followed a more conservative script dictated by the U.S. Court of Appeals for the Federal District.[5] This Note will first provide a historical foundation by analyzing the background, statutory content, and intended effect of OPA 90, as well as a short summary of the evolution of takings decisions in both the Supreme Court and

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1. Florida Rock Indus. v. United States, 18 F.3d 1560, 1575, 1580 (Fed. Cir. 1994) (Nies, J. dissenting).

2. *See* Pub. L. No. 101-380 § 4115, 104 Stat. 484 (1990); *see also* 46 U.S.C. § 3703a(a)–(c) (1994) (statutory authority for the Secretary of Transportation to "prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels . . .").

3. *See* Maritrans, Inc. v. United States, 43 Fed. Cl. 86, 87 (1999).

4. *See id.* at 92.

5. *See generally* M. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 195–98 (1995).

the Federal Circuit courts. Following that discussion will be a consideration of the *Maritrans* opinion itself. This Note concludes with a discussion of the peculiar tailoring of the court's analysis and the effect this opinion may have on both vessel owners and triers of fact in future considerations of OPA 90. This Note will also examine an alternative test of regulatory takings that may have provided guidance for the *Maritrans* court in reaching its conclusion that OPA 90 did not exact a taking of vessels out of compliance with the Act's construction requirement.

II. BACKGROUND

A. The Oil Pollution Act of 1990

An attempt at federal legislation of oil spill pollution first appeared in 1972 as part of the Federal Water Pollution Control Act (FWPCA).[6] The FWPCA contained sections dealing with liability, contingency planning, regulation of facilities, and a small revolving cleanup fund.[7] After the passage of the FWPCA, additional provisional packages were pieced onto different legislative acts, such as the compensation program of the Outer Continental Shelf Lands Act (OCSLA)[8] and the Fishermen's Contingency Fund,[9] but the resulting patchwork of laws caused confusion and was often conflicting on matters of liability.[10] Although several attempts were made in the following years to resolve the conflict and create a comprehensive oil pollution program, all efforts eventually failed due to a lack of agreement between the Senate and the House of Representatives on proposed legislation. In March of 1989, the urgent need for such legislation suddenly became abundantly clear.

On March 24, 1989, the tanker *M/V Exxon Valdez* struck a reef in Prince William Sound spilling approximately 11 million gallons of oil and causing one of the worst marine ecological disasters in history.[11] In August of 1990, after eighteen months of intense pressure from both the public and the media, Congress passed the Oil Pollution Act (OPA 90),[12] thereby introducing the most sweeping changes to marine pollution law since the FWPCA. The intent of OPA 90 was consolidation of the many fragmented federal and state laws and the enactment of a new bill that would

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6. *See* 33 U.S.C. §§ 1251–1376 (1982 & Supp. V 1987).

7. *See id.*

8. *See* 43 U.S.C. §§ 1331–1356 (1994). OCSLA regulations govern the oil and gas leasing operations on the outer continental shelf of the United States. *See id.* § 1344.

9. *See* 43 U.S.C. §§ 1841–1842 (1994).

10. *See generally,* Note, *Oils Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 HARV. L. REV. 1761 (1980).

11. *See* S. REP. NO. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723.

12. 33 U.S.C. §§ 2701–2761 (1994).

"[a]dequately compensate victims of oil spills, provide quick efficient cleanup, minimize damage to fisheries, wildlife, and other natural resources and internalize those costs within the oil industry and its transportation sector."[13]

OPA 90 is a complex statute which covers six different areas of marine pollution mitigation,[14] as well as some specific cleanup goals for Prince William Sound.[15] The statute is primarily concerned with the following issues: 1) liability and compensation for damages; 2) fines for non-compliance; 3) a cleanup fund; 4) improved vessel design; 5) improved communication and traffic monitoring; and 6) improved planning for cleanup response.[16] The area of improved vessel design contains the teeth of the statute for owners of tankers and tank barges as it requires that all vessels carrying oil or petroleum products must be built or retrofitted with double hulls by January 1, 2015 or be retired from service.[17] It is this particular section of OPA 90 that raises the specter of regulatory takings law for owners of vessels affected by the statute.

B. A Brief Synopsis of Takings Law

The Fifth Amendment to the Constitution provides, inter alia, that private property will not be taken for public use without just compensation.[18] The U.S. courts have struggled since 1922 with the interpretation of these words and their application to laws that restrict an individual's use of his property, typically in the form of land use regulations.[19] In 1922, Justice Holmes first put forth the notion in *Pennsylvania Coal v. Mahon*[20] that if a regulation was too restrictive its effect could amount to a compensable taking.[21] Since that opinion was written, both state and federal courts have

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13. S. REP. NO. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723.
14. *See* 33 U.S.C. §§ 2701–2761 (1994).
15. *See id.* §§ 2731–2737.
16. *See* 33 U.S.C. §§ 2701–2761 (1994).
17. *See* 46 U.S.C. § 3703 (1994). For further discussion on the double hull requirement, *see* T. Alcock, *Ecology, Tankers, and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers*, 19 ECOLOGY L.Q. 97 (1992). Double hulls have been studied since 1975. *See id.* at 108. Tankers that carry liquified natural gas and other highly combustible materials were required to have double hulls before the enactment of OPA 90. *See id.* at 110. Several studies have concluded that double hulls would have been effective in reducing or even eliminating oil spillage resulting from groundings. *See id.* at 108.
18. *See* U.S. CONST. amend. V.
19. *See, e.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) (defeating a Pennsylvania statute that restricted coal mining activities from causing subsidence under a private home).
20. *Id.*
21. *See id.* at 413.

tried to define where the line should be drawn between a noncompensable exercise of police power and an unreasonable regulation.[22]

Several tests have been developed for takings law, starting with the landmark *Penn Central Transportation Co. v. City of New York*[23] opinion in 1978. The three factors that emerged from this decision to uphold a landmark preservation law require a balance of economic impact, legislative intent, and notice, which is specifically referred to as "distinct investment backed expectations."[24] In 1987, the Supreme Court revisited the effect of coal mining restrictions in *Keystone Bituminous Coal Association v. DeBenedictis*.[25] Here the Court chose not to be bound by *Pennsylvania Coal* and instead upheld a coal mining regulation based on public interest and the inherent nature of police power to protect that interest.[26] Since *Penn Central*, the Supreme Court has also developed several other standards of review including: 1) permanent physical occupation;[27] 2) rational nexus between exaction and purpose;[28] and 3) a total diminution in value.[29] The Supreme Court recently expressed a somewhat more conservative reaction to ecological land regulation in *Dolan v. City of Tigard*,[30] which effectively

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22. *See generally* JESSE E. DUKEMINIER & JAMES E. KRIER, PROPERTY 1123–1216 (4th ed. 1998).

23. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

24. *Id.* at 124 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

25. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

26. *See id.* at 488–93.

27. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that State mandated cable installations on private buildings constituted a permanent physical occupation of property and reached the level of a taking requiring compensation).

28. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (finding a taking has occurred where there is lack of nexus between the purpose and effect of land use regulation).

29. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a regulation that denies all economic use of land constitutes a taking). In *Lucas*, the Supreme Court found a compensable taking where a state statute, enacted two years after a landowner paid close to $1 million for beachfront property, barred the construction of any permanent structures. *See id.* at 1007, 1032. The Court called the nuisance-prevention purpose of the statute with respect to beach erosion "unwarranted" and set a standard for takings where a regulation denies all economically beneficial or productive use of land. *See id.* at 1015.

30. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994). As a condition on a building permit, the City of Tigard required Dolan to dedicate all land on site within the 100-year flood plain to the city. *See id.* at 380. The city requested it be deeded over for public access on a greenway along a river. The Supreme Court held that the condition failed the test of rough proportions as a floodplain regulation. *See id.* at 395. Restricting development in the floodplain could have been seen to advance a legitimate purpose of flood control, but the creation of a public greenway and the deprivation of Dolan's right to exclude others was outside the realm of the regulatory action and the Supreme Court likened it to a physical permanent occupation of property. *See id.*

increased the burden on the government to justify any development mitigation regulations.

Two more remarkably conservative decisions on takings came from the Federal Circuit in 1994. In *Florida Rock Industries v. United States*,[31] the court first announced that a wetlands regulation could violate the Just Compensation Clause if it worked even a "partial taking" of property.[32] In *Loveladies, Inc. Harbor v. United States*,[33] the same court affirmed a lower court ruling that, for the purpose of takings analysis, only the parcel of property affected by the wetlands regulation need be considered, not the entire original parcel of land.[34] In other words, *Loveladies Harbor* allows a developer to subdivide and develop all the upland areas of land he owns and then sue the government for the value of the remaining wetlands under a partial takings doctrine.

As this brief history suggests, the line between regulatory taking and reasonable regulation is constantly evolving. In Section III of this Note, yet another standard of review gets added to the list—ripeness.

III. *MARITRANS, INC. V. UNITED STATES*

A. Facts and Procedural History

In 1996, the largest U.S. tank barge[35] operator, Maritrans, Inc,[36] sued the United States alleging that the effect of the OPA 90 on the forced retirement of its single hull vessels rose to the level of a taking under the Fifth Amendment.[37] Maritrans purchased a fleet of thirty-seven single hull tank

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31. Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

32. *See id.* at 1570. *Florida Rock* involved the denial of a permit under the Clean Water Act to mine limestone in an area of wetlands west of Miami. *See id.* at 1562. The case followed a byzantine procedure, taking 14 years to conclude and prompting comparison to Dickens' *Bleak House*. The Federal Circuit used a revolutionary approach to find that a regulation that denies an owner of a substantial part of the economic use of his property should be compensated under a partial taking doctrine. *See* Blumm, *supra* note 5, at 178.

33. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

34. *See id.* at 1181. *Loveladies Harbor* was decided three months after *Florida Rock* by the same court. *See id.* at 1180. It allowed property owners to segment their property into smaller parcels that could then be examined individually under the *Lucas* "total takings" rule. *See* Blumm, *supra* note 5, at 189. The court upheld an award of $2.6 million for 12.5 acres as compensation for restrictions imposed by a Corps of Engineers wetlands regulation. *See id.* at 187.

35. *See* Coast Guard/Department of Transportation Regulations, 46 C.F.R. § 30.10–65 (1998) (defining a tank barge as "[a] non-self-propelled tank vessel.").

36. Plaintiffs are Maritrans, Inc., Maritrans General Partner, Inc., Maritrans Operating Partners, L.P., and Maritrans Capital Corp. *See* Maritrans Inc. v. United States, 43 Fed Cl. 86 (1999).

37. *See* Joel Glass, *US faces single-hull compensation lawsuit,* Lloyd's List Int'l, Aug. 24, 1996, *available in* 1996 WL 11840254.

barges[38] in 1987 and they now argue that the double hull requirement of section 4115 of OPA 90 has significantly reduced the market value of these vessels and forced them out of service before the end of their useful life.[39] Maritrans filed suit in the U.S. Court of Federal Claims under the Tucker Act,[40] seeking $200 million in compensation. The case was decided in two separate trials[41] (hereinafter *Maritrans I* and *Maritrans II*) taking over one year to decide the ultimate issue of whether or not OPA 90 effected a taking of the Maritrans vessels. The first trial was conducted only to determine the threshold issue of whether or not the plaintiffs had a property right as proscribed by the Fifth Amendment.[42] The second trial was held several months later[43] and followed the Supreme Court template for consideration of regulatory takings laid out in the landmark *Penn Central* case.[44]

1. *Maritrans I*

In *Maritrans I*,[45] the defendant moved to dismiss, asserting that the plaintiffs did not possess a property right in their vessels that fell within the meaning of the Fifth Amendment,[46] and had therefore failed to state a claim upon which relief could be granted.[47] This assertion was supported by a number of cases representative of industries that were heavily regulated and

38. *See id.* As of the date of trial, Maritrans had sold or scrapped eleven of the vessels because it considered the needed repairs and upgrades economically unsound under OPA 90. *See* Maritrans, Inc. v. United States, 40 Fed. Cl. 790, 791 (1998). The court did not allow the retirement of the vessels to be part of its consideration of the regulatory taking issue. *See* Maritrans, Inc. v. United States, 43 Fed. Cl. 86, 90 n.2 (1999).

39. *See* Glass, *supra* note 37.

40. *See* 28 U.S.C. § 1491(a)(1) (1994 & Supp. III 1997). The Tucker Act gives the U.S. Court of Federal Claims (formerly the Court of Claims) jurisdiction over claims filed against the government that are based on the Constitution, an act of Congress, or a regulation. *See id.* A claim for just compensation based on a taking is founded in the fifth amendment to the Constitution and is therefore well within the court's jurisdiction.

41. *See* Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998) (Maritrans I) and Maritrans, Inc. v. United States, 43 Fed. Cl. 86 (1999) (Maritrans II).

42. *See* Maritrans, Inc. v. United States, 40 Fed. Cl. at 793.

43. The first Maritrans trial (Maritrans I) was decided on April 24, 1998. *See id.* at 790. The second Maritrans trial (Maritrans II) was decided on March 11, 1999. *See* Maritrans, Inc. v. United States, 43 Fed.Cl. at 86 (1999).

44. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). *Penn Central* established three factors, now called the Penn Central factors, for analysis in regulatory takings cases: 1) the character of the government action; 2) the economic impact of the regulation on the claimant; 3) the interference of the regulation with distinct investment backed expectations. *See id.* at 124, 130.

45. Maritrans, Inc. v. United States, 40 Fed. Cl. 790. (1998)

46. *See id.* at 791.

47. *See id.*

were therefore found to possess no Fifth Amendment property interest.[48] The defense further argued that personal property has "[t]raditionally been afforded less Fifth Amendment protection than real property."[49]

The court denied the defendant's motion for dismissal in April of 1997 and the case proceeded to trial in April of 1998.[50] The *Maritrans I* opinion reflects the court's rejection of the defendant's argument, holding that a "bright line heavy regulation test"[51] was inconsistent with Supreme Court precedent and that "[m]ere participation in a regulated industry does not preclude a finding that a compensable taking has occurred."[52] Having decided that Maritrans did indeed possess a Fifth Amendment property right in its vessels,[53] the court then proceeded to a second trial on the merits of a takings claim.

2. *Maritrans II*

In *Maritrans II*,[54] the court followed the Supreme Court directive that all takings cases shall be decided on an individual, ad-hoc, fact specific basis.[55] First, the court considered whether or not the plaintiff's investment backed expectations could have reasonably anticipated the regulatory requirements of OPA 90.[56] Using a standard imported from the Federal Circuit's decision in *Loveladies Harbor*,[57] the court imposed a burden on the plaintiffs to prove they had acquired the vessels "in reliance on a state of affairs that did not include the challenged regulatory regime."[58] The plaintiffs met this burden and defeated the defense's argument that the highly regulated nature of the shipping industry ran counter to any investment backed expectations by introducing extensive expert testimony on the

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48. *See id.* at 794–96. Cases cited include: *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993) (upholding ATF suspension of firearms import permits); *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988) (upholding government denial of plutonium plant operating permit); and *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (upholding a statutory provision restricting the state of California's right to withdraw from the Social Security system).

49. Maritrans, Inc. v. United States, 40 Fed. Cl. at 797.

50. *See id.*

51. *Id.* at 800–01.

52. *Id.* at 801.

53. *See id.* The only other decision of record involving a taking of non-real property is *Andrus v. Allard*, 444 U.S. 51 (1979) which held that a law prohibiting the sale of lawfully acquired eagle parts did not effect a taking. *See id.* at 68.

54. Maritrans, Inc. v. United States, 43 Fed. Cl. 86 (1999).

55. *See id.* at 87 (referencing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 106 (1978)).

56. *See id.* at 87.

57. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

58. *Id.* at 1177.

unforeseeability of OPA 90.[59] The court agreed with the plaintiffs and concluded that OPA 90 was only predictable in theory and did not meet the standard of reasonably foreseeable.[60]

The court then proceeded to examine the character of the government action. The defense relied on language from *Lucas v. South Carolina Coastal Council*[61] in which the Supreme Court set a categorical takings standard of all or nothing—only a total loss of property value was entitled to compensation.[62] The court set aside this standard of review, opting instead for a "partial regulatory taking analysis" as articulated by the U.S. Court of Appeals for the Federal Circuit.[63] The opinion represents the court's confusion in this area, however, as to the method of applying the three *Penn Central* factors to a partial takings analysis.[64] The result of this confusion was the court's failure to reach a definitive conclusion regarding the government's intent in the passage of OPA 90.

The final stage of the court's examination covered the degree of economic impact felt by the plaintiffs due to OPA 90.[65] Here the court encountered difficulty in establishing an appropriate time frame within which to assess the adverse effects of the regulation. It was faced with two choices: 1) the time at which the law was enacted; or 2) the time when the law actually has an effect on the plaintiffs vessels, forcing either a retrofit or retirement. Maritrans contended that the government "[s]evered the economic stream associated with the vessels"[66] with the passage of OPA 90 and that the effect was "felt immediately."[67]

In the end, the court categorized the economic impact of OPA 90 on Maritrans as a mere "diminution in value"[68] which it then analogized to a partial taking as recognized by the Federal Circuit.[69] Following the *Penn*

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59. *See* Maritrans, Inc. v. United States, 43 Fed. Cl. at 88.

60. *See id.* at 89. *But see* Chang v. United States, 13 Ct. Cl. 555 (1987), in which the Claims Court denied wage compensation to engineers in Libya whose employment contracts had been voided by Executive Order. *See id.* at 556. The court held that the engineers could have reasonably anticipated work interruptions due to increased tensions in U.S/Libyan relations and that economic sanctions were foreseeable. *See id.* at 560.

61. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

62. *See id.* at 1019.

63. *See* Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. 1997) (unpublished table decision).

64. *See* Maritrans, Inc. v. United States, 43 Fed. Cl. at 90.

65. *See id.*

66. *Id.*

67. *Id.*

68. *Id.* at 91.

69. *See, e.g.*, Broadwater Farms Joint Venture v. United States, 121 F. 3d 727 (1997); Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). In *Florida Rock*, the Federal Circuit adopted the language of Professor Richard Epstein, the developer of the partial takings doctrine. *See id.* at 1575.

Central guidelines while implementing the partial takings methodology led the court to define the ultimate issue: had the diminution in value been offset by either the nature of the government action or by strong investment backed expectations?[70] The answer returned by the court was a simple "not yet." The court went on to distinguish this case from the Supreme Court's rejection of partial takings theory in *Penn Central* by stating:

> "[h]ere, the only injury suffered by the plaintiffs so far is diminution in value, standing alone. If the law ever takes effect, it could interfere with reasonable investment backed expectations and could be held to merit compensation, but at this point the most the plaintiffs could show at trial would be a reduction in the value of the vessels, not the ability to use them. The character of the government action cannot be challenged because the only action the Government has undertaken so far is passing a law."[71]

Finally, after concluding that the Maritrans claim was untimely,[72] the court then refused to speculate on the viability of a Maritrans claim in the future. While justifying this decision with a plea of judicial economy,[73] the court still expressed some discomfort with the fine line it had just drawn. It left it up to future triers of fact to further define the difference between "economic value" and "economically viable use" in takings law.[74]

IV. DISCUSSION

The Court of Federal Claims was too quick to conclude that the Maritrans takings claim was simply untimely. By failing to adequately assess the character of the government action in the passage of OPA 90, the court has left the door ajar for future takings claims to arise under the statute.[75] The court reasons that the diminution-in-value test can be applied across the board as matter of efficiency, but the test has a number of

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70. *See* Maritrans, Inc. v. United States, 43 Fed Cl. at 91.

71. *Id.*

72. *See id.* at 92.

73. *See id.* at 91. The court here seems to embrace the judicial activism at work in the *Loveladies Harbor* opinion. The *Loveladies Harbor* court allowed segmentation of property for takings actions—only those parcels affected would be considered, not the undertaking as a whole. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d at 1181. The *Maritrans II* court states: "We see no reason to hold a trial on the economic impact of the regulation at issue with respect to nearly 40 vessels when none of the vessels has been retired." Maritrans, Inc. v. United States, 43 Fed. Cl. at 91.

74. *See id.* at 91.

75. *See id.* The court said specifically that "[o]nce OPA 90 has retired certain vessels in the Maritrans fleet, compensation might be due. [T]he loss is not the result of a taking, which admittedly may yet occur." *Id.*

shortcomings.[76] For instance, how extreme does the economic impact have to be in order for OPA 90 to become a regulation that has gone too far? If OPA 90 is found to protect the general public welfare, shouldn't the court have upheld it as a legitimate use of police power? The failure of the court to address these issues stems from its adherence to the partial takings analysis, the brainchild of the U.S. Court of Appeals for the Federal Circuit. The partial takings doctrine essentially removes any consideration of public benefit from the equation, thereby limiting the court's discussion to the degree of economic impact versus the investment backed expectations. Rather than being hamstrung by the Federal Circuit's method, the *Maritrans* court might have reached the same holding but provided stronger guidance if it had followed the template provided by the Supreme Court in *Keystone Bituminous Coal Association v. DeBenedictis.*[77]

A. Using Keystone as a Template

In *Keystone*, the Court began its analysis by quoting Justice Holmes's directive on takings law and police power from *Pennsylvania Coal v. Mahon.*[78] Had the *Maritrans* court followed this example, the first questions addressed might have been: 1) Is this regulation a valid exercise of police power even though it causes someone to be less well off than he was before the regulation?;[79] and 2) Does the law simply restrain conduct which

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76. Use of the diminution-in-value test under a partial takings analysis is shortsighted. The court considers only the following factors: value of property before enactment of regulation = X, value of property following enactment of regulation = Y; if X-Y = too severe of an impact, then the regulation is a taking. This limited focus does not take into account that OPA 90 served twenty-five years of notice before its effect will be felt. It also fails to consider that most of the Maritrans vessels will be close to end of their useful lives by the year 2015 and that single hulled boats can remain in service after 2015 in any non-petroleum shipping capacity, such as grain or cement. Under the court's strict formula, any regulation that prescribes a phasing out period of a particular property use is a prime suspect for a takings claim.

77. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

78 *See id.* The Court stated that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Id. at 473 (quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922)).

79. *See generally*, Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). This question also find support with other commentators. "[T]he use of compensation

is harmful to others or does it aim to extract public enrichment from private property?[80]

The character of the government action in *Keystone* was remarkably similar to the intentions of OPA 90. Both are aimed at a particular industry and effect an impairment of a use of property for the protection of public interests.[81] Perhaps the protection of marine resources and shoreline habitat from the hazards of oil spill pollution is an even stronger and more global argument than the locally focused Subsidence Act upheld in *Keystone*. Nothing in OPA 90 suggests that it is a statute enacted solely for the benefit of a private party.

Another factual comparison to *Keystone* that is followed by *Maritrans* is the burden borne by the plaintiffs to prove a denial of "economically viable use."[82] Just as the *Keystone* plaintiffs failed to prove that the continuation of coal mining was all but impossible, *Maritrans* likewise failed to prove that the domestic shipping of oil and petroleum products had become commercially impracticable. This failure led the court to categorize the Maritrans loss as a mere diminution in value, not a denial of economic use.[83]

V. CONCLUSION

In *Maritrans, Inc. v. United States*, the plaintiffs claim that the Oil Pollution Act of 1990 effected a taking of their vessels was found to be premature because it was not presented in a specific factual time frame. By following the formula for takings analysis set by the Supreme Court in *Penn Central*, overlaid on the Federal Circuit partial taking doctrine, the court was faced with the impossible task of ruling on what could only be called a speculative test of rough proportions. The end result of this confusion was a dismissal for being untimely. Perhaps if the court had followed a different script for regulatory takings analysis, it might have reached a similar conclusion but left larger signposts along the way. The process followed by the Supreme Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, which was initiated with a complete study of the legislative intent, might have provided a more appropriate script for the *Maritrans* court to follow. Had the court used *Keystone* as a template, it might have

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cannot arise until the question of justification has been disposed of." RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE ROLE OF EMINENT DOMAIN 199 (1985).

80. *See* Michelman, *supra* note 79, at 1196. A similar sentiment was echoed in the dissent in the *Pennsylvania Coal* decision. *See* Pennsylvania Coal v. Mahon, 260 U.S. at 416 (Brandeis, J. dissenting).

81. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 485.

82. *See id.* at 493–96.

83. *See* Maritrans, Inc. v. United States, 43 Fed. Cl. at 91.

reached the same conclusion that the takings claim was premature, but it might also have concluded that OPA 90 advanced a legitimate state interest and that the benefit to the general public from oil spill pollution prevention far outweighed the burden felt by the oil and gas industry.