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EMINENT DOMAIN: A CASE COMMENT—*MOUNTAIN STATES LEGAL FOUNDATION V. HODEL*

I. INTRODUCTION

The founding fathers of the United States, in their creation of the Constitution, went to great lengths to protect private property from governmental use and invasion. While government has the right to expropriate private property for purposes beneficial to the general public, it cannot require a single property owner to bear the costs of providing property for the general public.[1] This principle, which is the essence of the property clause of the fifth amendment,[2] commands that the cost of public benefits must be borne by the public.[3] The fifth amendment demands just compensation to property owners as a governmental restraint.

The Tenth Circuit Court of Appeals, in *Mountain States Legal Foundation v. Hodel,*[4] has lifted the restraints on governmental power by allowing the use of the Rock Springs Grazing Association's (the "Association") land by wild horses without just compensation. The horses are exclusively and affirmatively under the control of the Secretary of the Interior under the Wild Free-Roaming Horses and Burros Act (the "Act").[5] The Act was promulgated to protect wild horses from "capture, branding, harassment, or death."[6] It places them under the sole dominion of the Secretary of the Interior and prevents any management or control of such horses by private parties.[7] Due to the Secretary's noncompliance with the Act, the unmanaged horses caused thousands of dollars of damage[8] to the Association's property.

This article addresses the different types of takings, the tests used to determine whether a property owner is entitled to compensation, and the case law through which these tests developed. It will also demonstrate how the tests were confused and misapplied by the Tenth Circuit Court of Appeals to the facts in *Hodel.*

II. BACKGROUND

The determination of whether a governmental action constitutes a taking is not a clear-cut task. Although there is no analytical formula in

1. Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981).

2. Clause four of the fifth amendment provides that "private property (shall not) be taken for public use without just compensation." U.S. CONST. amend V, § 2.

3. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

4. 799 F.2d 1423 (10th Cir. 1986), *vacated sub nom.* Mountain States Legal Found. v. Clark, 740 F.2d 792 (10th Cir. 1984), *cert. denied*, 107 S.Ct. 1616 (1987).

5. 16 U.S.C. §§ 1331-40 (1982).

6. 16 U.S.C. § 1338(a)(3) (1982).

7. 16 U.S.C. § 1331 (1982).

8. Brief for appellant at 19, Mountain States Legal Found. v. Hodel, 779 F.2d 1423 (10th Cir. 1986), indicates the amount of damage.

which to insert the facts and render a solution, guidelines have evolved through case law which facilitate a takings analysis.[9]

The landmark case in takings jurisprudence is *Mugler v. Kansas*,[10] where the Supreme Court in 1887 upheld the shutdown of a brewery under the Kansas prohibition law. The United States Supreme Court closely examined the character of the action and recognized the need for categorization of governmental action.[11] The Court distinguished two types of governmental takings which necessitate compensation: (1) a regulatory taking, which is a restriction on land use outside the authority of the police power, and (2) an actual physical invasion.[12] When government causes the latter, the landowner may recover through an inverse condemnation action. "Inverse condemnation" is the term used to "[describe] the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."[13] Such action is brought by the landowner when government causes a physical invasion to private property.

Thirty-five years after *Mugler*, in *Pennsylvania Coal v. Mahon*, the Supreme Court developed a balancing approach to the takings analysis.[14] In *Pennsylvania Coal*, Justice Holmes placed the government's authority to regulate on a continuum by stating that if a regulation goes too far, it will be recognized as a taking.[15] Like *Mugler*, *Pennsylvania Coal* represents the theory that a regulatory taking may be present without a physical occupation, but it is most noted for the balancing test it established, weighing the private burden against the public benefit.[16]

Though not often cited in recent cases, *Mugler* still influences case law today. The following demonstrates the necessity of characterizing the nature of the government interference as either a regulation or a physical occupation. The standards applied in determining whether a property owner deserves compensation depend on which category the government action belongs. Whether governmental action is a regulation properly exercised under the police power, or a permanent physical occupation warranting inverse condemnation is the issue upon which *Hodel* turns.

A. *Inverse Condemnation Based on "Permanent Physical Occupation"*

In a takings analysis, the court often analogizes property rights to a "bundle of sticks," with each stick representing a property right.[17] Some sticks in that bundle are more valuable than others, the right to

9. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978). *See infra* notes 11-71 and accompanying text.

10. 123 U.S. 623 (1887).

11. *See* Note, *"Taking" Jurisprudence and its Application to Regulations of Sensitive Ecological Environments*, Graham v. Estuary Properties, Inc., 9 FLA. ST. U.L. REV. 489, 493 (1981).

12. Mugler v. Kansas, 123 U.S. at 666-69.

13. United States v. Clarke, 445 U.S. 253, 257 (1980).

14. 260 U.S. 393 (1922).

15. *Id.* at 415.

16. *Id.* at 413-15.

17. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982);

exclude being the most valuable. The Supreme Court applies a per se rule when the government physically and permanently occupies one's land. The per se rule renders a physical invasion to be a taking regardless of an offsetting public interest and differs from the ad hoc test applied to regulatory takings which balances several competing factors.[18] The regular use of private property by the government is "[t]he one incontestable case for compensation."[19] Indeed, both federal and state governments have been required to compensate property owners for the use of their property in numerous cases.[20] A discussion of the inverse condemnation case law will facilitate the understanding of when compensation is required for government action.

The United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*[21] applied the per se rule and found for the landowner in an inverse condemnation proceeding. In *Loretto*, the Court determined that a New York statute, forcing a landlord to permit installation of cable facilities on private property, constituted a taking.[22] The *Loretto* Court held that the permanent physical occupation by the cables is a taking regardless of offsetting public interests which include the educational and recreational benefits provided by cable television. Justice Marshall stated that "[o]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[23]

Airplane flights in *U.S. v. Causby*[24] infringed on a farmer's property rights to the extent that the Supreme Court found a taking in an inverse condemnation proceeding. The land over which the airplanes flew was held to have been "appropriated as directly and completely as if it [was] used for the runways themselves."[25] The Court compared *Causby's* facts to *Richards v. Washington Terminal Co.*,[26] where a property owner was denied compensation for the nuisance of smoke, noise, and vibrations from a nearby railroad.[27] In *Richards*, the elimination from the property owner's "bundle of sticks," that stick which represented the right to enjoy property free from nuisance, was not a substantial enough loss to constitute a taking. However, in *Causby*, the stick the government took from the "bundle of property rights" was the right to exclude; thus, the

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Andrus v. Allard, 444 U.S. 51, 65-66 (1979); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

18. Tarlock, *Regulatory Takings*, 60 CHI.[-]KENT L. REV. 23, 26 (1984).

19. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967).

20. *See* Nollan v. California Coastal Comm'n, 107 S.Ct. 3141 (1987); *Loretto*, 458 U.S. 419; United States v. Causby, 328 U.S. 256 (1946).

21. 458 U.S. 419 (1982).

22. *Id.* at 426.

23. *Id.* at 434-35.

24. 328 U.S. 256 (1946).

25. *Id.* at 262.

26. 233 U.S. 546 (1910).

27. *Causby*, 328 U.S. at 262.

govenment effectuated a taking.[28] The degree of actual governmental appropriation of the land in *Causby* and *Richards* was crucial in the Court's determination of whether land had actually been physically invaded, necessitating compensation.

The Court again emphasized the right to exclude as being highly protected in *Kaiser Aetna v. United States*.[29] In order to create a marina, a pond owner dug an inlet through a natural barrier. The owner was faced with a government claim that the marina had become part of the navigational waterways, and therefore must be open to the public. The Supreme Court held that the government servitude constituted a taking of the landowner's right to exclude which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[30] The *Kaiser* Court, in order to avoid compensation from the inverse condemnation, however, found the marina did not constitute a navigational waterway.

The Supreme Court reconfirmed the importance of a property owner's right to exclude in *Leo Sheep Co. v. United States*.[31] There, the government's easement over private property to a public recreational area necessitated compensation in an inverse condemnation proceeding. The government argued that the public use of the road was an easement by necessity and therefore no compensation should be paid. However, because the government has the power of eminent domain, the Court found that the easement of necessity doctrine is not available to the sovereign.[32]

The United States government has been required to compensate private property owners for physical occupation of property. This has included compensation for use of water rights,[33] underlying secured materials,[34] and the use of a leasehold.[35]

B. *Regulatory Takings*

Although at one time eminent domain and police power were two different concepts, they have merged to mean practically the same thing: the government's authority to regulate land use is for the common well-being of the public.[36] In short, the police power is the government's authority to regulate private property for public use.[37] When a regula-

28. *Id.* at 262.
29. 444 U.S. 164 (1979).
30. *Id.* at 176.
31. 440 U.S. 668 (1979).
32. *Id.* at 680.
33. Dugan v. Rank, 372 U.S. 609 (1963).
34. Armstrong v. United States, 364 U.S. 40 (1960).
35. United States v. General Motors, 323 U.S. 373 (1945).
36. *See* Comment, *Eminent Domain, the Police Power and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491, 499 (1986).
37. *Id.* at 499. "Public use" means the furtherance of the public interest in health, safety, welfare or morals. The decision of what constitutes public use is left to the legislature. Most courts, although empowered to decide questions of public use, choose not to second-guess the legislature.

tion is outside the boundaries of authority granted by police power, it is a "regulatory taking" which requires compensation.

The government's authority to regulate under the police power was very broad in 1915 when the Supreme Court rendered the opinion of *Hadacheck v. Sebastian*.[38] *Hadacheck* represents the theory that, although a regulation diminishes the value of property, compensation is not due where diminution is the result of the police power.[39] In *Hadacheck*, the City of Los Angeles passed an ordinance prohibiting the manufacture of bricks within city limits. Although the regulation diminished the value of Hadacheck's land from $800,000 to $60,000, diminution of value alone was not enough to constitute a taking. Because the restriction served a substantial public purpose, it was upheld against the takings challenge. The scope of judicial review was thus extremely limited so long as the legislative act supported a public purpose.[40]

In 1922, Justice Holmes did find a regulatory taking in *Pennsylvania Coal Co. v. Mahon*[41] when the Pennsylvania legislature went beyond its constitutional powers by enacting a statute which prohibited the mining of coal in a manner that would cause surface subsidence. Using a balancing test, Justice Holmes weighed the public benefit against the private burden and found the regulation to be an infringement of such magnitude on mine owner's property rights that it could not be allowed.[42] Justice Holmes sustained the coal company's argument that enforcement of the Pennsylvania statute constituted a taking under the fifth and fourteenth amendments.[43]

After *Pennsylvania Coal*, the Court for many years found that regulations did not constitute takings because they fell under the pervasiveness of the police power;[44] however, there were a few exceptions. In *Nectrow v. City of Cambridge*,[45] property suitable for commercial purposes was rezoned to residential. Justice Sutherland found the rezoning to be a taking because the area in question adjoined land used for commercial purposes and the property would have been of little value if limited to residential use.[46]

Until recent years, the Court sustained land use regulations despite claims that the government had taken private property. Courts do not often scrutinize the legislature's decision to regulate property for the common good of the public. Although courts have not commented directly on the issue, because of the nature of land use regulation, they have used a more deferential standard than that used with a physical invasion of land.[47] The Supreme Court has been consistently reluctant

38. 239 U.S. 394 (1915).
39. *See* Comment, *supra* note 19.
40. *Id.*
41. 260 U.S. 393 (1922).
42. *Id.* at 413.
43. *Id.* at 413-15.
44. *See* notes 49-70 and accompanying text.
45. 277 U.S. 183 (1928).
46. *Id.* at 187. *See also Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987).
47. *See* Comment, *supra* note 19.

to require compensation for the loss of property caused by government regulation.[48]

In 1978, the Court in *Penn Central Transportation Co. v. New York City*,[49] one of the most frequently cited takings cases, articulated a test composed of three factors to be considered in compensation or takings analysis: (1) the character of the governmental action,[50] (2) the economic impact of the regulation,[51] and (3) the extent government action interferes with investment-backed expectations.[52] These factors have been interpreted to mean that unless property is one hundred percent diminished by a regulation, there is no taking.[53]

The Supreme Court's analysis of *Agins v. City of Tiburon*[54] demonstrates a combined approach of the *Penn Central* three factor test and the *Pennsylvania Coal* balancing test. Claimants challenged a zoning ordinance which limited the development of their property to one-family dwellings, accessory buildings, and open space uses. The court held that the issue of whether to compensate the landowners required a weighing of private and public interests.[55] In *Agins*, the public interest in preserving open space outweighed the private interest. In support of the holdings that there can be no taking without just compensation, the Court used the *Penn Central* test.[56] Because there was no complete denial of the owner's economically viable use of land, the zoning ordinance did not effectuate a taking.

The *Agins* Court's analysis also set forth an additional test to be used in evaluating a regulatory taking, that which has come to be called the "ends-means" test.[57] A regulation on property is upheld under the state's police power if that regulation promotes a legitimate public purpose and is likely to advance that purpose.[58] "The public interest," courts have found, includes the protection of endangered species and wildlife. The Migratory Bird Treaty Act of 1916,[59] for example, was upheld against the challenges of landowners who claimed its promulgation amounted to a taking in *Bishop v. United States*.[60] Property owners sued the government for the alleged taking of hunting facilities and for crop damage resulting from a prohibition to hunt wild geese. The Court held

48. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

49. 438 U.S. 104 (1978).

50. *Id.* at 130.

51. *Id.* at 128.

52. *Id.* at 136.

53. *See Euclid*, 272 U.S. 365 (1926)(75% diminution of property value, resulting from enactment of a zoning ordinance, was not sufficient to constitute a taking); *Sebastian*, 239 U.S. 394 (1915) (87% diminution of property's value, resulting from prohibition of brick manufacturing within city limits, did not constitute a taking).

54. 447 U.S. 255 (1980).

55. *Id.* at 260.

56. *Id.* at 262-63.

57. Agins v. Tiburon, 447 U.S. 255, 260-61 (1980).

58. *Id.* at 261.

59. 16 U.S.C. §§ 703-711 (1982).

60. 126 F. Supp. 449 (1954), *cert. denied*, 349 U.S. 955 (1955).

the important goal of protection and preservation of game justified the restriction and found that there was no taking under the fifth amendment.[61] In *Sickman v. United States*,[62] a claim similar to that in *Bishop* was brought by property owners. There, the Court held that the government did not own the wild geese, and therefore they were not responsible for their trespass and the resulting damage.[63]

Andrus v. Allard[64] demonstrated that there is unlikely to be a taking of property when an alternative use for property exists. The court also reinforced the substantial public interest in protecting wildlife through regulation. Merchants who sold artifacts containing eagle feathers brought a claim for damages resulting from the enforcement of the Bald and Golden Eagle Protection Act[65] which prohibited destroying or removing their nests and selling or collecting their feathers. The Court held that because the regulation did not compel the surrender of the feathers and there was no physical invasion or restraint on the merchants, there was not a taking.[66] Although the Court banned the most profitable use of the feathers,[67] their value had not been sufficiently reduced since the merchants were allowed to keep them.[68]

As demonstrated by the preceding discussion of case law, regulatory takings analysis requires the *Pennsylvania Coal* balancing approach of weighing the public interest versus the private interest. In evaluating the private interest, courts use the *Penn Central* test to consider the economic hardship on the property owner.[69] The Court has refused to find a taking even in the face of substantial diminution of property.[70]

The inverse condemnation analysis, however, does not require the same balancing and economic hardship test. The rule to be followed, in a situation where there is a permanent physical occupation resulting from government action, is just compensation to the property owner.[71]

C. *The Wild and Free Roaming Horses and Burros Act*

Congress passed The Wild Free-Roaming Horses and Burros Act[72] in order to protect the dwindling population from hunting and commer-

61. 126 F. Supp. at 452-53.
62. 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).
63. 184 F.2d at 618.
64. 444 U.S. 51 (1979).
65. 16 U.S.C. § 668(a) (1982).
66. 444 U.S. at 64.
67. *Id.*
68. "[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.*
69. *See* Agins v. Tiburon, 447 U.S. 255, 261-62; *Andrus*, 444 U.S. at 65-66.
70. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). In *Goldblatt*, the owner of a gravel pit was not compensated for a taking when regulation banned excavation from the potentially dangerous pit. No regulatory taking was found because the owner failed to present evidence that the value of the lot on which the pit was located was completely diminished. The court held that diminution of value alone did not establish a taking.
71. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
72. 16 U.S.C. §§ 1331-1340 (1982).

cial exploitation by prohibiting "malicious harassment."[73] This Act placed all wild horses under the sole dominion of the Secretary of the Interior, preventing any management or control of such horses by private parties.[74] *Kleppe v. New Mexico*[75] upheld the Act as a proper exercise of congressional power, thereby confirming the duty and authority of the Bureau of Land Management ("BLM") to manage the horses and burros as part of the public land system.

Under the Act, the Secretary of Interior has exclusive control to manage wild horses and is required to remove horses from private property upon the owners request.[76] This affirmative duty to manage means the Secretary must locate and relocate the horses from time to time "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands."[77] Only the Secretary of Interior may capture, move, or otherwise manage the horses; any other person found to perform these acts could be criminally prosecuted.[78]

III. FACTS

The Mountain States Legal Foundation[79] filed this action because wild horses were destroying the Association's land. They argued that because the Secretary of the Interior failed to perform his duty of removing the horses upon their request, as mandated under section 4 of the Wild Horses Act, the government was liable for resulting damage to their property.[80] The nature of the government's action, they contended, was best characterized as inaction, having resulted in the physical occupation of wild horses on private property.

The Wyoming land in question covers an area about 115 miles long by forty miles wide and is called the "checkerboard." This title was given to land granted by the federal government to the Union Pacific railroad in the Union Pacific Act of 1862.[81] Odd-numbered sections of 640 acres each, running along the original railbed, were granted to the

73. 43 C.F.R. § 4700.0-5(k) (1985). Malicious harassment was defined by the Department of the Interior as:

> an intentional act which demonstrates a deliberate disregard for the well-being of wild and free roaming horses and burros and which creates the likelihood of injury, or is detrimental to normal behavior patterns. . . . Such acts include but are not limited to, authorizing chasing, pursuing, herding, roping, or attempting to gather or catch wild, free-roaming horses and burros.

74. 16 U.S.C. § 1333(a) (1982).

75. 426 U.S. 529 (1976).

76. 16 U.S.C. § 1334 (1982).

77. 16 U.S.C. § 1333(a) (1982).

78. 16 U.S.C. § 1338(a)(3) (1982).

79. Mountain States Legal Foundation is a non-profit public interest law foundation, dedicated to the preservation of individual liberties and private property rights. Many of the Foundation's members are shareholders in the Rock Springs Grazing Association. The Foundation initiated the lawsuit to protect its members' property interests and constitutional rights.

80. 16 U.S.C. § 1334 (1982) ("If wild, free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest federal marshall or agent of the Secretary, who shall arrange to have the animals removed. . . .").

81. For history and discussion of railroad land grants, see J. Laitos, *Natural Resources Law* 251-253 (1985).

Union Pacific, while even numbered lots were retained by the federal government, thus creating a "checkerboard" pattern. Union Pacific has since sold portions of their property to private landowners who mainly use it for grazing. The Association purchased their land from Union Pacific in 1909 and has since used it for winter cattle and sheep grazing. The BLM has issued grazing permits to allow the Association to graze their livestock on federal land.[82] The wild horse herds have continually grazed the Association's unfenced private property, as well as adjoining public lands.

In 1972, there were an estimated 1,116 wild horses on the checkerboard. At the time the Association filed their lawsuit in 1979, the population had more than doubled. As a result of the drastic herd population increase, vast quantities of the Association's forage were consumed. Due to the nature of the sensitive soil and growing conditions, it will be many years before the depleted land will be replenished to its former grazing capacity.[83]

The Association's property is comprised of high desert badlands and sand dunes. Horse trails are frequently found in steep terrain where the soil is particularly sensitive to overuse and erosion, resulting in damage to the forage.[84]

In order to stem the loss of forage and water, the Association, within six months of the passage of the Act, made repeated oral and written requests, pursuant to section 4 of the Act, to the BLM to remove the horses from their property.[85] Despite the requests and offers of aid from the Association, the horses were not removed, and in fact, the numbers greatly increased.[86]

The Association's cause of action for compensation was the result of the BLM's noncompliance with the mandates of the Act which require that the Secretary shall remove the wild horses upon request within a reasonable time.[87] The Association sought a declaratory judgment that the Secretary mismanaged the horses.[88] They also filed a writ of mandamus to compel the Director of the BLM to reduce the herd population on the adjacent public land. Damages of $500,000 were requested by the Association from the Director of the BLM for the alleged uncompen-

82. Brief for appellant at 6, Mountain States Legal Found. v. Hodel, 779 F.2d 1423 (10th Cir. 1986).

83. *Id.* at 7.

84. *Id.* at 5-7.

85. *Id.* at 7 n.1. The ineffectiveness of the program is revealed by the total number of horses rounded up yearly. The wild horse population increases 15% to 25% each year. The BLM was not even able to remove the annual increase, much less reduce the overall population.

86. *See* Opening Brief for appellant at 26, Mountain States Legal Found. v. Hodel, 779 F.2d 1423 (10th Cir. 1986)(Frank Gregg, director of the BLM, and under pressure from various media sources, was alleged to have diverted funds, originally appropriated for wild horse removal and adoption, to an investigation of the treatment of already adopted horses. As a result, the BLM cancelled the wild horse gathering activities for 1979).

87. *See supra* note 77.

88. 799 F.2d at 1424.

sated taking of its property.[89]

The District Court granted the Association's petition for mandamus to remove the horses, dismissed the claim against the Director, and granted the summary judgment. In the Tenth Circuit Court's first hearing, it affirmed the dismissal of the claim against the director but reversed and remanded the grant of summary judgment, holding that an unresolved factual issue precluded a summary determination of the takings claim. The government respondents sought a rehearing en banc in September of 1984. In March of 1985, the Tenth Circuit Court of Appeals granted rehearing of the case as to whether the trial court properly dismissed the Association's claim and whether the Secretary's failure to manage the horses constituted a taking.[90]

A. *Majority Holding*

Judge McKay, writing for the four member majority of the court, affirmed the trial court's decision to grant summary judgment for the government. The court held that the Association was not entitled to compensation because the government action was nothing more than a land use regulation enacted by Congress to ensure the survival of a particular species of wildlife.[91] The court cited a series of cases[92] to show that damage to private property by protecting wildlife did not constitute a taking. Through a discussion of *Andrus v. Allard*,[93] *Sickman v. United States*[94] and *Barrett v. State*,[95] the court demonstrated the Supreme Court's stance on the paramount interest of wildlife protection by regulation. Through these case analyses, the majority likened the Wild Horses Act to the Endangered Species Act, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act. The degree of governmental control in these acts, the Tenth Circuit stated, was no different in character from the Wild Horses Act.[96]

A second line of reasoning in support of the constitutionality of the Wild Horses Act was addressed by the court through the *Penn Central* test. Government regulation, the majority stated, often necessitates adjustment of private rights for the public good.[97] Although regulation often diminishes the economic use of property, it would be unreasonable to compensate every affected landowner, thus requiring regulation by purchase. Because the court found no taking had occurred, they also dismissed the Association's claim against the Director of the BLM.

89. *Id.*
90. *Id.* at 1425.
91. *Id.* at 1428.
92. *Id.* at 1428-29.
93. 444 U.S. 51 (1979).
94. 184 F.2d 616 (7th Cir. 1950).
95. 220 N.Y. 423, 116 N.E. 99 (1917).
96. 799 F.2d at 1428-29.
97. *Id.* at 1429.

B. *The Dissenting Opinion of Judge Seth*

In his dissent, Judge Seth emphasized that the case primarily involved the BLM's failure to perform specific duties under the Act.[98] Judge Seth argued that the Association was entitled to compensation for the consumption and destruction of its property from the public use.[99]

C. *The Dissenting Opinion of Judge Barrett*

Judge Barrett, in his dissent, disagreed with the majority's characterization of the Act as nothing more than a land use regulation.[100] He reasoned that Congress did not intend the Act to burden private parties because of the duty it imposed on the BLM to remove the horses at the request of the landowners. He therefore believed that a fifth amendment taking violation was possible and summary disposition of the Association's claim was inappropriate.[101]

IV. ANALYSIS

A. *The Court's Mischaracterization of the Governmental Action*

The Tenth Circuit Court of Appeals, in *Hodel*, showed a gross misunderstanding of the Association's claim. This misunderstanding led them to improperly apply the law by sidestepping the takings issue and devoting three pages of discussion to the authority of the federal government to control wildlife. The discussion by the majority on the government's authority over marine animals, waterfowl, and endangered species is irrelevant. The issues presented in *Hodel* have little to do with the government's exclusive authority to control the horses. They primarily involve the consequences of the Director's mismanagement or nonaction. The Association agrees with the majority, that government management is essential for protection of the wild horses and ecological balance; however, it is not the authority to control that is disputed by the Association. It is the failure of the Director to manage the wild horses properly that violates the Act.

The majority cited *Bishop v. United States*[102] and *Sickman v. United States*[103] to illustrate that damage caused by wildlife protected under congressional acts did not constitute a taking.[104] In both *Bishop* and *Sickman*, wild geese damaged crops. The property owners' claims were denied because the importance of the Migratory Bird Treaty Act, which served to protect the geese, outweighed the property owners' rights for compensation. However, these cases cannot be applied to *Hodel* because

98. *Id.* at 1431.
99. *Id.* at 1434.
100. *Id.* at 1435.
101. *Id.* at 1438.
102. 126 F. Supp. 449 (1954).
103. 184 F.2d 616 (7th Cir. 1950).
104. 799 F.2d at 1428-29.

there is no clause mandating government control in the Migratory Bird Treaty Act, as there is in the Wild Horses Act.

Judge McKay, who stated in the majority opinion that the Act "is nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife,"[105] did not address the real issue. As Judge Barrett stated in his dissent, the Association's claim was not for compensation due to the promulgation of a regulation; the case was instead about actual physical invasion of property.[106]

The key to an analysis of the Association's claim is a proper understanding of the character of the governmental action. The government's action or inaction, the Supreme Court has said, must be characterized as either a regulatory taking or inverse condemnation.[107] The Supreme Court cases which have distinguished regulatory takings from inverse condemnation have emphasized the seriousness of the government's action when physical use and occupation occur.[108] The comparison of regulatory takings with inverse condemnation was made in *Penn Central*, where the Court stated that a taking was more likely to be found when the government action was characterized as a physical invasion than when it was characterized as a regulatory action meeting a public purpose.[109] A physical invasion is a government intrusion of unusually serious character, and the remedy is just compensation.[110] In *Loretto v. Teleprompter*, the court held that a physical intrusion by the government was of unusually serious character.[111] When the government physically invades private property, it does not simply take a "single strand" from the "bundle" of property rights; it chops through the bundle taking a slice of every strand.[112]

In *Hodel*, the regulatory takings issue would not have been improperly addressed by the court had the Association contended their damage was the result of the enforcement of the Act. Instead, the Association argued that nonenforcement of the Act caused the actual physical presence of the horses which resulted in the consumption of their forage and deprived them of their right to exclude.

The Tenth Circuit accepted the government's argument that the action was regulatory. The court erred, however, in basing its decision on regulatory takings standards, when the actual damage was not caused by the regulation, but by the noncompliance with the regulation. The court should have based its analysis on the physical invasion aspect of the claim resulting from the BLM's inaction. *Loretto* provided that a perma-

105. *Id.* at 1428.
106. *Id.* at 1435.
107. *See supra* notes 18-72 and accompanying text for comparison between regulatory takings and inverse condemnation.
108. Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Causby, 328 U.S. 256 (1946); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
109. 438 U.S. at 124.
110. Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635, 645 (1986).
111. 458 U.S. at 426.
112. Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

nent physical occupation authorized by the government is a taking without regard to the public interest it may serve.[113]

B. *Government Ownership of a Damaging Instrumentality is not a Prerequisite for Finding a Taking when Government has Assumed Control*

The facts supporting the finding of a taking in *United States v. Causby*[114] are analogous to the situation at hand. In *Causby*, the government owned the military aircraft which was found to have taken an easement by continually flying low over private property. In *Hodel*, the government did not own the horses which grazed continually on the Association's property; however, the Secretary of Interior had assumed complete and exclusive control over the horses. *United States v. Cress*[115] held that the government need not own the instrumentality of the invasion as long as the actual use or invasion is caused by the government action. In *Cress*, construction of a government flood control project caused the private property owner's land to be repeatedly flooded by water. Although the government did not actually own the water that occupied the land, the United States was responsible for the invasion and thus a compensable taking was found.[116] Similarly, in *Hodel*, the inaction of the Secretary of the Interior resulted in the physical invasion of the Association's property. Because the Secretary is mandated by the Act to remove the horses upon request, the government is responsible for the damage.

C. *Takings Case Law Decided After Hodel*

In its 1986-1987 term, the United States Supreme Court decided more takings cases on the merits than in its entire history. The Supreme Court has yet to deal with the *Hodel* issue of whether "nonaction," when the government clearly has a duty to act, constitutes a taking. However, three of the recently decided cases are relevant to the takings analysis set forth above and deserve discussion relative to *Hodel* and the future of takings case law.

In *Nollan v. California Coastal Commission,*[117] the California Coastal Commission conditioned its approval of rebuilding permits for beachfront property on the requirement that owners provide lateral access to the public. The public easement, the commission argued, was in furtherance of the state interest of providing beach access to the public and therefore was not a violation of the fifth amendment under the police power. However, the Supreme Court focused on the Commission's justifications for the condition and found that the easement would not further a public interest. The *Agins* ends-means test was not met: the government's use of property as an easement did not further a legiti-

113. 458 U.S. at 426.
114. 328 U.S. 256 (1946).
115. 243 U.S. 316 (1917).
116. *Id.* at 328.
117. 107 S.Ct. 3141 (1987).

mate public interest.[118]

Along with this ends-means analysis, Justice Scalia reiterated the per se takings rule set forth in *Loretto* and stated that Supreme Court precedent has uniformly held there is a taking to the extent of the occupation. Thus, a taking exists without regard to whether the action achieves an important public benefit or causes only minimal economic impact on the owner.[119]

The *Nollan* ends-means analysis is not directly applicable to *Hodel* because there is no issue as to whether the Act furthers a legitimate public interest. However, application of the per se rule strengthens the Association's argument. The majority in *Nollan* found a permanent physical occupation by the public's continuous right to pass back and forth, even though no individual was permitted to station himself permanently upon the premises.[120] Therefore, it would seem that the same finding of a permanent physical occupation should have been applied in *Hodel* by invoking the per se rule.

In *Keystone Bituminous Coal Association v. Debenedictis,*[121] mineowners attacked the constitutionality of sections of an act prohibiting mining that caused surface subsidence damage to pre-existing buildings.[122] Because it was a facial attack and not an as-applied challenge claiming damages resulting from application of the act to the mineowners, the inquiry was limited to whether the mere enactment of the statute constituted a taking.[123]

Although the facts in *Keystone* were somewhat similar to those of *Pennsylvania Coal,*[124] *Pennsylvania Coal* did not control the *Keystone* holding. Whereas Justice Holmes found the act in *Pennsylvania Coal* to be solely for the benefit of private parties, the act in *Keystone* was found to serve legitimate public interests, that of avoiding further subsidence damage to surrounding surface estate owners.[125]

The second factor on which the Court relied to distinguish *Keystone* from *Pennsylvania Coal* is the degree of diminution of property. In *Keystone*, the court held a regulatory statute is only a taking if it denies owners of *all* economically viable uses of of their land.[126] However, as the Court held in *Andrus v. Allard*, to take one strand from the bundle of rights is not a taking because the aggregate must be viewed as an en-

118. *See supra* notes 57-58 and accompanying text. The Court in *Nollan* believed sufficient public access to the beach existed and that increased access was not in furtherance of a legitimate public interest.

119. *Loretto*, 458 U.S. at 434-35.

120. *Nollan*, 107 S.Ct. at 3145.

121. 107 S.Ct. 1232 (1987).

122. The Act in question is the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, §§ 1406.4, 1406.6 (Purdon 1980).

123. 107 S.Ct. at 1236.

124. *See supra* notes 41-43 and accompanying text.

125. *Keystone*, 107 S.Ct. at 1246.

126. *Id.* at 1248 (emphasis added); Agins v. Tiburon, 447 U.S. 260 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

tirety.[127] Thus, the Court in *Keystone* denied the mineowners' facial challenge of the act because they did not prove it was impracticable for the miners to continue mining all types of coal.[128]

The final relevant case decided by the Court during this term, *Hodel v. Irving*,[129] involved an amendment of the Indian Land Consolidation Act of 1983 which threatened to deprive Indian landowners of the right to pass property to their heirs. Property would only be subject to the amendment, section 217, if it was small, undivided, and if its productivity was low during the year preceding the owner's death. Upon the death of the owner, this small parcel would escheat to the tribe to ameliorate the problem of extreme fractionalization of the land. Justice O'Conner, after making an ad hoc inquiry as to the impact of the regulation, its interference with investment-backed expectations, and the character of the governmental action, found the new amendment to be a taking.[130] The impact of the regulation was determined to be substantial even though the income from the land was *de minimis*. Justice O'Conner stated that, although the value of the land may not be much, the right to convey land to heirs is itself a valuable right.[131] The stick in the bundle of rights involved here, the right to pass property to heirs, could be equated to the right of a property owner to occupy land free from physical invasion, as in *Mountain States Legal Foundation v. Hodel*.[132] Denial of either stick invokes the per se rule, resulting in the finding of a taking.

Through these recently decided cases, the Court has reaffirmed the framework for examining whether a regulation amounts to a taking. By examining the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action, the Court makes an ad hoc factual inquiry and determines which test should be used. If the character of the governmental action is a permanent physical invasion, as in *Nollan*, the inquiry is limited, and the per se rule is applied. The holdings in these recent Supreme Court cases, which are consistent with established precedent, are contrary to the finding of *Mountain States Legal Foundation v. Hodel*.

V. CONCLUSION

The character of the government's action must be identified by the courts in a takings analysis in order to determine what precedent to follow. The nature of the government's interference with private property owners' rights should be distinguished as either a regulation or a physical occupation. Differentiation by the courts is essential because the Supreme Court has developed different standards in their takings analy-

127. 444 U.S. 51 (1979).
128. *Keystone*, 107 S.Ct. at 1250.
129. 107 S.Ct. 2076 (1987).
130. *Id.* at 2084.
131. *Id.* at 2082.
132. 799 F.2d 1423 (10th Cir. 1986).

sis, depending on the character of the action. Although the Court has given deferential treatment to the legislature to regulate as they see fit, because of the serious character of a governmental action which physically uses and occupies private property, government physical invasion has been closely scrutinized. Permanent physical occupation of private property by the government is a taking without regard to the public purpose it may serve, and thus deserves compensation under the fifth and fourteenth amendments.

In *Hodel*, there is no doubt that the wild horses, as a result of the BLM's noncompliance with the Wild Horses Act, physically invaded the Association's property. Therefore, the regulatory takings analysis set forth by the Tenth Circuit was inappropriate. Enforcement of the Wild Horses Act did not cause the damage to the Association's property and, furthermore, compliance with the Wild Horses Act would have prevented the damage. The wild horses are controlled exclusively and affirmatively by the BLM under the Act. Had the BLM complied with the Act, the damage caused by the wild horses would never have occurred.

The majority, in their analysis of *Hodel*, whether inadvertently or intentionally, misconstrued the basis for the cause of action in upholding the government's authority to regulate. As a result, the court's analysis did not address the issues around which *Hodel* centers.

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