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"Taking" a Walk on a Winter's Night

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INTRODUCTION

Over the past few years, the concept of regulatory takings has gained national visibility, captured the attention of an impressive array of legal scholars, and spawned a number of analytical "tests." In addition to the concept of physical taking liability,[1] the Supreme Court has advanced regulatory theories under *Nollan v. California Coastal Commission*,[2] *Penn Central Transportation Co. v. New York City*,[3] and, more recently, *Lucas v. South Carolina Coastal Council*.[4] The most frequent outcome is a conclusion that the government action has negligible or minimal impact or, if it imposes a burden, asks of the owner only that which is reasonable. Still, in the facts of a few cases, the courts have found liability, concluding that the government action "took" the owner's property expectations under the terms of the Fifth Amendment.[5]

The first analytical framework suggests that a taking may occur if—at least when government action compels the physical

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[1] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a statute requiring landlords to permit cable installation in their buildings constituted a taking under the traditional physical occupation test); United States v. Causby, 328 U.S. 256 (1946) (holding that low and frequent flights of aircraft over private land constituted a physical taking).

[2] 483 U.S. 825 (1987).

[3] 438 U.S. 104, *reh'g denied*, 439 U.S. 104 (1978).

[4] 112 S. Ct. 2886 (1992).

[5] The Takings Clause states "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

presence of others on private property—the particular action does not "substantially advance the legitimate state interests" argued to sustain it.[6] The second framework does not speak in terms of a bright line but, instead, presumes a balancing of three factors—the character of the government action, its economic impact on the property, and the extent to which it interferes with distinct, investment-backed expectations.[7] The third "categorical" taking speaks to the relatively rare circumstance where the government regulatory action results in a loss of all economically productive or beneficial use.[8] Additionally, the taking challenge may be mounted against legislation itself (the so-called "facial" challenge where it is alleged that "mere enactment" of the provisions crosses the compensability threshold) or against the provisions as they are applied ("as applied" challenge) to a particular property.[9]

The struggle to grasp the analytical frameworks that the Supreme Court has defined as a question of "fairness and justice"[10] is daunting. In a current landscape of decidedly *ad hoc* decision making, the facts of the case are frequently dispositive. Each path is challenging. One is reminded of cold nighttime walks through a moonlighted winter forest. The landmarks for the trip are hard to find—so hard, in fact, that the eye and mind grasp any distinguishing movement in the brush, any tree or stone, or looking upwards, any star as a point of reference for future bearings. Working with takings "tests" is like that scenario.

Our purpose here is to highlight the emerging points of reference. It is too early to tell if these recent decisions are enduring guidemarks—too soon to know if they are the morning stars which

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[6] *See Nollan*, 483 U.S. at 834-35. "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Id.* at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

[7] *See Penn Central*, 438 U.S. at 124. "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." *Id.*

[8] *See infra* text accompanying notes 11-24.

[9] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). "The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Id.* at 494.

[10] Armstrong v. United States, 364 U.S. 40, 49 (1960) (explaining that the Fifth Amendment is designed to ensure that individuals are not forced by the government to bear public burdens).

will guide us to dawn. In any event, we can be certain that as we move through the takings forest and as the nighttime sky turns above us, still other, fact-intensive decisions will soon find their own place in the sky. For the moment, however, we must use what is currently there. And so, we begin the trek.

I. "TAKING" A WALK THROUGH A NIGHTTIME WINTER FOREST

As our first landmark, we see the Supreme Court's most recent guidance on the topic of regulatory land use takings.

A. Categorical Taking and Compensable Expectancies

In 1986, David Lucas purchased two residential beachfront lots on the Isle of Palms, a South Carolina barrier island, for $975,000.[11] At that time, the State's definition of "critical area"[12] for protection of its barrier islands extended no further than the dune on the seaward side of Lucas' tracts.[13] In 1988, that definition changed. The State enacted its Beachfront Management Act (the Act), which precluded occupiable improvements seaward of a line drawn twenty feet landward of the "baseline."[14] What was significant for Lucas and his plans for building on the two lots (one for speculation and one for occupancy) was that the new "baseline" was located landward of his lots, precluding his planned development.[15] Two years later, in 1990, South Carolina would amend the statute to allow for a variance mechanism.[16]

After succeeding in persuading the state trial court that the 1988 statute deprived him of all economic value in the lots, Lucas found the South Carolina Supreme Court less hospitable. Given the Act's legislative findings of "serious public harm" arising from beach development and the fact that Lucas did not challenge the validity of those findings in the trial court, the State's high court found a controlling line of cases which included *Mugler v. Kan-*

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[11] *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2889 (1992).

[12] Beach owners within a "critical area" were required to obtain a permit prior to a use change. *Id.* (citing S.C. CODE ANN. § 48-39-130A (Law. Co-op. 1987).

[13] *Lucas*, 112 S. Ct. at 2889.

[14] S.C. CODE ANN. § 48-39-10 to -220 (Law. Co-op. 1987 & Supp. 1988).

[15] *Lucas*, 112 S. Ct. at 2889.

[16] *Id.* at 2890-91 (citing S.C. CODE ANN. § 48-39-290(D)(1) (Law Co-op. Supp. 1991)).

sas.[17] That line of authority is popularly recognized in takings law as reflecting the so-called "nuisance exception" to takings liability for harmful or noxious use.[18]

The Supreme Court granted certiorari.[19] The case presented the question of the extent of the government's obligation to compensate where a loss of all economic value occurred and, in that context, the balancing of societal and private expectations embodied in actions undertaken out of nuisance concerns. How the Court addressed these concerns has great significance and, for that reason, the case warrants our attention.

1. Categorical Taking

The Court began by stating a premise of categorical liability in a discrete and rare set of regulatory taking cases. To be precise, this "categorical" liability exists "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle . . . ."[20] Without something more, legislative statements "of a noxious-use justification [could not] be the basis for departing from our categorical rule that total regulatory takings must be compensated."[21]

2. Expectancies Inquiry

Neither the inquiry nor the relevance of public health and safety concerns ended there. The Court turned to the question of whether the State could resist compensation in one of these "categorical" liability cases. It reasoned, first, that liability could be avoided in such a claim "only if the logically antecedent inquiry into the nature of the owner's estate show[ed] that the proscribed use interests were not part of his title to begin with."[22] That is, was the expectancy allegedly taken a part of plaintiff's compensable expectancies "to begin with"? Second, to determine whether

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[17] 123 U.S. 623 (1887) (holding that a prohibition on the manufacture and sale of intoxicating liquors is not a compensable taking); *Lucas*, 112 S. Ct. at 2890.

[18] Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991) (relying on a line of cases finding that a taking does not occur if the regulation prevents public harm), *rev'd*, 112 S. Ct. 2886 (1992).

[19] Lucas v. South Carolina Coastal Council, 112 S. Ct. 436 (1991).

[20] *Lucas*, 112 S. Ct. at 2895 (emphasis in original).

[21] *Id.* at 2899.

[22] *Id.*

the estate included that interest, one would look to "background principles of the State's law of property and nuisance already placed upon land ownership."[23] The Court remanded the case for further proceedings and the South Carolina Supreme Court ruled that a temporary taking had occurred.[24]

*B. A Near-*Lucas *Cluster*

Much as the newborn stars of the Pleiades cluster, our continuing scan of the nighttime sky reveals for a moment—especially from the perspective of the expectancies inquiry—a selected cluster of recent decisions.

Glancing westward, we find two notable cases from Oregon. The first predates *Lucas* but is important to reference because of its role in the second (post-*Lucas*) of the two cases. In 1967, Oregon enacted a comprehensive statute to regulate development and use of the seashore and beaches within the state.[25] In a suit under that act, the State sought to enjoin the owners of a tourist facility from constructing fences or other improvements in the dry sand area of the beach (an area between the sixteen-feet contour line and the ordinary high tide line of the Pacific Ocean).[26] In *Oregon ex rel. Thomas v. Hay*, the Oregon court reached to the ancient doctrine of "customary use" to establish the preexisting state interest in assuring the use and enjoyment of the dry sand area.[27]

In the second case, *Stevens v. City of Cannon Beach*, the Department of Parks and Recreation denied plaintiffs' request to build a seawall adjacent to two vacant lots.[28] The intermediate appeals court turned to the "antecedent law" inquiry articulated in *Lucas* and pointed to the doctrine of customary use summarized in *Hay* to conclude that the plaintiffs never had a "property interest" to construct the wall.[29]

Now, looking northward along the East Coast, we see that a 1987 storm breached the beach off of a group of coastal properties. The storm exposed the coastline to higher tides and destruc-

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[23] *Id.* at 2900.

[24] Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992).

[25] OR. REV. STAT. §§ 390.065 to .925 (1991).

[26] Oregon *ex rel.* Thornton v. Hay, 462 P.2d 671, 672 (Or. 1969).

[27] *Id.* at 677-78.

[28] 835 P.2d 940 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 449 (1993), *petition for cert. filed*, 62 U.S.L.W. 3275 (U.S. Sept. 27, 1993)(No. 93-496).

[29] *Id.* at 942.

tive wave action, posing a threat to the houses. The landowners brought various administrative and court actions seeking permission to construct barriers to stem this enhanced erosion.[30] Before administrative action occurred, however, the wave action destroyed the houses.[31] Rejecting takings claims tied to the failure of the agencies to act, the state court in *Wilson v. Commonwealth* reasoned that *Lucas* would have little bearing.[32] The court read *Lucas* as not involving administrative action, loss attributable to natural resources, or, for that matter, allegedly dilatory conduct.[33]

C. "Taking" a Turn into Regulatory Timber

1. Mining and Surface Mining

Still on the eastern horizon, we can see a light which reminds us that mining was there at the beginning—when our walk into this regulatory takings forest began.

For seventy years, our courts have explored just how far is "too far" under the often quoted language from *Pennsylvania Coal Co. v. Mahon*:[34] "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[35] The *Nollan*[36] and *Lucas*[37] tests are only the newest stars placed by the Supreme Court in this regulatory nighttime sky. In *Mahon*, the Court addressed the lawfulness of a Pennsylvania act, which regulated subsurface mining of anthracite coal, as an exercise of the police power.[38] Concluding that the statute sought to benefit only one private house, Justice Holmes concluded that the Act had effected a total preclusion of mining and that the "public interest" associated with protecting one private residence was insufficient to "warrant so extensive a destruction of the [company's] constitutionally protected rights."[39]

In its own search for takings landmarks, the Court has twice returned to coal mining. It did so, each time, in the context of

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[30] *Wilson v. Commonwealth*, 597 N.E.2d 43, 44 (Mass. 1992).
[31] *Id.*
[32] 597 N.E.2d 43 (Mass. 1992).
[33] *Id.* at 46.
[34] 260 U.S. 393 (1922).
[35] *Id.* at 415.
[36] *See supra* note 6.
[37] *See supra* text accompanying notes 11-24.
[38] *Pennsylvania Coal Co.*, 260 U.S. at 396-99.
[39] *Mahon*, 260 U.S. at 414.

surface mining legislation. First the Court addressed the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[40] Through this Act the Congress saw the wisdom of regulating, *inter alia*, steep slope mining so as to assure reclamation of mine slopes to their original contours.[41] Elsewhere, Congress concluded that surface mining should be prohibited outright "subject to valid existing rights" in certain areas, such as national forests and national parks.[42] Expectancies which could establish themselves as "pre-existing," or valid existing rights (VERs), were exempted from the prohibition.[43] The process of probing the contours and status of these VERs continues through today. In the first of these two cases, the Court concluded that the company had failed to demonstrate that a facial taking resulted from mere enactment of SMCRA's Section 522(e) provision.[44]

But it was the second case which, some sixty-five years after *Mahon*, revisited the takings implications of surface mining regulation in some detail. In the context of a facial taking challenge to Pennsylvania's Bituminous Coal Act, the Court applied the three-factor analysis in *Keystone Bituminous Coal Association v. DeBenedictis*.[45] On the character of the action inquiry, it concluded that Pennsylvania's new legislation (unlike the Kohler Act which Holmes had viewed as serving the interests of only one private residence) served broad public and nuisance-like purposes.[46] Moreover, because the new Act only required companies to leave a portion of their coal in the ground as pillars to avoid surface subsidence, the Court could not conclude that mere enactment of the legislation effected compensable interference.[47] Finally, the record failed to show interference with distinct investment-backed expectations attributable to enactment of the legislation itself.[48] In

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[40] 30 U.S.C. §§ 1201-1328 (1986).

[41] 30 U.S.C. § 1265(b).

[42] 30 U.S.C. § 1272(e).

[43] *Id.*

[44] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296 (1980) (finding that a mere diminution in property value resulting from the legislation's express terms was not compensable). Moreover, the United States Court of Appeals for the Federal Circuit later advised that it was premature to raise a claim under Section 522(e) until the VER administrative process had been exhausted. *See* Burlington N. R.R. v. United States, 752 F.2d 627 (Fed. Cir. 1985).

[45] 480 U.S. 470, 485-93 (1987).

[46] *Id.*

[47] *Id.* at 493-97.

[48] *Id.*

contrast to *Mahon*, the Court sustained the State's exercise of police power (this time) and proceeded to find that, on its face, the new statute did not go too far.[49]

The Pennsylvania courts are apparently not finished exploring takings and surface mining. In *Gardner v. Commonwealth*, plaintiffs had acquired their interests (some of which had already been mined) as devisees to a 1968 will.[50] In 1967, the later devised property was already subject to Pennsylvania's Bituminous Coal Open Pit Mining Conservation Act.[51] It lay within Pennsylvania's Moraine State Park and, in 1971, Pennsylvania's Surface Mining Conservation and Reclamation Act[52] operated to permit surface mining in public parks by way of variance.[53] Although that statute was amended in 1980 to prohibit surface mining except where attributable to "existing rights,"[54] the Act retained the Secretary's authority to grant variances for mining in state parks in "special circumstances." The state court resolved the taking claim by turning to the ripeness doctrine.[55] "Landowners bear the burden of showing that no administrative remedy exists or that none is applicable in this case."[56] The State need not demonstrate conclusively that "a variance might be granted, but merely that a reasonable interpretation of the statutes and regulations admits to the possibility of an administrative remedy."[57] The "special circumstances" option afforded just such a possibility.

Indiana has also recently addressed surface mining and takings. Under the authority of the Indiana Surface Mining Control and Reclamation Act,[58] the State had designated a 6.57 acre parcel as "unsuitable" for surface mining.[59] The designation rested on the existence of a significant archaeological site on the land.[60]

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[49] *Id.*

[50] 603 A.2d 279 (Pa. Commw. 1992).

[51] 52 PA. STAT. ANN. §§ 1396.1 to .21 (1966).

[52] In 1971, the Pennsylvania Bituminous Coal Open Pit Mining Conservation Act was amended and retitled the Surface Mining Conservation and Reclamation Act.

[53] 52 PA. STAT. ANN. § 1396.4b(c) (1966).

[54] 52 PA. STAT. ANN. § 1396.4(e) (1966).

[55] Gardner v. Commonwealth, 603 A.2d 279, 282 (citing Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)).

[56] *Id.* at 282-83.

[57] *Id.* at 283.

[58] IND. CODE § 13-4.1 (Burns 1990).

[59] Department of Natural Resources v. Indiana Coal Council, 542 N.E.2d 1000, 1001-02 (Ind. 1989), *cert. denied*, 493 U.S. 1078 (1990).

[60] *Id.*

Despite the designation, the State allowed for continued farming use and for subsurface mining, provided that the archaeological objects remained undisturbed.[61] Further, in the event the owner would permit archaeological testing and data collection (at no cost to the owner), the restrictions would thereafter be lifted.[62] The Indiana Supreme Court found no taking.[63]

In the facts of one suit which remains pending, a different result followed. The Surface Mining Control and Reclamation Act prohibits surface mining which would interrupt, discontinue, or preclude farming on alluvial valley floors (AVFs).[64] In *Whitney Benefits, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit concluded that Congress intended that the provisions of SMCRA would directly apply to—and prohibit—mining of plaintiff's coal.[65] Moreover, it affirmed the trial court ruling that the provision deprived Whitney of "all economically viable use" of its property.[66] The circuit dismissed government arguments that a residual use (farming) existed and that the economic impact of the prohibition had been mitigated (a reference to the statute's provisions for an exchange of regulated coal).[67] Finally, the circuit rejected the proposition that the government's action fell within the "nuisance exception" in this case.[68]

Before leaving the mining terrain, our attention is drawn to quarry operations, mill tailings, and uranium mining leases. Here, we first notice New Jersey. In *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, the plaintiff had purchased a quarry in 1987 which had been in operation since 1931.[69] The quarry had been declared a nonconforming use in 1963, and at that time, the previous owner agreed to a mining depth limitation.[70] The plaintiff initially mined under two temporary certificates of occupancy; the

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[61] *Id.*

[62] *Id.* at 1002.

[63] *Id.* at 1007.

[64] 30 U.S.C. § 1260(b)(5)(A) (1988).

[65] 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991). Several federal takings decisions addressed in this article, including *Whitney* and others later mentioned, remain pending in the federal courts. Given the pendency of those cases, the discussions here will be limited. *See infra* notes 118-28, 159-69 and accompanying text

[66] *Id.* at 1174-77.

[67] *Id.*

[68] *Id.* at 1177.

[69] 608 A.2d 1377 (N.J. 1992).

[70] *Id.* at 1379.

second certificate, however, was suspended when engineers discovered asbestos material at the site.[71] In 1988, the plaintiff filed for an application to mine and excavate down to levels below the earlier stipulated floor.[72] The Borough denied the application, and the plaintiff alleged a taking.[73]

In its opinion, the state court looked at the *Nollan* "nexus" inquiry,[74] concluding that reasonable bases existed for the municipality to conclude that the quarrying operations were a threat to the environment (e.g., the potential for surface pollution, groundwater pollution, and asbestos risks).[75] The court then turned to the economic diminution inquiry, citing *Gardner v. New Jersey Pinelands Commission*[76] for the New Jersey rule that no regulatory taking occurs unless the action denies "all practical use" or fails to allow "adequate" or "just and reasonable return."[77] In *Bernardsville Quarry*, remaining uses included blacktop or concrete production, revenues from telephone tower location, plus office complex and residential use.[78] Focusing on the third factor, the court reasoned that the plaintiff had no reasonable expectation at the time of its acquisition to quarry ten million metric tons "without being subject to significant governmental restrictions."[79] Moreover, citing *Lucas*, the court concluded that reasonable expectations should countenance the possibility of some change in restrictions.[80]

Turning our eyes westward again, we find a case involving the Secretary of the Interior's approval, consistent with his statutory role as Trustee, of leases to mine uranium located on Navajo Tribe trust lands.[81] Responding to the Tribe's subsequent concerns over the lease return, the Secretary deferred approval of the pro-

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[71] *Id.*

[72] *Id.*

[73] *Id.* at 1379-80.

[74] *See supra* note 6.

[75] *Bernardsville Quarry*, 608 A.2d at 1383-86 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)).

[76] 593 A.2d 251, 260 (N.J. 1991).

[77] *Bernardsville Quarry*, 608 A.2d at 1382.

[78] *Id.* at 1387.

[79] *Id.*

[80] *Id.* ("It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992)).

[81] United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990), *reh'g denied*, No. 89-1727, 1990 U.S. App. LEXIS 21056 (Fed. Cir. Dec. 3, 1990).

posed mining plan.[82] In time, the lease lapsed and the lessee sued for a taking. Relying on a three-factor test, the court in *United Nuclear Corp. v. United States* focused on economic impact and reasonable investment-backed expectations, evidenced by the corporation's investment of $5 million in the lease development.[83] In the particular circumstances of this case, the court rejected the conclusion that plaintiff lessee's reasonable expectations had been colored by the Secretary's trust duties.[84] Further, it rejected the conclusion that the Secretary's action fell within the *Mugler* line of cases.[85]

Finally, we turn to the question of royalty readjustments on coal mined from federal lands. In *Western Energy Co. v. United States Department of the Interior*,[86] the plaintiff challenged the Interior's readjustment of royalties due under leases entered pursuant to the 1920 Mineral Lands Leasing Act (MLLA).[87] Western Energy alleged that the adjustment of royalty rates and the reduction of periods at which royalty readjustment would occur (from twenty to ten years) would effect takings of already existing lease interests.[88] Looking to the MLLA under which the original expectancies had been created, the Ninth Circuit concluded that Congress' intent was to leave the establishment of mineral rates to administrative action and to allow for secretarial oversight and subsequent amendment of the Secretary's authority.[89]

2. Wetlands

As the snow covering the forest floor seems to thin, we move from the rock and mineral-laden landscape into what we recognize today as wetlands. The Clean Water Act seeks the restoration and maintenance of the chemical, biological, and physical integrity of the "waters of the United States."[90] To that end, it precludes the discharge of dredge or fill material into those waters but enables the United States Army Corps of Engineers (the Corps) to issue

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[82] *Id.* at 1434.
[83] *Id.* at 1435-37.
[84] *Id.* at 1436.
[85] *Id.* at 1438.
[86] 932 F.2d 807 (9th Cir. 1991).
[87] 30 U.S.C. §§ 181-287 (1988).
[88] *Western Energy Co.*, 932 F.2d at 812.
[89] *Id.* at 813.
[90] 33 U.S.C. § 1251(a) (1986).

permits for discharge.[91] By regulatory definition, "waters of the United States" includes wetlands.[92] Similarly, wetlands have been held to be "navigable waters" of the United States.[93]

In this area, we can begin to see a few themes. For instance, the cases are arising in instances of denial of (or agency delay in acting upon) the required permit for use of the private property. Further, the economic impact and reasonable financial expectation factors are forcing litigants to come to grips with the property's dimensions as an "economic unit." This latter theme, which the nomenclature terms "the parcel as a whole" issue, struggles to define the piece of property against which the severity of the regulatory impact will be measured. A given level of economic impact has a different significance when measured against an overall unit of twenty acres than when measured against a unit of, say, twelve hundred acres.

We begin in 1979 in New Jersey. In *American Dredging Co. v. New Jersey*, plaintiff's twenty-five-hundred-acre tract fronted the Delaware River in Logan Township.[94] Under its existing zoning, the tract was already limited to fifty percent development.[95] Plaintiff contended that application of New Jersey's own wetlands statute—which regulated only eighty acres of the entire tract and which left open the opportunity for a permit—effected a taking.[96] The court rejected the challenge, noting that the roughly three percent of the parcel which was affected by the State's wetlands statute could easily serve the purpose of the "open space" already excepted by the property's existing zoning—resulting, even if permitting was denied, in no additional impact.[97] Moreover, the potential for a permit did exist, holding open the possibility of some development on the restricted property.[98]

In *American Savings & Loan Association v. County of Marin*, we find the county treating a sixty-eight acre holding in two different ways.[99] On the one hand, it zoned twenty acres for high

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[91] The procedures governing the Corps' review are found in 33 C.F.R. §§ 320-330 (1991).

[92] 33 C.F.R. § 328.3(a)(2), (3), (7).

[93] Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 647 (5th Cir. 1983).

[94] 404 A.2d 42 (1979).

[95] *Id.* at 44.

[96] *Id.* at 43.

[97] *Id.* at 44.

[98] *Id.*

[99] 653 F.2d 364 (9th Cir. 1981).

density development. The remaining forty-eight-acre parcel, however, was zoned only for low density development.[100] The Association, arguing in part the rule for severance damages in condemnation cases, contended that the segmentation of the combined tract eroded its value and effected a taking.[101] Pointing out that a severance damage theory presumes the answer to the very question before the court—the extent of the "parcel as a whole"—the circuit looked to the following flexible criteria for identifying the correct parcel: physical contiguity, unity of ownership, and unity of use.[102] Unless the developer could demonstrate the futility of doing so, the court concluded that it could not answer the parcel as a whole issue until the plaintiff submitted a development plan to the county.[103]

We next briefly reference *Fox v. Treasure Coast Regional Planning Council*, where the court concluded that a compromise land use plan attempting to reconcile wetlands values with Fox's proposed development lacked sufficient findings.[104] Florida's statute provided that a governmental agency regulating development could not issue an order which was unduly restrictive or which constituted a taking. Construing that statute, the court stressed that

> the focus [was] on the nature and extent of the interference with the landowner's rights in the parcel *as a whole* in determining whether a taking of property has occurred. Prohibition of development on certain *portions* of the tract [did] not in itself effect an unconstitutional taking.[105]

In New Hampshire, Donna Rowe contended that denial of a variance (from the Town of North Hampton's wetlands ordinance) reduced the value of her property from $130,000 to a substantially smaller figure, resulting in a taking.[106] The state Supreme Court in *Rowe v. Town of North Hampton* affirmed the lower court's finding that because significant wetlands legislation existed at the time of Rowe's purchase, she had no justified expec-

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[100] *Id.* at 367.
[101] *Id.* at 368.
[102] *Id.* at 369.
[103] *Id.* at 371.
[104] 442 So. 2d 221 (Fla. Dist. Ct. App. 1983).
[105] *Id.* at 225 (emphasis added).
[106] 553 A.2d 1331 (N.H. 1989).

tation to be free of wetlands concerns.[107] Further, Rowe's property retained, by her own expert's testimony, economic value even if the variance was denied.[108]

We now turn to the federal sector. In 1981 the United States Court of Claims (the predecessor of the United States Claims Court and, more recently, the United States Court of Federal Claims) addressed the Rivers and Harbors Act[109] and the Clean Water Act in *Deltona Corp. v. United States*.[110] In 1964, plaintiff had purchased ten thousand acres, which were subdivided into five development areas.[111] In that same year, a dredge and fill permit issued; in 1969, after public interest review, a second permit issued, albeit with some conditions. In 1973, three permits were requested: one was granted (because work had progressed and significant environmental damage had occurred), and two were denied.[112] The court concluded that the plaintiff had recovered value from the overall property and, thus, had not been deprived of all economic utility.[113]

In the same year, the Court of Claims addressed another Corps permit denial in *Jentgen v. United States*.[114] There, the Corps offered modifications which would allow development of more than twenty of the eighty acres in contest.[115] The applicant declined that option.[116] The court found no taking, reasoning that although plaintiff might have suffered some economic loss as a result of the regulations, the impact was not such as to effect a taking.[117]

Nine years later, in *Loveladies Harbor, Inc. v. United States*, the Corps of Engineers denied plaintiff a permit to develop twelve and one-half acres of what was an otherwise developed two-hundred-and-fifty-acre parcel.[118] The trial court elected to view the applicable parcel as the smaller segment.[119] Because eleven and

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[107] *Id.* at 1336.
[108] *Id.*
[109] 30 U.S.C. § 403 (1988).
[110] 657 F.2d 1184 (1981), *cert. denied*, 455 U.S. 1017 (1982).
[111] *Id.* at 1188.
[112] *Id.* at 1188-89.
[113] *Id.* at 1192-94.
[114] 657 F.2d 1210 (1981), *cert. denied*, 455 U.S. 1017 (1982).
[115] *Id.* at 1212.
[116] *Id.*
[117] *Id.* at 1213-14.
[118] 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).
[119] *Id.* at 154.

one-half acres of that segment were in fact regulated wetlands, the permit denial—in the trial court's view—effectively deprived the small parcel of its economic value.[120] The court found a taking, and the case is now pending before the United States Court of Appeals for the Federal Circuit.[121]

In *Florida Rock Industries v. United States*, the landowner had purchased property and received local zoning sufficient for limestone mining activities prior to enactment of the Clean Water Act provisions.[122] Mining did not commence until 1978, but in 1980 the Corps issued a letter directing Florida Rock to cease mining activities pending completion of the permit process.[123] When the company applied for a permit to mine ninety-eight acres, the EPA, the Fish and Wildlife Service, and the National Park Service objected. The Corps denied the permit.[124] Invoking the three-factor analysis, the trial court found a taking. With respect to the character of the action inquiry, the court concluded that limestone mining was not properly viewable as a nuisance.[125] The court then turned to the economic impact and expectations inquiries, finding that no market existed among knowledgeable buyers in holding the property for speculation.[126] Identifying a diminution of ninety-five percent in value based on the valuation evidence before it, the court found a taking.[127] This case is also pending in the Federal Circuit.[128]

In *Ciampitti v. United States*, plaintiff purchased property in 1979 or early 1980 and at that time knew that some nearby lots were wetlands within the terms of New Jersey's state wetlands program (adopted in 1970).[129] Indeed, his pattern of succeeding purchases indicated that the property owner actually knew where the wetlands were and was gerrymandering his purchase plan so as to buy around the wetlands.[130] Finally, in September 1983, the plaintiff purchased an additional forty-five acres (known as

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[120] *Id.* at 159.
[121] 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).
[122] 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).
[123] *Id.* at 164.
[124] *Id.*
[125] *Id.* at 166-67.
[126] *Id.* at 172.
[127] *Id.* at 176.
[128] *Id.* at 161.
[129] 22 Cl. Ct. 310 (1991).
[130] *Id.* at 321.

Purchase 7).[131] The purchase price was $3.3 million, against a mortgage obligation of $2.8 million.[132] From commitments for four ocean-side blocks in the purchase, the plaintiff expected to return some $4.6 million on his investment.[133]

About fourteen acres of Purchase 7 had been mapped as state wetlands; an additional four acres were federally regulated wetlands. Those eighteen acres were the subject of the takings claim.[134] On two instances shortly before plaintiff's acquisition of Purchase 7, the Corps advised Ciampitti to cease filling operations already underway on the property.[135] On the date of purchase, September 15, 1983, the Corps issued a cease and desist order.[136] Ciampitti did not receive the order until October, but the court concluded that he was fully informed of the likelihood that the Corps would assert jurisdiction over the lands as of the date of purchase.[137] Eventually, the United States was forced to secure a district court temporary restraining order restricting further filling.[138] When Ciampitti applied for an after-the-fact permit, the permit was denied for two reasons. First, the project was inconsistent with: federal wetlands regulations; title 33, section 320 of the Code of Federal Regulations; the EPA's wetlands guidelines; and (in New Jersey's view) the state's coastal zone management program.[139] Second, Ciampitti had failed to seek required state wetlands permits.[140]

In the resulting takings claim, the court did not view the nuisance issue as dispositive and turned to the economic impact and reasonable expectation inquiries.[141] In this context, it concluded that the "parcel as a whole" included, at least, all of the estimated forty-five acres in Purchase 7.[142] Here, such factors as contiguity, date of acquisition, treatment of the parcel as a single unit, and the extent to which protected lands enhanced the value of the un-

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[131] *Id.* at 313.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 315.
[136] *Id.*
[137] *Id.* at 316.
[138] United States v. Ciampetti, 583 F. Supp. 483 (D. N.J. 1984).
[139] Ciampitti v. United States, 22 Cl. Ct. 310, 316 (1991).
[140] *Id.*
[141] *Id.* at 318.
[142] *Id.*

protected lands informed the outcome.[143] Moreover, the portions of Parcel 7 were treated as a whole for purposes of purchase and finance.[144] Given government evidence of $14 million in retained value, no compensable economic impact had occurred.[145] Pointing to Ciampitti's advance notice of the wetland character of the lands, his apparent gerrymandering purchase practice, and his (relatively speaking) little investment risk in Purchase 7 by virtue of the value of the anticipated four block sales, the court concluded that Ciampitti had no reasonable investment-backed expectations in development of the wetlands lots.[146]

We will now turn to two cases which combine the Section 404 wetlands taking inquiry with a further question. To do so, we must lay a threshold. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Supreme Court considered whether it was a sufficient remedy (from the perspective of the Takings Clause[147]) to provide for administrative rescission of government action later found to be a taking.[148] Was a "temporary" or interim monetary remedy required for the period before rescission? Yes, the Court reasoned: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[149] The Court made clear that it was not addressing instances of "normal" governmental delay in decision making.[150]

In the following two federal cases, we see claims of such "temporary" takings. In *Dufau v. United States*, the Corps issued a 1984 cease and desist order against clearing and fill operations and required an after-the-fact permit.[151] The landowner applied for the permit on November 13, 1984, and, on March 25, 1986, after mitigation negotiations, a permit for fifty-seven acres issued.[152] On November 6, 1986, Dufau applied for a permit to develop thirteen acres which had been set aside as mitigation under

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[143] *Id.*
[144] *Id.* at 319.
[145] *Id.* at 320.
[146] *Id.* at 320-21.
[147] *See supra* note 5 and accompanying text.
[148] 482 U.S. 304 (1987).
[149] *Id.* at 321.
[150] *Id.* at 323.
[151] 22 Cl. Ct. 156, 158-59 (1990), *aff'd*, 940 F.2d 677 (Fed. Cir. 1991).
[152] *Id.* at 159-60.

the original permit.[153] Ten months later the second permit also issued. Because permits eventually issued, Dufau could not prevail on a permanent taking claim.[154] Turning to the temporary taking inquiry, the court gauged the "delay" period as from the date of application to permit issuance; in the case of the first permit, the delay period was fifteen and one-half months.[155] This period of time was not, in the court's view, unreasonable delay; indeed, ten of those months were devoted to mitigation negotiations, and plaintiff had indicated his own satisfaction with the process at that time.[156] Moreover, the period between the issuance of the cease and desist order and the after-the-fact application was also not cognizable; plaintiff was obligated to comply with the regulatory process.[157] The court rejected plaintiff's claim that market deterioration during this period was compensable. Without extraordinary delay, the externally-driven market deterioration was noncompensable.[158]

Next, in *Tabb Lakes, Inc. v. United States*, we see a roughly three-year period between the Corps' assertion of jurisdiction by a cease and desist order over plaintiff's regulated wetlands and a later district court ruling invalidating that order for procedural reasons.[159] Plaintiff alleged that the defective assertion of jurisdiction effected a temporary taking.[160]

Within the context of the character of the action inquiry, the court concluded that " 'absent extraordinary delay' in the governmental permitting or decision-making process, mere diminution in value will not, as a matter of law, rise to the level of a taking."[161] "The Corps' assertion of jurisdiction over the wetlands on plaintiff's property was based upon a good-faith belief that the wetlands were within its jurisdiction," notwithstanding the fact that the district court later found the rationale for jurisdiction procedurally defective.[162]

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[153] *Id.*

[154] *Id.* at 162.

[155] *Id.* at 163.

[156] *Id.* at 163-64.

[157] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-39, 164 (holding that the Clean Water Act authorizes the Army Corps of Engineers to require landowners to obtain permits from the Corps before discharging fill material into the wetlands).

[158] *Dufau*, 22 Cl. Ct. at 164 (citing Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980)).

[159] 26 Cl. Ct. 1334 (1992), *appeal docketed*, No. 93-5029 (Fed. Cir. Nov. 23, 1992).

[160] *Id.* at 1343.

[161] *Id.* at 1353.

[162] *Id.* at 1354.

The court's primary focus in *Tabb Lakes*, however, was on economic impact. In that context, the court reached the parcel as a whole inquiry and based its ruling on alternative grounds—the first ground viewing the entire five-section development as the entire parcel and the alternative ground viewing sections three, four, and five as the parcel.[163] Within the alleged period of the taking, undisputed evidence showed gross sales of more than $3.9 million.[164] In the court's judgment, that was more than sufficient to demonstrate that plaintiff did not lose all economically viable use of its property during that period.[165]

On the smaller parcel, the court viewed plaintiff's argument as, essentially, the following:

> Apparently, plaintiff theorizes that since a developer would not buy all of the property in sections 3, 4, and 5—because [the wetlands] could not be developed—plaintiff lost all economically viable use. The standard plaintiff is arguing is not "all economically viable use," but rather some version of "economically viable use of 'all' " in the same way that the term "all" appears to have been used by [plaintiff's expert].[166]

As the court put it rather succinctly: "The standard advocated . . . is neither appropriate nor legally cognizable."[167] Moreover, because the undisputed facts showed substantial economic activity during the three-year period (e.g., $1.89 million in total receipts on the three sections), plaintiff could not credibly claim that the economic impact was only "one step short of complete" as envisioned by *Lucas* itself.[168] The court found no temporary taking, and the case was recently affirmed by the Federal Circuit.[169]

3. Critters

Walking more quickly now, we nonetheless catch what seems to be the image of deer out of the corners of our eyes.

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[163] *Id.* at 1346.

[164] *Id.* at 1352.

[165] *Id.*

[166] *Id.* at 1349-50.

[167] *Id.* at 1350.

[168] *Id.* at 1352 (quoting Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 n.8 (1992)).

[169] 26 Cl. Ct. 1334 (1992), *aff'd*, 10 F.3d 796 (1993).

In *Southview Associates, Ltd. v. Bongartz*,[170] the Second Circuit considered the takings implications of Vermont's 1970 "Act 250."[171] Requiring land use planning and a land use permit, the Act had an "eye towards maintaining, among other things, existing recreational uses of the land, such as hunting, and preserving lands, when possible, that have special value to the public."[172] In 1982, twelve years after passage of Act 250, Southview purchased eighty-eight acres near Stratton and Jamaica, Vermont, intending to construct a seventy-eight lot residential subdivision.[173] As a part of its own review of the project, Southview studied deeryard maps, prepared by the Vermont Department of Fish and Wildlife, that showed a winter habitat for white-tailed deer and found no indicated deeryards on the tract.[174] Shortly before filing its Act 250 application, however, Southview in fact identified a deeryard presence.[175] When the District III Environmental Commission denied the permit, it found that the proposed development was situated within a two-hundred-and-eighty-acre deeryard—the only deeryard within a roughly eleven-square-mile area—that was necessary for winter survival of the white-tailed deer.[176] Its findings concluded that the construction would destroy one of the two best cover areas within the yard and, without effective mitigation, significant tree cover area.[177] The Vermont Environmental Board, on review, agreed with the Commission and found that the proposed development would "destroy and significantly imperil" a deeryard "decisive" to the deer.[178] The Vermont Supreme Court eventually affirmed.[179]

Southview then brought an action on due process and takings theories under the Civil Rights Act,[180] and the Second Circuit

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[170] 980 F.2d 84 (2d Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1586 (1993).

[171] VT. STAT. ANN. tit. 10, § 6001 (1984 & Supp. 1991).

[172] *Southview Assoc., Ltd.*, 980 F.2d at 89.

[173] *Id.*

[174] *Id.* at 90.

[175] *Id.*

[176] *Id.* at 91.

[177] *Id.*

[178] *Id.* (referencing VT. STAT. ANN. tit. 10, § 6086(a)(8)(A) (1984)).

[179] In re Southview Assoc., 569 A.2d 501, 505 (Utah 1989).

[180] 42 U.S.C. § 1983 (1982). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress . . . ." *Id.*

considered whether the district court appropriately dismissed the action for failure to state a claim.[181] The Second Circuit found the claim insufficient under physical taking theory because it lacked either a government directed "absolute dispossession of Southview's property rights"[182] or governmentally compelled occupation of the property.[183] In its regulatory and due process analyses, the court turned to the ripeness doctrine as enunciated in *Williamson County Regional Planning Commission v. Hamilton Bank*.[184] Because Southview had submitted only one application under Act 250 and because the Board might be receptive to a plan which located development in a different segment of the parcel, some development might be possible. That being so, the impact of the state action was not yet "final."[185] As further ground for the unripeness of the takings claim, the Second Circuit rejected Southview's argument that it need not pursue a claim for just compensation first in the state courts.[186] Southview argued that because Vermont had no statutory just compensation provision, it necessarily had no state taking remedy.[187]

As we gaze westward again, it is elk that we see. The moonlight clears for a moment—it is tule elk. In *Moerman v. State of California*, the plaintiffs contended that a state program to relocate elk into their native ranges resulted in the presence of elk on their two-hundred-acre ranch.[188] State efforts to discourage the elk were not completely successful.[189] Indeed, the State permitted the hunting of the elk.[190] Plaintiffs alleged that the presence of the elk effected a taking under physical liability theories.[191] The court disagreed, resting on the proposition that the State neither owned nor controlled animals which had not been reduced to posses-

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[181] Southview Assoc., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1586 (1993).

[182] *Id.* at 95 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982) (noting that not every physical invasion will constitute a taking)).

[183] *Id.* (citing Yee v. Escondido, 112 S. Ct. 1522, 1528 (1992)).

[184] 473 U.S. 172 (1985) (pointing to the need for a "final" state position impacting the proposed use and, for the taking claim, the utilization of a state just compensation remedy if available).

[185] *Southview Assoc., Ltd.*, 980 F.2d at 97.

[186] *Id.* at 99.

[187] *Id.* at 100.

[188] 21 Cal. Rptr. 2d 329 (Cal. App. 1 Dist. 1993).

[189] *Id.* at 331.

[190] *Id.*

[191] *Id.* at 332.

sion.[192] It was not enough that the elk had been once captured or that they were now the objects of a state management plan. The court declined to reach allegations that a regulatory taking had occurred.[193]

And, northward, toward Lake Michigan, we see the nighttime commercial fishing of smelt. The purpose is to avoid incidental catches of the protected alewife fish. The Wisconsin court in *LeClair v. Natural Resources Board* concluded that this regulation of fishing under Wisconsin-issued permits did not effect a taking of those commercial permits.[194] Pointing to *Board of Regents v. Roth*,[195] the court reasoned that compensable expectancies are "something more" than "unilateral expectations."[196] Nothing in the statutes or rules creating the permitting structure "grant[ed] any 'entitlement' to forage fishing licenses, or to indefinite continuation of the fish quotas and time and area restrictions contained in existing permits."[197] Although government action may create valuable benefits, the government frequently—as the court reasoned had occurred here—reserves the power to modify or limit those expectancies. When such changes later occur, no taking of an "entitlement" results.[198]

4. CERCLA

Our walk continues, pausing only briefly to catch the flicker of a CERCLA-related case. In *Hendler v. United States*, the EPA attempted to combat the spread of ground water contamination to plaintiff's property and to other adjacent sites from a toxic waste site known as the Stringfellow Acid Pits.[199] Acting under the authority of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[200] the EPA drilled ground water wells and installed corresponding monitoring equipment at

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[192] *Id.* at 333-34.

[193] *Id.* at 335 (distinguishing *Yee*, 112 S. Ct. 1522, where the Supreme Court initially agreed to consider a regulatory taking argument even though it was unclear whether the argument had been raised in the lower courts).

[194] 483 N.W.2d 278 (1992).

[195] 408 U.S. 564, 577 (1972).

[196] *LeClair*, 483 N.W.2d at 282.

[197] *Id.* at 283.

[198] *Id.*

[199] 952 F.2d 1364, 1369 (Fed. Cir. 1991).

[200] 42 U.S.C. §§ 9601-9657 (1982).

three sites on plaintiff's property.[201] Plaintiff claimed that this presence effected a taking.[202] Before the case could be adjudicated on the merits at the trial level, plaintiff failed to comply with discovery and suffered a dismissal.[203] On review, the circuit reversed the dismissal.[204] In fact, within the limits of the record then before it, the court found a physical taking[205] and remanded for further proceedings.[206]

5. Rails-to-Trails

As we turn to our next heading, we discover a trail which apparently was, at one time, a railroad track bed. To be precise, in *Preseault v. United States*[207] the plaintiff challenged the 1988 amendment to the National Trails System Act.[208] Through the amendment, Congress sought to assure that otherwise abandonable railroad rights of way were maintained in the interest of future rail revitalization.[209] Congress, thus, empowered the Interstate Commerce Commission (ICC), through its long-standing discontinuance and abandonment powers, to "railbank" such rights of way and to allow for the interim discontinuance of service.[210] During the interim, the right of way could be applied to trail use.[211] In part focusing on the plaintiff's date of purchase (*after* enactment of 1976 federal legislation providing for the concept of railbanking), the trial court found that plaintiff had no compensable expectancy to be free of the railbanking and trail use provision.[212]

II. THE TRIP CONCLUDES

With that trail, our present trek ends. It is clear enough that there are some other stars about to emerge overhead. For the mo-

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[201] *Hendler*, 952 F.2d at 1370.

[202] *Id.*

[203] Hendler v. United States, 19 Cl. Ct. 27 (1989).

[204] *Hendler*, 952 F.2d at 1382-83 (finding an abuse of discretion because failure to comply with the court order was not due to willfulness or to bad faith).

[205] *Id.* at 1377.

[206] *Id.* at 1384.

[207] 27 Fed. Cl. 69 (1992).

[208] 16 U.S.C. §§ 1242-1251 (1988).

[209] *Preseault*, 27 Fed. Cl. at 80.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 94.

ment, though, we must pause. During our course, we have moved from the concept of a "categorical" regulatory taking, in the relatively rare instance of a loss of all economic value, to the three-factor analysis, which balances the character of the government's action, its economic impact, and its interference with investment-backed expectations, to assess whether compensable interference has occurred. We have noted *Nollan*. Moreover, we have seen how an analysis of the "antecedent" expectancies (including such inquiries as customary use and public trust) in the property is clearly critical in today's regulatory taking claim. From the perspective of gauging economic impact, we have glimpsed the complexity of proof on the "parcel as a whole" issue. And, from the vantage point of the temporary taking theory, we have seen that reasonable—even if apparently procedurally-flawed—government actions have been held not to give rise to takings. Along the way, we have focused on mining and mineral takings claims, wetlands suits, species protection, CERCLA activities, and the rails-to-trails program. This overview is only a portion of the environmental program forest, and much more terrain remains to be crossed.

For those who focus on the litigation of such claims, we cannot close without stressing one further point. It is absolutely essential to understand the complexity of this particular forest. The regulatory takings case is among the most complicated—legally and factually—on the federal or state docket. Factual proof on such issues as the extent of economic impact and reasonable expectations requires an exhaustive analysis of the current use of the property and the justifiability of the use allegedly taken. Typically, this proof is expert-based and can be expensive. On the other hand, and of equal significance, it is patently clear from the journey just completed that the legal standards which guide us on the takings trek are themselves evolving. The result is a lawsuit which, subject to the client's interests and goals, calls out for the best in conscious case management. It should be said again: It is complicated litigation. It is, however, plainly invigorating—just like that nighttime walk in a winter's forest.