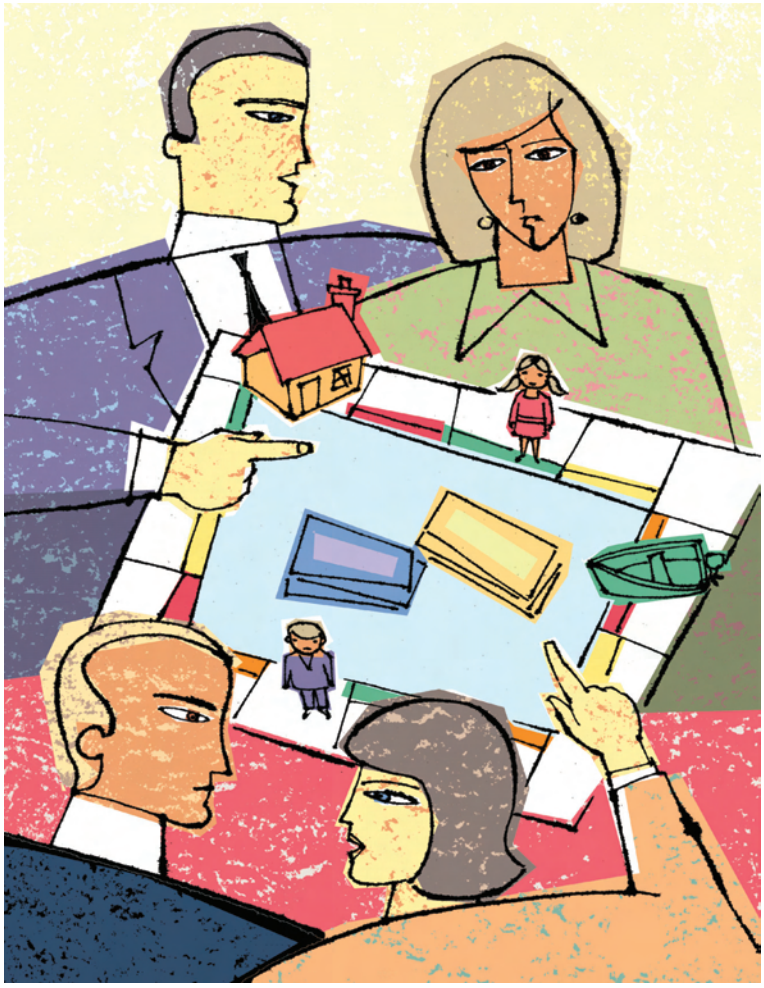
Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests is the Most Important Inquiry in Every Fifth Amendment Takings Case

By Kristine S. Tardiff

Do you know how many sticks are in your bundle? Although the Takings Clause of the Fifth Amendment prohibits the taking of private property for public use without just compensation, not all property is protected by the Fifth Amendment, and even protected property may be regulated without running afoul of the Constitution. Untangling this web involves a task that has confounded parties, practitioners, and judges alike: identifying and defining the proverbial "bundle of sticks"—that is, the group of rights associated with the physical thing that we typically think of as property.



When I ask my children what property is, their initial reaction is simple and straightforward. They recognize that the land on which our house is built—and even the house itself—is property. They understand the concept of personal property, readily pointing out that their bicycles and baseball gloves are their property. Satisfied with those responses, but curious as to the extent of their understanding of property and property rights, I probed further. Could we, I asked, build an ice hockey rink in our yard this winter even if we know that when the ice melts in the spring it is going to flow right into our neighbor's yard and perhaps flood her basement? My seven-year-old contemplated this and said, "Well, we could probably do it, but Mrs. C would get mad and we might get in trouble for hurting *her* property." That commonsense response reveals the underlying complexity of defining property and understanding property rights that presents itself in every Fifth Amendment takings case. Although our hockey rink dilemma involves sorting out the rights and responsibilities of two private property owners, the questions that we'll ask in deciding whether to build that rink when the temperature drops are the same types of questions that every attorney presented with a Fifth Amendment takings claim needs to ask in determining whether the claimant possesses property interests that are protected by the Fifth Amendment.

The genesis of all Fifth Amendment takings litigation is the Takings Clause of the Fifth Amendment, which proscribes the taking of private property for public use without just compensation.30[1] Federal courts apply a two-part test for determining whether a governmental action has resulted in the taking of private property for which just compensation must be paid. Courts first examine whether the claimant possesses a property interest that is protected by the Fifth Amendment—sometimes referred to as a "cognizable property interest" or a "compensable property interest."30[2] If such an interest is established, courts then examine whether the government's action amounts to a compensable taking of that interest.[330] Fleshing out the nature and scope of a claimant's property interest is obviously important to the first part of the two-part takings inquiry, because, if the claimant does not possess an interest in property that is protected, a takings claim premised on that interest fails as a matter of law. However, even in cases where it is determined that the claimant possesses a compensable property interest, understanding the nature

and scope of that interest is critical to the second part of the two-part takings inquiry, which examines whether the government's action constitutes a taking of that interest. Accordingly, the nature and scope of a claimant's property interests should be examined at the early stages of every takings case.

What Is Property and When Is It Protected by the Fifth Amendment?

What is property? As the conversation with my hockey-playing children suggests, the initial identification of property is not difficult. Indeed, Justice Stewart's famous test for identifying obscenity—"I know it when I see it"—aptly applies to the identification of most types of property.[4]31 Land, both improved and unimproved, is property; a business is property; a lease or a contract is property. But this initial identification of something as property is only part of the inquiry when it comes to analyzing a claim that the government has taken a person's private property. The determination of whether a claimant has a "protected" or "compensable" property interest within the meaning of the Fifth Amendment requires a more probing inquiry.

Let's begin with the basics. Property, in the constitutional sense, is frequently described conceptually as a "bundle of sticks," with each stick in the bundle representing a different right that is inherent in the ownership of the physical thing that we typically think of as property, such as a parcel of land. Those rights include the right of possession, the right to use the property, the right to dispose of or transfer the property, and the right to exclude others from the property.[5]31 Although every stick in the bundle is potentially important in assessing a takings claim, the right to exclude others, including the government, is frequently described as the most "fundamental" and "treasured" of all property rights.[3][16] A claimant does not necessarily need a full bundle of sticks in order to establish a protected property interest, but, as the number of sticks in the bundle decreases, it is less likely that the claimant possesses a protected property interest with which the government has interfered.

So how do you determine which sticks are in your bundle and whether those sticks add up to a protected property interest? The first step is to examine the complaint and identify precisely what property interests the claimant alleges to have been taken. This step is aided by Rule 9(h)(7) of the Rules of the U.S. Court of Federal Claims, which requires "identification of the specific property interest which plaintiff contends has been taken by the United States."31[7] In those cases where the plaintiff's complaint does not adequately identify the property interest or interests alleged to have been taken, a motion for a more definite statement under Rule 12(e) should be considered.[8]31

Next, it is important to identify and examine the source of the claimant's property interest. This inquiry is guided by the established principle that the Constitution itself does not create or define the nature and scope of property interests. Instead, property interests and rights that are afforded protection by the Fifth Amendment are created and defined by "existing rules or understandings" and may be further defined or limited by "background principles" of law. These existing rules, understandings, and background principles are derived from a source that is independent of the Constitution, such as state, federal, or common law.31[9] The easiest way to apply these concepts is to ask two distinct questions. First, which sticks are in the bundle of rights associated with the claimant's property? The answer to this question generally lies in an examination of the documentation through which the plaintiff acquired the subject property, such as a deed, a lease, or a contract, and consideration of the "existing rules and understandings" that affect the interpretation of that documentation, such as state or common law of property or contracts. Once the sticks in the bundle have been identified, the second question should be asked: Are there any background principles, such as nuisance law, that place limitations on the exercise of those rights?

Finally, even in those cases where the property interests allegedly taken appear to be interests protected by the Fifth Amendment, the plaintiff is required to prove that he or she was the owner of those interests on the date of the alleged taking. If the ownership issue is not addressed in the complaint or in the plaintiff's initial disclosures under Rule 26(a)(1)(B),31[10] then the issue should be the subject of early discovery by the defendant. As with most legal concepts, the importance of making all these inquiries is best understood by illustration.

The Government Cannot "Take" What the Claimant Does Not Have

In certain cases, it will be readily apparent that the claimant possesses an interest in protected property and very little additional inquiry will be needed. The best example of this is when the claimant owns a fee-simple interest in land, which is an estate that is recognized as having "a rich tradition of protection at common law" and has long been regarded as a property interest protected by the Constitution.[11]31 But in many cases, the inquiry into the nature of the claimed property interest is more complex and may "require[] the court to sort among various, sometimes overlapping, claimed interests, some of which may be in the nature of a property compensable under the Fifth Amendment and others of which not. … Far from being doctrinaire, these antecedent inquiries are critical lest the court apply the right test to the wrong corpus, and yield seemingly valid, but ultimately misleading results."31[12]

For example, in *American Pelagic Fishing Company v. United States*, the plaintiff was the owner of the Atlantic Star, a fishing vessel that had federal permits authorizing it to fish for Atlantic mackerel in the Exclusive Economic Zone of the United States. After federal legislation resulted in the cancellation of the permits, the plaintiff alleged a taking of those permits and related authorizations as appurtenances to the use and operation of the vessel. The court's analysis included an examination of sticks in the bundle of rights associated with the federally issued permits. Based on its findings that the plaintiff lacked authority "to assign, sell, or transfer its permits and authorization letter"[13] and that the government could revoke or modify the permits, the court determined that the plaintiff "did not and

could not possess a property interest in its fishery permits and authorization letter."32 Accordingly, although it was undisputed that the plaintiff possessed a property right in its vessel, the court's findings regarding the nature of the permits led it to conclude that the use of that vessel to fish for Atlantic mackerel in the Exclusive Economic Zone "does not equate to a cognizable property interest for the purposes of a takings analysis."[14]32

The importance of identifying the nature and scope of all of a plaintiff's alleged property rights was also evident in the case of *Colvin Cattle Company v. United States*. In that case, the plaintiff was the owner of a 520-acre cattle ranch in Nevada that was adjacent to a 625,000-acre grazing allotment on public lands. Following the government's cancellation of the grazing permit, the plaintiff alleged a taking of water rights on the allotment, grazing rights inherent in those water rights, and the ranch. Although there was no question that the plaintiff's ranch and any water rights vested under state law were protected property, the crux of this case was the plaintiff's contention that the state's law-based water rights included an inherent right to graze livestock on the allotment. After examining both federal and state law, the court rejected that argument, holding that "grazing is not a stick in the bundle of rights that [the plaintiff] has ever acquired."32[15] The court also rejected the plaintiff's claim that the ranch had been taken, noting "[t]hat the ranch may have lost value by virtue of losing the grazing lease is of no moment because such loss in value has not occurred by virtue of governmental restrictions on a constitutionally cognizable property interest."32[16]

As each of these cases illustrates, the government cannot take a property right that the claimant does not possess. Determining whether the property interest allegedly taken is a protected property interest should therefore occur at the earliest stages of all takings cases.

Contracts Are Property, But Not All Contract Disputes Have a Constitutional Remedy

Another type of property that warrants special mention is contracts. Although contract rights are widely recognized as property that is protected by the Fifth Amendment,32[17] not all contractual disputes involving the government give rise to Fifth Amendment takings claims. However, because the intersection between contract claims and takings claims is complex, it is not unusual for a plaintiff to bring *both* breach of contract and takings claims when the government's actions have had an adverse impact on rights that are derived from a contract.

The question of whether a takings claim can be premised on a contractual right depends on a number of issues. When the government is a party to the contract at issue, then the following general rule applies: "the concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim."[18]32 For example, in *Castle v. United States*, the plaintiffs acquired an insolvent savings and loan institution or "thrift" pursuant to a contract with the government in which government regulators agreed to afford the thrift favorable regulatory treatment on certain matters. When Congress subsequently revamped the entire regulatory scheme governing thrifts and imposed stricter capital requirements, the subject thrift fell out of compliance and was placed in receivership; the plaintiffs filed suit alleging both a breach of the contract and a taking of their contractual rights. The court rejected the takings claim, finding that because the plaintiffs "retained the full range of remedies associated with any contractual property right they possessed[,]" the enforcement of the legislation might constitute a breach of the contract, but was not a taking of any contractual rights.32[19] The outcome in *Castle* also reveals the exception to the general rule, which is that the government may be held liable for a taking in the context of contracts when Congress eliminates a contractual remedy.32[20]

If the government is not a party to the contract at issue, then one must consider whether the rule articulated by the Supreme Court in *Omnia Commercial Company v. United States* applies.[21] In *Omnia*, the plaintiff alleged a taking of its contractual right to purchase steel plate from a manufacturer at below market prices after the United States requisitioned all of the steel plate produced by the manufacturer in 1918. The Court rejected the takings claim, holding that the government's action (requisition of the steel), though rendering the manufacturer's performance impossible and resulting in consequential losses for the plaintiff, was merely a frustration of the contract rather than a taking of the contract or of any contractual rights. The flip side of *Omnia* is that the government may be liable for a taking if it takes over a contract by stepping into the shoes of one of the contracting parties. The *Omnia* rule has been applied in a number of recent cases arising out of regulatory restrictions imposed in response to the events of Sept. 11, 2001. In one such case, *Huntleigh USA Corporation v. United Stat*es, the plaintiff held contracts to provide passenger and baggage screening services at a number of airports. Following the enactment of legislation that federalized airport screening services, the plaintiff's contracts were terminated. Relying in part on *Omnia*, the court rejected the claim that the government's regulatory actions constituted a taking of the plaintiff's contracts or of its business assets, holding that the government's actions, at best, merely frustrated the performance of those contracts.32[22]

The Background Principles Defense

After the initial inquiry into whether a claimant possesses an interest in protected property, the next issue that should be considered is whether that interest is subject to or limited by any "background principles" of state or federal law. These existing laws impose limits on the use of private property that are said to be "inherent" in the owner's title. Thus, when the government's action merely proscribes or limits a use of private property in which the owner never had a right to engage because of such existing limitations, those background principles serve as a complete defense to the claim that the government action amounted to a taking.

The notion of background principles as a defense to a takings claims is not new. In fact, the concept was the basis for the Supreme Court's 1887 decision in *Mugler v. Kansas*, in which the Court declined to find that a law prohibiting the use and sale of alcohol was a taking by the government. The Court explained that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[23]33 In holding that the legislation in question was not a taking, the Court noted that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property for the public benefit."[24]33 Modern discussions of background principles generally don't reach all the way back to *Mugler* for support; instead, they tend to rely on the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*, in which the Court recognized that in every regulatory takings case it is necessary to "inquire into the nature of the landowner's estate to determine whether the use interest proscribed by the governmental action was part of the owner's title to begin with, i.e., whether the land use interest was a stick in the bundle of property rights acquired by the owner."[3325]

Background Principles of State Law: The Nuisance Defense and Beyond

The classic background principle of state law is the power to abate or prevent nuisances. As explained by the Federal Circuit, "[p]roperty rights as a matter of law since Blackstone's day have been understood to be subject to the power of the state to abate nuisances. If the imposed restraint would have been justified under the state's traditional nuisance law, then the property owner's bundle of rights did not include the right claimed, and no taking could occur."[26]33 Background principles such as nuisance may also serve as a defense to physical takings claims when the government enters private property and takes steps to abate or prevent a nuisance.33[27]

There are numerous examples of background principles of nuisance law being invoked to defend the regulation of private property under a modern regulatory program. Because the nuisance defense turns on the application of state nuisance laws, cases arising out of the state courts are particularly instructive and provide useful guidance to federal courts faced with applying state law. For instance, the case of *Palazzolo v. Rhode Island* is known to most takings practitioners because of the Supreme Court's decision in the case—the Court found that the plaintiff's regulatory takings claim involving the proposed development of a coastal salt marsh property to be ripe.[28]33 On remand from the Supreme Court, the trial court rejected the plaintiff's takings claims based on the state's backgrounds principles defense, holding that "[b]ecause clear and convincing evidence demonstrates that Palazzolo's development would constitute a public nuisance, he had no right to develop the site as he has proposed."33[29]

On the federal court side of the equation, takings claims are also dismissed based solely on the nuisance defense without further inquiry into the second part of the two-part takings test. *M & J Coal Company v. United States* is a frequently cited example. There, the federal Office of Surface Mining issued an order restricting the plaintiff's subsurface coal mining operations after investigating multiple reports of surface subsidence, a report of a severed gas line, and a report from one resident that "the electric wires leading to his house were stretched 'as tight as a fiddle string.'"[30]33 The plaintiff eventually filed suit alleging that restrictions imposed by the Office of Surface Mining, which reduced the quantity of coal the company could mine, constituted a taking. The court rejected this claim, holding that a prohibition on coal mining was not a taking because the "antecedent inquiry" demonstrated that the plaintiff never possessed the right to mine in such a way as to endanger public health and safety.

Another background principle that has been cited as a defense to a takings claim is the public trust doctrine, which the state court relied upon in *Palazzolo v. Rhode Island* to support its conclusion that the plaintiff had no right to fill or develop that portion of the site that is below the mean high water mark. In a slightly different application of the public trust doctrine, the denial of a takings claim in *Glass v. Goeckel* turned in part on the court's conclusion that the public has the right to walk along the shores of the Great Lakes below the ordinary high water mark. The court explained that "[b]ecause private littoral title remains subject to the public trust, no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine."[31]

Background Principles of Federal Law

Although the background principles defense is generally associated with background principles of state law, there are background principles of federal law that also serve as inherent limitations on the use of private property. One background principle of federal law is the federal navigational servitude, which originates in the Commerce Clause of the Constitution[32]33 and grants the federal government authority to "regulate and control the waters of the United States in the interest of commerce."[33]33 The federal navigational servitude, when applicable, serves as a complete defense to a takings claim, because governmental action taken pursuant to that servitude "is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject."[3334]

In *Palm Beach Isles Associates v. United States*, the plaintiffs alleged a taking after the Army Corps of Engineers denied them a permit to dredge and fill 50.7 acres of Florida land consisting of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land of Lake Worth, which is part of the Atlantic Intercoastal Waterway. The Federal Circuit found that the trial court's initial grant of summary judgment in favor of the government was improvident but acknowledged that the "navigational servitude may constitute part of the

'background principles' to which a property owner's rights are subject, and thus may provide the [g]overnment with a defense to a takings claim."[34][35] On remand with instructions to determine whether the government could show that it "had bona fide navigational grounds for its permit denial[,]"[34][36] the trial court found that the navigational servitude was one of the reasons for the Corps of Engineers' denial of the plaintiffs' permit application and that its invocation of the navigational servitude was legitimate. Based on these findings, the trial court concluded the Corps of Engineers' denial of the plaintiff's permit application was based on a bona fide navigational purpose and thus constituted a complete defense to the plaintiff's takings claim.[34][37]

Another background principle of federal law involves the right to use navigable airspace. For example, in *Air Pegasus of D.C. v. United States*, the plaintiff alleged the taking of its heliport business in Washington, D.C., based on the Federal Aviation Administration's shutdown of commercial air traffic in the area where the plaintiff's heliport was located following the events of Sept. 11, 2001. The court rejected this claim on the ground that the plaintiff's claimed right to access navigable airspace from its heliport was not a cognizable property interest under the Fifth Amendment. Specifically, the court held that "'background principles' of long-standing federal property law indicate that there is no private property right in the navigable airspace of the United States. For that reason, we hold that Air Pegasus does not have a cognizable property interest in its alleged right to access the navigable airspace from the South Capitol Street Heliport."[38][34]

What Happens When Your State or Federal Regulatory Laws Are Not "Robust Enough" to Qualify as a Background Principle?

In the recent case of *John R. Sand & Gravel Company v. United States*, the trial judge observed that "[n]ot all background principles of state law are robust enough to fit within the *Lucas* background principles exception."[39][34] So, what does a claimant do when background principles of state or federal law are not "robust enough" to support a backgrounds principle defense to a takings claim? Fear not! The case is far from over.

Once the court determines that a claimant possesses an interest in protected property and that applicable background principles do not provide a complete defense to the government's actions, the court's inquiry then moves to the merits of whether the government's action has resulted in a taking of that interest. If a takings claim is premised on the government's regulation of the subject property, the question of whether that regulatory action results in a taking involves an ad hoc, factual inquiry that is guided by the three *Penn Central* factors, which examine the character of the government's action, the reasonableness of the plaintiff's investment-backed expectations, and the economic impact of the regulatory action.[40][34] In analyzing these factors, all the hard work done in figuring out the nature and scope of the claimant's property interest is again relevant to the *Penn Central* liability analysis.

For example, there is significant overlap between the threshold background principles inquiry and the "character of the government action" prong of the *Penn Central* test. The Federal Circuit describes this part of the *Penn Central* test as requiring the trial court to "consider the purpose and importance of the public interest underlying [the] regulatory imposition" by examining "'the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented.'"[34][41] The similarity between this description and the test applied in cases such as *Mugler v. Kansas* is immediately evident. As a result of the overlap between these two inquiries, the nuisance defense and other background principles are often analyzed as part of the character of the government action inquiry. For example, *K & K Construction Inc. v. Department of Environmental Quality* involved a claim that the state's denial of a permit to fill wetlands constituted a regulatory taking of the plaintiff's property. In reversing the trial court's finding of liability and award of more than $16 million in just compensation, the Michigan Court of Appeals applied the full *Penn Central* test but emphasized the character of the government action inquiry. Specifically, the court stated that "[w]etland regulations are, like zoning regulations, all but ubiquitous" and that "[l]ike zoning regulations, wetland regulations place a burden on some property owners, but this burden ultimately benefits all property owners, including those who claim they are unfairly burdened."[34][42] In this particular case, because the regulatory scheme was generalized and comprehensive (applying to all landowners, not just the plaintiffs), and because the scheme sought to protect the rights of the public and provided an "average reciprocity of advantage," the court held that the character of the government action weighed heavily against the finding of a taking.[43][34]

Similarly, in *Appolo Fuels Inc. v. United States*, the federal Office of Surface Mining designated certain lands in which the plaintiff held a lease-hold interest as unsuitable for surface coal mining partly because of concerns about the impact that such operations would have on a lake that was located in the same watershed as the proposed mining activities and served as the public water supply for a nearby community. In response to Appolo Fuels' claim that this regulatory action constituted a taking of its mining interests, the government argued that the water pollution that would be caused by the proposed mining was an abatable nuisance under Tennessee state law. The trial court agreed that water pollution was an abatable nuisance under both Tennessee common law and state regulatory law and found that the government's designation of the plaintiff's property as unsuitable for surface coal mining operations under federal law was an "exercise of its police power to protect its citizens from a nuisance[.]"[34][44] However, rather than treating the government's nuisance abatement as a defense, the trial court analyzed the nuisance issue as part of the character of the government action prong of the *Penn Central* inquiry, concluding that this factor weighed in the government's favor. On appeal, the Federal Circuit acknowledged that the government may successfully defend a takings claim based on a nuisance defense "without regard to the

other *Penn Central* factors[,]" but affirmed the trial court's decision based on the *Penn Central* analysis and did not reach the nuisance defense apart from its relevance to the character of the government action inquiry.35[45]

The nuisance defense also frequently finds its way into the analysis of a plaintiff's reasonable investment-backed expectations, as was the case in *Rith Energy Inc. v. United States*. In *Rith Energy*, the trial court rejected the plaintiff's claim that the government's denial of a federal mining permit constituted a regulatory taking, because denying the permit "represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law."[46]35 However, on appeal, the Federal Circuit affirmed the trial court's decision based on its determination that Rith Energy lacked reasonable investment-backed expectations, without reaching the trial court's assessment of the background principles issue.35[47]

Don't Overlook Ownership on the Alleged Date of the Taking

Even in those cases where there is no doubt that the property at issue is protected by the Fifth Amendment, one should not overlook the separate question of whether the claimant actually owned the property at the time of the alleged taking. This inquiry is important because, as a general rule, only those persons with a valid or protected property interest at the time of the alleged taking are entitled to pursue a claim for just compensation under the Fifth Amendment.[48]35 As simple as this requirement is to articulate, its application requires close attention to factual details that may become apparent only following discovery. For example, in *Wyatt v. United States*, the plaintiff entered into a lease that gave it the exclusive right to mine coal on the lessor's land. The plaintiff alleged a taking of its property following the government's denial of a federal permit required to conduct surface coal mining operations on the property. There was no question in this case that the plaintiff's lease-hold interest was a protected property right and, in fact, the trial court held that there had been a permanent regulatory taking of that property interest and awarded just compensation in excess of $19 million to the plaintiff lessee and to the owner of a coal royalty interest. However, the Federal Circuit reversed that decision on the ground that the plaintiff had voluntarily relinquished its lease-hold interest prior to the government's denial of the permit application and therefore did not posses a valid property interest on the date of the alleged taking and could not legally assert a permanent takings claim based on the permit denial.[49]35 As the *Wyatt* case demonstrates, the question of whether the claimant actually owned the property allegedly taken on the date of the taking is one that should be checked and rechecked throughout the litigation.

Conclusion

The importance of identifying, defining, and understanding a plaintiff's property interests to the ultimate resolution of a takings claim cannot be overemphasized. Claims that the government has taken private property are fact-intensive and complex. Resolution of such claims often takes years and can require significant discovery and the use of expert witnesses—neither of which is inexpensive. In many cases, the lack of interest in a protected property will be apparent at an early stage, and dismissal may be warranted prior to the unnecessary expenditure of time and resources required to address other issues. Even in those cases where the plaintiff possesses an interest in protected property, limitations that are inherent in the ownership of that interest may prove to be dispositive of the takings claim either under a background principles defense or under a *Penn Central* liability analysis. Identifying and understanding the nature and scope of the plaintiff's property interests is thus critical in all takings cases and is a matter that should be examined at the earliest stages of the case—and re-examined as the case progresses. **TFL**

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Endnotes

[135]"[N]or shall private property be taken for public use, without just compensation." U.S. Constitution, Amendment V.

35[2]*See Colvin Cattle Co. v. United States*, 468 F.3d 803, 806 (Fed. Cir. 2006) ("[U]nder our regulatory takings analysis, … the threshold question is 'whether the claimant has established a "property interest" for the purposes of the Fifth Amendment'") (citations omitted).

35[3]*See Air Pegasus of D.C. Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005) (holding that the court does not reach the question of whether a taking occurred "without first identifying a cognizable property interest").

35[4]Justice Stewart's struggle to "define what may be indefinable" in a case involving obscenity led to his oft-quoted observation that "I know it when I see it" in *Jacabellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[5]*See United States v. General Motors Corp.*, 323 U.S. 373, 377–378 (1945) (describing the term "property" as referring to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"); *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1332 (Fed. Cir. 2005) ("The right to transfer is a traditional hallmark of property."), *cert. denied*, 126 S. Ct. 2967 (2006).

[6]*35See Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539 (2005) (describing an owner's "right to exclude others from entering and using her property [as] perhaps the most fun-

damental of all property interests"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing the right to exclude others as "one of the most treasured strands in an owner's bundle of property rights").

[7]The Rules of the U.S. Court of Federal Claims (RCFC) are available on the court's Web site at www.uscfc.uscourts.gov/rules.htm (last visited Aug. 7, 2007). Although there is no similar requirement in the Federal Rules of Civil Procedure, the vast majority of takings claims brought against the United States are filed in the Court of Federal Claims, which has exclusive jurisdiction over such claims that seek more than $10,000 and jurisdiction, concurrent with the federal district courts, over takings claims that seek $10,000 or less. 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2). The Federal Circuit has exclusive jurisdiction over takings claims appealed from both the Court of Federal Claims and the federal district courts. 28 U.S.C. § 1295(a)(2)–(3).

[8]36RCFC 12(e); Fed. R. Civ. P. 12(e).

[9]*36Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

[10]36RCFC 26(a)(1)(B) and Fed. R. Civ. P. 26(a)(1)(B) both require parties to provide "a copy of, or description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment[.]"

[11]36*Lucas*, 505 U.S. at 1016 n.7 (noting that the fee-simple interest in land pleaded by the plaintiff "is an estate with a rich tradition of protection common law").

[12]36*Arctic King Fisheries Inc. v. United States*, 59 Fed. Cl. 360, 369 (Fed. Cl. 2004) (citations omitted).

36[13]*American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

[14]36*Id.* at 1377.

[15]*Colvin Cattle Co. v. United States*, 468 F.3d 803, 808 (Fed. Cir. 2006).

[16]36*Id.*

[17]36*See United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken ... provided that just compensation is paid."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a [s]tate, or the United States.").

[18]36*Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978). *See also Hughes Communications Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2000) ("Takings claims rarely arise under government contracts because the [g]overnment acts in its commercial or proprietary capacity in entering contracts, rather than its sovereign capacity. Accordingly, remedies arise from the contracts themselves rather than from the constitutional protection of private property.").

[19]36*Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 925 (2003).

[20]36*See generally Lynch v. United States*, 292 U.S. 571 (1934) (distinguishing between congressional abrogation of a contractual right and a contractual remedy).

[21]*Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923).

[22]*Huntleigh USA Corp. v. United States*, 75 Fed. Cl. 642, 644–646 (2007). *See also Air Pegasus*, 424 F.3d at 1216–1217 (finding that the government's post-Sept. 11 regulations restricting the use of airspace around Washington, D.C., did not constitute a taking of the plaintiff's heliport business even though the regulations frustrated the plaintiff's business expectations).

36[23]*Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

[24]*36Id.* at 668–669.

[25]*Lucas*, 505 U.S. at 1027.

36[26]*Loveladies Harbor Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994).

36[27]*See John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 239 (2004) (holding that the Supreme Court's articulation of the nuisance and background principles exceptions to takings liability in *Lucas* also applies to physical takings claims), *dismissed on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006), *pet. for cert. granted in part*, 127 S. Ct. 2877 (U.S. May 29, 2007).

36[28]*Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

[29]36*Palazzolo v. Rhode Island*, No. WM 88-0297, 2005 WL 1645974, *5 (R.I. Super. July 5, 2005).

[30]*36M & J Coal Co. v. United States*, 47 F.3d 1148, 1151 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995).

[31]36*Glass v. Goeckel*, 703 N.W.2d 58, 78 (Mich. 2005), *cert. denied*, 546 U.S. 1174 (2006).

[32]36U.S. Constitution, Article 1, § 8, cl. 3.

36[33]*Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374, 1382 (Fed. Cir. 2000) (citing *United States v. Rands*, 389 U.S. 121, 122–123 (1967)).

[34]*36United States v. Rands*, 389 U.S. 121, 123 (1967).

36[35]*Palm Beach Isles* at 1384.

[36]*36Id.* at 1386.

36[37]*Palm Beach Isles Assocs. v. United States* 58 Fed. Cl. 657, 681 (2003), *aff'd*, 122 Fed. Appx. 517 (Fed. Cir.), *cert. denied*, 546 U.S. 818 (2005).

36 [38]*Air Pegasus*, 424 F.3d at 1218.

36[39]*J.R. Sand & Gravel Co.*, 62 Fed. Cl. 556, 573 (2004).

36[40]*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The Supreme Court reaffirmed the use of the *Penn Central* factors as guideposts for analyzing regulatory takings claims in *Tahoe-Sierra Preserv. Council Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 n.23 (2002).

[41]*Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003) (quoting *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994)). *See also Bass Enterprises Production Co. v. United States,* 381 F.3d 1360, 1370 (Fed. Cir. 2004) (describing the character of the government action inquiry as requiring consideration of "the purpose of the regulation and its desired effects in determining whether a taking has occurred").

[42]36*K & K Constr. Inc. v. Dep't of Envtl. Quality*, 705 N.W.2d 365, 368–369 (Mich. App. 2005), *appeal denied*,

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