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I. INTRODUCTION—INVERSE CONDEMNATION OF FEDERAL OIL AND GAS LEASE RIGHTS—WHAT'S ALL THE FUSS

The United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."1 In Pennsylvania Coal2 the United States Supreme Court first recognized that government regulation could in effect "take" property requiring the payment of just compensation.3 The Court held that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."4 The award for the "regulatory taking" of property under the Fifth Amendment has been summarized as being "designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole."5

Since Pennsylvania Coal, courts have struggled to identify when permissible regulation necessitates payment of just compensation. Advocates desiring to protect private property rights from governmental interference and advocates of more comprehensive regulation to control the use and development of property in the United States have squared off over

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1. U.S. const. amend. V.
3. See Store Safe Redlands Ass'n v. United States, 35 Fed. Cl. 726, 729 (1996) where the Court explains in detail physical, legal and regulatory takings summarizing a regulatory taking as one that "involves the imposition upon the private property of some government condition, generally limiting or prohibiting beneficial use by the private owner."
the issue of compensation. Recent opinions from the United States Supreme Court, Court of Appeals for the Federal Circuit and Court of Federal Claims have intensified this debate.

To complicate matters, in the context of a federal oil and gas lease, the chief regulator controlling the use and development of the property is simultaneously the mineral lessor. It is not surprising, therefore, that once a lease has been issued, the federal government becomes much more synonymous with the "public" than with private mineral lessors. Decisions to prevent or severely restrict development of the lease can cause the lessee to bear the sole financial burden associated with such decisions. More importantly, when the debate shifts to a larger discourse concerning whether to develop mineral resources on public lands, the government's ability to function as the chief regulator in the public's interest can easily blur the line between its co-existent legal obligations as mineral lessor/grantor of real property rights conveyed by an oil and gas lease.

Even so, the goal to protect the public good cannot singly justify governmental action resulting in an uncompensated taking of property. Similarly, government inaction in the face of controversy relating to a plan of development cannot indefinitely forestall all beneficial use of property. While a typical taking occurs when the government condemns property under its power of eminent domain, the doctrine of "inverse condemnation"


8. See Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

recognizes that a taking may also occur without the initiation of formal proceedings. The "self-executing character of the constitutional provision with respect to compensation" entitles a property owner to bring an action in inverse condemnation when government action effects a taking of property rights.

It is important to note that the Fifth Amendment does not prohibit the "taking" of property either physically, through regulation, or through legal transformation. Neither does it transform the judge into a "super legislator or executive, intent on preventing regulation that 'goes too far.'" Rather, when deciding a takings claim,

[the job of the court is to deal with a concrete claim, by an aggrieved person or persons, that their constitutional rights under the Fifth Amendment have been violated by some governmental action. The court must proceed to analyze this claim, as any other legal claim, regardless of the consequences to governmental policy. Unless property right claims are to be given lesser due process than other claimed constitutional violations, the court must interpret the words of the constitutional protection as it would any other language conferring rights.

As with any other "rights" based analysis required by the Constitution, the determination that "property rights" merit constitutional protection is a determination that limits the regulatory power of government in favor of the individual property owner. This premise must hold true even when the United States is the grantor. The principle must guide the analysis of regulatory takings of federal oil and gas lease rights, because it is the constitutional guarantee of just compensation that keeps the United States' role as regulator from wholly eroding its obligations as mineral lessor.

11. Id. at 305, 315.
12. See First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304. "As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of property, but instead places a condition on the exercise of that power. This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation." Id. at 314-15 (citations omitted).
14. Id. at 150-51.
This article considers these roles in the context of regulatory takings and the related government liability. It outlines the prima facie elements of a takings case and discusses the impact of such precedent, developed largely outside the context of federal oil and gas lease rights, on those property interests. It also highlights some of the most recent arguments used by both lessees and the United States in connection with regulatory decisions impacting specific lease rights and recent cases brought by lessees seeking just compensation. Finally, it concludes that the United States' role as regulator cannot constitutionally be used to defeat its obligations as mineral lessor.

II. ESTABLISHING A PROTECTABLE PROPERTY INTEREST

A. Oil and Gas Leasing on Federal Lands

The oil and gas minerals owned by the United States are leased pursuant to the Mineral Leasing Act of 1920 (MLA).\textsuperscript{15} The MLA vests authority for issuing leases with the Secretary of Interior,\textsuperscript{16} who in turn has delegated all authority for onshore minerals management, except related to royalty management, to the Bureau of Land Management (BLM).\textsuperscript{17} Present day leasing must also substantively comply with the Federal Land Policy Management Act of 1978 (FLPMA),\textsuperscript{18} and procedurally comply with the National Environmental Policy Act of 1969 (NEPA).\textsuperscript{19} These three statutes, along with other federal statutes relating to protection or conservation of

\textsuperscript{15} 30 U.S.C. §§ 181-287 (1994). The Mineral Leasing Act replaced the claim location system, as to oil and gas, with procedures for permitting and leasing. In comparison to the absence of federal control of mining claims patented under the General Mining Laws, the Mineral Leasing Act requires lessees to pay rentals and royalties to the United States as the lessor-landowner and to adhere to standards established by the Secretary of the Interior for oil and gas operations. The Act governs those lands designated as "public domain." Public domain lands are those lands or mineral deposits owned by the United States which have not been disposed of under any of the public land laws. See generally 1 James M. Piccone, History, the Government Survey and Basic Oil and Gas Leasing Legislation, LAW OF FEDERAL OIL AND GAS LEASES (1996).

\textsuperscript{16} See 43 U.S.C. § 1201 (1994) (stating that "The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this [Title 43] not otherwise specially provided for"); Best v. Humbolt Placer Mining Co., 371 U.S. 334, 336 (1963); Ryan Outdoor Adver., Inc. v. United States, 283 U.S. 414, 419 (1931); McDonald v. Clark, 771 F.2d 460, 462 (10th Cir. 1985). Responsibility for royalty management under MLA has been delegated to the Minerals Management Service. Transfer of Mineral Management Functions, 48 Fed. Reg. 8983 (1983).


various resource values, influence how BLM carries out its charge to administer all federal minerals and the surface resources on the public lands. Within limits, leasing by the BLM is discretionary and the agency, assuming it follows proper procedural guidelines, may refuse to lease an entire region or decline to issue a lease for a particular location. The decision to lease, however, is an extremely important one because it commits the subject lands to mineral development.

B. Lease Rights Granted

Most leases are issued as the result of a competitive lease sale. Prior to the lease sale, BLM posts a listing of the tracts to be sold along with any restrictions to be imposed through stipulations attached at the time of lease issuance. By regulation, stipulations become part of the lease and supersede inconsistent provisions of the standard lease form. As consideration for the lease, the successful bidder pays up front a lease


21. "Where federal lands are not closed to leasing by statutory exception, prior appropriation, or by formal withdrawal or reservation, the Secretary of the Interior may still exercise his discretionary authority to refuse to lease public lands for oil and gas development." 1 C.M. Peterson, Lands Available for Leasing, LAW OF FEDERAL OIL AND GAS LEASING 3-83 (1996). The Secretary's discretion is guided by the public interest but can not be exercised in a manner which is arbitrary or capricious. Id. at 90. "With the passage of FLPMA, any supplemental forms of land use management, aside from withdrawals, that would work a segregative effect upon mineral leasing should result from the land use planning process." Id. (citing 43 U.S.C. § 1712 (1982)); see also Mountain States Legal Found. v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980) (holding that the Department of Interior's policy of refusing to act on oil and gas lease applications in a National Forest wilderness study area constituted a de facto withdrawal in violation of FLPMA). For a thorough discussion of the issue of public land withdrawals before and after FLPMA, see Peterson, supra, at 58-88.

22. Conner v. Burford, 848 F.2d 1441, 1449 (9th Cir. 1988).

23. Over the years, numerous amendments to the Mineral Leasing Act modified the provisions and applications of the Act. These amendments changed the initial prospecting permit system to a competitive and noncompetitive leasing system that remains in effect today. The Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, Title 5, subtitle B, § 101(a), 30 U.S.C. §§ 181, 187(a), 187(b), 188, 191, 195, 226(b)-(d), (f)-(h), 226-1, 226-3 (1994); 16 U.S.C. § 3148 (1994) changed the simultaneous leasing system. All lands must now be first offered for competitive bidding. Noncompetitive leases are available only for lands previously offered competitively and for which no acceptable minimum bid has been received. If no competitive offer is received within two years, the lands are again subject to leasing only according to the competitive leasing process.


25. 43 C.F.R. §§ 3101.1-3 (1996). "Any party submitting a bid . . . shall be deemed to have agreed to stipulations applicable to the specific parcel as indicated in the List of Lands Available for Competitive Nominations or the Notice of Competitive Lease Sale available from the proper BLM office." Id.
bonus, first year rentals and an administrative fee.26 Rentals are paid on or before the anniversary date of the lease for each year during its fixed term. Once production is obtained, the lessee pays the United States a royalty on the value of all production from or attributable to the lease.27

Oil and gas leases, including federal leases, are a unique hybrid of contract and real property rights. On the one hand, the lease is a contract meeting the contract formation requirements of offer, acceptance and payment of consideration; providing remedies for breach and containing terms both express and implied which govern each party's performance.28 In most jurisdictions, the same lease is also recognized as a grant of an interest in real property.29 An oil and gas lease is executed by the grantor in favor of a named grantee, identifies the property subject to the grant, contains present words of grant, and identifies any limitations on the grant.30 In many respects an oil and gas lease is far more analogous to a deed than to the tenancy created by a commercial or residential lease of real property.31

The granting clause of the lease causes the conveyance of the estate from the lessor to the lessee. Under the express terms of a federal oil and gas lease, the United States grants to the lessee the "exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas (except helium) in the [described] lands . . . together with the right to build and maintain improvements thereupon . . ."32 The habendum clause of the lease conveys the oil and gas interest for a primary term of years and for so long thereafter as oil or gas is produced in paying quantities.33 The exclusive right to develop the lease is bargained for and is an essential element of the lease.

27. 43 C.F.R. § 3103.3.
29. See Terry v. Humphreys, 203 P. 539, 540-542 (1922); see also Rock Island Oil & Ref. Co. v. Simmons, 386 P.2d 239, 241 (N.M. 1963) (involving a federal lease).
30. See generally RBO Indus., Inc. v. S.C. Natural Gas Pipeline Co. of America, 932 F.2d 447, 452-53 (5th Cir. 1991); FDIC v. Hulsey, 22 F.3d 1472, 1483-84 (10th Cir. 1994).
31. See Van Zant v. Heilman, 214 P.2d 864, 870 (N.M. 1950) (the habendum clause of an oil and gas lease distinguishes it from other types of leaseholds because it creates a fee simple determinable estate which continues indefinitely until the occurrence of a condition that causes the estate to terminate and revert back to the original owner).
32. 43 C.F.R. § 3101.1-2 (1996); see also U.S. Dept. of the Interior, Bureau of Land Mgmt., Offer to Lease and Lease for Oil and Gas, Form 3100-11b (Aug. 1988). This provision applies only to the leasehold surface, and not to surface overlying adjoining leases. For a thorough discussion of access to leaseholds, see 2 Charles L. Kaiser, Access to the Leaseholds, LAW OF FEDERAL OIL AND GAS LEASES (1996). For the purposes of this article, access to the leasehold itself is presumed.
While the lease does not grant title to the oil and gas minerals in place, the exclusive right to explore, remove and dispose of all the oil and gas in the described lands granted under the terms of the lease conveys more than a license or mere expectancy to develop the mineral resource.\textsuperscript{34}

The right to develop also carries with it several implied obligations.\textsuperscript{35} For example, the lessee is obliged to develop the lease with reasonable diligence after discovery of oil or gas in paying quantities.\textsuperscript{36} The lessee has a duty to drill offset wells if reasonably necessary to prevent drainage or pay compensatory royalty, drill wells on the lease in accordance with state spacing restrictions, and prevent waste.\textsuperscript{37} Lastly, the lessee also is subject to the implied covenant to market the oil or gas produced.\textsuperscript{38} In determining whether a lessee has complied with these covenants, courts traditionally have applied the reasonably prudent operator standard.\textsuperscript{39}

In a nutshell, during the term of a federal oil and gas lease or any extension thereof, the lessor grants the lessee the express and implied rights of ingress, egress and the right to use so much of the surface of the subject lands as reasonably necessary for the exploration, development, processing, storage and transportation of the oil and gas minerals subject only to reasonable regulation consistent with these rights.\textsuperscript{40} It is this right of access and present ability to reduce the subsurface minerals to possession that gives the lease its value.\textsuperscript{41} The importance of the lease rights granted

\textsuperscript{34} See Union Oil Co. of Cal. v. Morton, 512 F.2d 743 (9th Cir. 1975).


\textsuperscript{41} See Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) (discussing the limitations of a no surface occupancy stipulation attached at lease issuance giving the agency absolute authority to prohibit surface access). See generally Del Rio Drilling Programs, Inc. v. United
becomes immediately apparent when viewed in light of *Lucas v. South Carolina Coastal Council*. 42

C. Antecedent Inquiry Test

In *Lucas*, the South Carolina state legislature enacted legislation which provided that new construction in the coastal zone constituted a "nuisance" and therefore should be prohibited. 43 This legislation prevented Lucas from constructing habitable structures similar to houses immediately adjacent to his property on two lots which he had purchased for just that purpose. 44 The United States Supreme Court held that a court, independent of the justifications for a taking, should first look to the nature of the owner's estate to determine whether "the proscribed use interests were not part of his title to begin with." 45 The Court concluded that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation *only if* the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 46 This preliminary test, which is frequently referred to as the "antecedent inquiry test," essentially embodies the legal principal that where an owner's title is itself limited by background principles of property law that would otherwise preclude the use in question such use may be prohibited without compensation, even though the owner is left without alternative economic uses. 47

It follows that any inquiry into a takings claim must begin with determining whether property rights are at issue and if so, the nature and scope of those rights. Because economic harm alone is insufficient to establish a claim, a showing must be made that the government action causing the economic harm "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." 48

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43. Id.
44. Id.
45. Id. at 1027; Broughton Lumber Co. v. United States, 30 Fed. Cl. 239 (1994).
46. Lucas, 505 U.S. at 1027 (emphasis added).
47. M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 53 (holding that M & J's acquisition of certain rights did not give it the right to mine in such a way as to endanger the public health and safety); see also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489 (1987). But see Lucas, 505 U.S. at 1026 (reasoning that the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory taking must be complete).
In determining the nature and scope of a protected property interest, two important factors must be noted. First, property rights originate outside the Constitution from sources such as state and federal law.\footnote{See Ruckelhaus v. Monsanto, 467 U.S. 986, 1001 (1984); see also Board of Regents v. Roth, 408 U.S. 564 (1972).} Property then cannot be defined by the procedures adopted for its deprivation.\footnote{See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).} In this regard, government regulation of "property" is not imposed in a vacuum. To meet constitutional muster, the nature of an owner's interest must be defined outside the "takings" context. Secondly, property rights cannot be redefined in order to avoid payment of just compensation.\footnote{See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).} The danger of such a notion was emphasized by Justice Holmes in Pennsylvania Coal, where he opined that "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits."\footnote{Lucas, 505 U.S. 1003, 1014 (1992) (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. at 414-15).} For this reason, the government has the burden of establishing that the proposed use would constitute a nuisance,\footnote{See Bowles v. United States, 31 Fed. Cl. 37 (1994).} and may not insulate itself from takings liability by simply "finding" that the activity is a "nuisance" if it was not historically so characterized.\footnote{Lucas, 505 U.S. at 1023-28.}

For example, the United States Court of Federal Claims in Florida Rock Industries, Inc. v. United States\footnote{21 Cl. Ct. 161, 168 (1990) [hereinafter Florida Rock III], vacated and remanded on other grounds, 18 F.3d 1560 (Fed. Cir. 1994).} held the nuisance exception to the Fifth Amendment's requirement of just compensation inappropriate when applied to rock mining of the type planned for plaintiff's property which had never before been considered a nuisance.\footnote{Id. at 167.} In connection with this holding, the court observed that "the assertion that a proposed activity would be a nuisance merely because Congress chose to restrict, regulate or prohibit it for the public benefit indicates circular reasoning that would yield the destruction of the [F]ifth [A]mendment."\footnote{Id. at 168.}

Moreover, the government cannot turn the antecedent inquiry "into a threshold test that defines whether or not a property right exists."\footnote{Store Safe Redlands Assoc. v. United States, 35 Fed. Cl. 726, 733 (1996).} The
importance of this distinction is particularly true in light of the fact that some courts have held that purchase under a comprehensive regulatory scheme may imply some limitation of the property interests at issue. Any such limitation, however, has been expressly linked with the lack of the right to exclude rather than "the right" to be free from government regulation. Absent a right to exclusive possession, entry into a pervasively regulated environment may carry with it the increased likelihood that legitimate government action could adversely affect the value of investments. This argument is more closely related to the subsequent determination of whether there has been a taking by implying a limitation on the claimant's investment backed expectations rather than in undermining the existence of a protectable property interest in the first instance.

III. ESTABLISHING THE RIGHT TO COMPENSATION

Possessing the antecedent property right in a federal oil and gas lease allows a claimant to proceed to establish the right to compensation. To do so, the claimant must show the takings claim is ripe and the government's action is of the type which should not be solely borne by the lessee.

59. See, e.g., M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995). In California Housing Securities, Inc. v. United States, 959 F.2d 955, 957-58 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 324 (1992), the court held that voluntary participation in the pervasively regulated banking business prevented plaintiff from demonstrating historically rooted expectation that it could prevent government action or be compensated. The court reasoned that at the time of the alleged taking, the plaintiff did not possess "the most valued property right in the bundle of property rights, the right to exclusive possession or the right to exclude others." Id. See also criticism of M & J Coal and California Housing Securities by the Federal Circuit in Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (where the court distinguished both cases on the grounds that the government's action in enforcing otherwise valid laws to control social conduct was distinguishable from circumstances in which an owner's use and enjoyment of the property itself is at stake).

60. See Eastern Minerals Intl., Inc. v. United States, 36 Fed. Cl. 541, 549 (1996) (holding that "[m]ere awareness that Eastern's permits could be affected by future regulations does not destroy plaintiff's property interests").

61. See Golden Pacific Bancorp v. United States, 15 F.3d 1066, 1074 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 420 (1994), where the court distinguished United Nuclear's uranium lease from the interest represented by Golden Pacific's investment in the Bank. United Nuclear possessed a reasonable investment-backed expectation because inherent in its respective interest as a mineral lessee was the right to exclude others. See also United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990) (prior regulations do not justify new and unrelated regulations).

A. Perfecting a Claim

For a taking claim to be "ripe," there must be a final agency decision on the merits of the proposed development. This requirement implies both the submission of an application which puts the relevant regulative body on notice of a property owner's intent to develop and receipt of a decision in response.

Several exceptions to both of these requirements exist. First, "it is not necessary for a landowner to engage in a futile, pro forma exercise of agency review when no possibility exists that a permit will be granted" or where a regulation specifically prohibits development of identifiable property if, for example, the enactment itself constitutes a taking of that property.


64. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985). The requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property because the existence of a permit system implies that permission may be granted, leaving the landowner free to use the property desired or if the permit is denied, with other viable uses available to the owner. "Only when a permit is denied and the effect of the denial is to prevent economically viable" use of the land in question can it be said that a taking has occurred. But see Hage v. United States, 35 Fed. Cl. 147, 164 (1996) where the United States Court of Federal Claims has held that it is not necessary to apply for a permit if the process is so burdensome or futile that it "effectively deprives the property of value." See also Stearns Co. v. United States, 34 Fed. Cl. 264 (1995).

65. Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 236 (1996) (citing Parkview Corp. v. Dep't of the Army, 490 F. Supp. 1278 (E.D. Wis. 1980)) (where the government's indication that a permit would not be granted foreclosed the need for applying for a permit); Conant v. United States, 12 Cl. Ct. 689 (1987) (where the circumstances did not indicate that applying for a permit would be futile). In short, a takings claim is ripe when the issues are fit for judicial decision and hardships occur if the court declines to hear the claim. Hage, 35 Fed. Cl. at 163 (citing Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)).
property. Secondly, where a property owner has received a final agency decision which applies the suspect regulations in question to the property, the owner need not file multiple applications and receive multiple denials. In the absence of a formal denial, "a taking may occur by reason of 'extraordinary delay' in governmental decision-making..." with the date of taking to be determined by the Court after the delay becomes unreasonable. Upon receipt of a permit denial, approval or statutory enactment which seems to amount to a denial or after what amounts to an extraordinary delay, property owners can seek a determination of their rights to just compensation.

B. Determining the Right to Compensation

In Pennsylvania Coal the United States Supreme Court noted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in


67. Whitney Benefits v. United States, 752 F.2d 1554, 1558 (Fed. Cir. 1985). See also Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 386 (1988), where the Court held that a property owner need not seek successive denials prior to filing an action for inverse condemnation.

68. Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993); see also Eastern Minerals, 36 Fed. Cl. at 548 (extraordinary delay in permit review process can result in permanent taking without necessity of final agency action. Such delays result in constructive denial that supplants final agency action).

69. Id.

70. Under the Tucker Act, 28 U.S.C. § 1491(a), the Court of Federal Claims has exclusive jurisdiction over all monetary damage claims in excess of $10,000 brought against the United States. This would include takings claims of rights granted under a federal oil and gas lease. The United States District Court has concurrent jurisdiction over claims under $10,000. 28 U.S.C. §§ 1346, 1491(a). Takings claims must be brought within 6 years of the time the taking occurred. 28 U.S.C. § 2501. It is important to note that the date of taking is often difficult to determine and an intensely litigated issue. Property owners must be sensitive to this in the context of the ripeness discussion above. Authority for agency action is a prerequisite for a claim under the Tucker Act. See Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987). Simultaneous actions challenging the legality of the permit denial in one jurisdiction and claiming compensation for the denial in the Court of Federal Claims is allowable because the two claims seek entirely different relief. Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1552 (Fed. Cir. 1994) (en banc). No challenge of the underlying decision is necessary to perfect a claim for monetary damages in the Court of Federal Claims. Bass Enter. Prod., Inc. v. United States, 35 Fed. Cl. 615, 618 (1996).
the general law."71 Nevertheless, the Court explained while "some values are enjoyed under an implied limitation and must yield to the police power . . . the implied limitation must have its limits or the contract and due process clauses are gone."72 Justice Holmes warned that it is "the natural tendency of human nature to extend the qualification [by the police power] more and more until at last private property disappears."73 Thus, on this spectrum between unregulated use and regulations which in effect prohibit all use, the right to compensation must be established. Out of the bevy of cases that guide courts confronted with determining whether there has been a taking "what emerges is at least the basic notion that the government, under the guise of regulation, cannot take from a property owner the core economic value of property, leaving the owner with a mere shell of shambled expectations."74

The United States Supreme Court has identified three factors which have "particular significance" in making the determination: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; (3) "the character of the governmental action."75 Each factor merits further discussion.

C. Economic Impact of the Regulation

The economic impact of a regulation is measured by comparing the fair market value of the property before and after the alleged date of taking.76 It calls for a property owner to show serious financial loss in order "to ensure that every restraint imposed by government to adjust the competing demands of private owners would not result in a takings claim."77 In consideration of this factor, the Court of Appeals for the Federal Circuit has summarized Lucas as teaching that economic impact "alone may be determinative."78 According to Lucas,

[i]f a regulation categorically prohibits all economically beneficial use of land-destroying its economic value for private ownership-the regulation has an effect equivalent to

71. Pennsylvania Coal, 260 U.S. at 413.
72. Id.
73. Id. at 415.
76. Loveladies Harbor, 28 F.3d at 1180.
77. Id.
78. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1564 (Fed. Cir. 1994).
a permanent physical occupation. There is, without more, a compensable taking.
If, however, a regulation prohibits less than all economically beneficial use of the land and causes at most a partial destruction of its value, the case does not come within the Supreme Court's 'categorical' taking rule.\(^\text{79}\)

As a practical matter, though, *Lucas* left unanswered several important questions. First, how much value must an owner lose to constitute loss of "all" economically beneficial use and when does the partial loss of economic use of the property cross the line from a noncompensable "mere diminution in value" to a compensable taking?\(^\text{80}\) Second, how does a court arrive at the appropriate denominator for use in determining whether there has been a categorical taking. The determination of whether there has been a loss of "all" economically beneficial use is directly tied to the identification of the appropriate denominator or relevant parcel against which to measure the denial.\(^\text{81}\)

Each of these questions has been preliminarily addressed to some extent by the United States Court of Appeals for the Federal Circuit. Refusing to adopt any bright line test, the courts' decisions in *Florida Rock Industries*\(^\text{82}\) and *Loveladies Harbor*\(^\text{83}\) both point to rather intensive factual inquiries grounded firmly in traditional notions of property law.

1. **Partial Takings Compensable Under Fifth Amendment**

Recognizing that a regulatory imposition that results in a mere diminution in the value of property is not compensable,\(^\text{84}\) the court in *Florida Rock Industries* went on to address the real question at issue: can government avoid compensation by limiting a regulation's effect to something less than a taking of all of the use, enjoyment and value of the property at issue?\(^\text{85}\) The court held that

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\text{[n]othing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings, nor has the Supreme Court or this Court so held. Thus there remains in cases such as this the difficult task of resolving when a partial loss of economic use of the property has crossed the line from a non-}
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\(^{79}\) Id.

\(^{80}\) *Lucas*, 505 U.S. at 1019 n.8.

\(^{81}\) Id. at 1016 n.7.

\(^{82}\) *Florida Rock Indus., Inc.*, 18 F.3d 1560.

\(^{83}\) *Loveladies Harbor*, 28 F.3d at 1176.

\(^{84}\) In *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Ct. Cl. 1981), the court focused on the uses the regulations permitted and whether given a present economic use the remaining value was sufficient to defeat a takings claim.

\(^{85}\) *Florida Rock Indus., Inc.*, 18 F.3d at 1560.
compensable 'mere diminution' to a compensable 'partial taking'.

The Court reasoned that marketplace decisions should be made under the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good onto a few people, nor act arbitrarily or capriciously, that is, will not act to disappoint reasonable investment backed expectations. The Government, in a word, must act fairly and reasonably, so that private parties can pursue their interests. At the same time, when Government acts as the intermediary between private interests to provide a mutually beneficial environment from which all benefit and in which all can thrive, the shared diminution and free choice that results may not rise to a level of constitutionally required compensation.

The Florida Rock court identified several areas for consideration when the impact of a regulation resulted in a partial but not total denial of economically beneficial use of the property. These areas included whether direct compensating benefits flowing from the regulatory environment were accruing to the property, and others similarly situated; whether benefits, if any, were general and widely shared through the community and the society, while the costs are focused on a few; and whether the alternative permitted activities were economically realistic in light of the setting and circumstances, and were realistically available.

2. Taking of the Parcel as a Whole

In Penn Central Transportation Co. v. City of New York, the United States Supreme Court stated that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Instead, the Court stated that it considers the nature and extent of governmental interference with the "parcel as a whole." When New York City denied the owner's request to build an office building on top of the famous terminal based on the fact that the terminal had been designated a city landmark, the owner challenged the denial as an unconstitutional taking. The Supreme Court refused to treat the air rights separately from the underlying land.

86. Id. at 1570.
87. Id. at 1571.
88. Id.
90. Id. at 130.
91. Id. at 130-31.
92. Id. at 119.
93. Id. at 136-38.
Looking at the terminal as an entire parcel, the Court found no taking because the law did not completely interfere with the owner's present use of the property and the pre-existing air rights were transferable to the owner's other parcels in the city.94

The Lucas court has since questioned the Penn Central "parcel as a whole" analysis. In Lucas, the Court explained that

"[t]he answer to this difficult question [of relevant parcel] may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection of the particular interest in land with respect to which the takings claimant alleges a diminution in, or elimination of, value."95

After Lucas, the Federal Circuit considered the relevant parcel question in Loveladies Harbor, Inc. v. United States. There, the Court declined to adopt a bright line rule that the denominator of the takings fraction is always that parcel for which the owner seeks a permit in favor of "a flexible approach designed to account for factual nuances."96 Factors relevant for consideration include geographic continuity, temporal development parameters, and the effect of disparate regulatory treatment on essential attributes of ownership.97 The nature and type of the property affected also merit consideration.98 In the absence of a complete denial of all economically beneficial use and a categorical taking, these types of factors must be considered by the trial court as part of its analysis in a determination that government action has resulted in a taking.

D. The Character of Government Action

Prior to Lucas, this criterion called for a court to balance the liberty interest of the private property owner against the Government's need to protect the public interest through the imposition of the restraint.99 According to the Federal Circuit, the effect of Lucas was to dramatically change examination of the character of the governmental action from an ad hoc balancing process to a situation in which state property law, incorporating common law nuisance doctrine, controls. In short, the trial court must consider whether the proposed use is contained within the scope

94. Id.
95. Lucas, 505 U.S. at 1016 n.7.
96. 28 F.3d 1171, 1181.
97. Id.
98. Id.
99. Id. at 1176.
of the government's power to regulate under common law nuisance. If the regulation prevents what would or legally could have been a nuisance, then no taking occurred. The State merely acted to protect the public under its inherent police powers.

E. Interference with Distinct Investment Backed Expectations

Consideration of this criterion "was a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." This argument is usually first raised in the context of the antecedent inquiry test. To the extent the interest is found to qualify for protection, it is frequently argued that the use interest does not give rise to reasonable investment backed expectation. General regulation of the property in question, however, does not give way to a complete abandonment of investment backed expectations. Such expectations are formed just as readily by past use consistent with applicable regulation and do not require an absence of regulation to be compensable. For example, generally speaking, the requirement that a person obtain a development permit does not "take" property. The expectancy of a permit under the regulatory scheme plays a central role in this conclusion. Additionally, the assertion of regulatory jurisdiction does not constitute a regulatory taking. It follows then that the mere existence of a specific regulatory scheme or general regulatory jurisdiction should not prevent a property owner from possessing reasonable investment backed expectations.

100. Id. at 1179.
102. Loveladies Harbor, 28 F.3d at 1177.
103. "In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it." Id.
104. Eastern Minerals, 36 Fed. Cl. at 550. Although plaintiffs' leases were subject to the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1201-1328 (1994), plaintiffs reasonably relied on the two permits they received under SMCRA when they invested in the property and "leased the property in reliance on a state of affairs that did not include the definition of adverse effect that formed the basis of the permit denial." Id. at 551.
IV. COMPENSATION AND FEDERAL OIL AND GAS LEASES

A. Bass Enterprises Production Co. v. United States:107 Applying the Ad Hoc Factual Inquiry Test—Post Lucas to a Federal Oil and Gas Lease.

In Bass, the BLM denied eight Applications for Permits to Drill (APD) filed by Bass to directionally drill and develop their federal oil and gas lease rights under the Waste Isolation Pilot Plant (WIPP) in Eddy County, New Mexico.108 The United States had condemned the surface and the initial 6,000 feet subsurface in 1977 for construction of WIPP as a facility for the Department of Energy to store low level nuclear waste.109 In 1992, Congress passed the WIPP Land Withdrawal Act to withdraw the condemned land from the public domain for waste disposal and to establish a regulatory framework to govern the site.110 The Act generally prohibited drilling through and underneath the site from outside the withdrawn lands but exempted plaintiffs' prior existing rights.111 Under the Act, plaintiffs' rights were not to be affected unless the EPA determined that plaintiffs' rights should be acquired in order for WIPP to comply with EPA's final disposal regulations.112 As of the date of filing of the complaint, Bass could not drill because BLM had denied its APDs and EPA had not determined whether the leases should be acquired in order for DOE to comply with the final transuranic waste disposal regulations which were not ever promulgated until after commencement of trial.113 The Court of Federal Claims held that BLM's denial of plaintiffs' APDs constituted a "taking" of their property interests.114 In so holding, the court examined the three criteria set forth by the United States Supreme Court in Penn Central and further developed in Lucas.115

First the Court of Federal Claims recognized the severe economic impact that results when a mineral lessee is prohibited from accessing and reducing minerals to possession.116 The court noted that the denials required

107. See Bass, 35 Fed. Cl. at 616.
108. See id. at 617.
109. See id. at 616.
110. See id.
111. See id.
112. See Bass, 35 Fed. Cl. at 616.
113. See id. at 617.
114. See id. at 620.
115. See id. at 618.
116. See id. at 619.
the lessees leave the property in its substantially natural state.\textsuperscript{117} The court held this imposition affected the plaintiff and any future purchasers from plaintiff.\textsuperscript{118} In considering the character of the government's action, the Bass court applied principles regarding basic notions of property law to the rights under a federal oil and gas lease. The court concluded that there was no evidence presented by the United States that "adjacent land owners could have prevented plaintiff's drilling under the law of private nuisance or [that] the state could have prevented the use under its power to abate nuisances . . . ."\textsuperscript{119} Finally, the investment backed expectations of the plaintiffs indicated that they had relied on the lease rights granted which included the right to develop the lease as proposed by Bass. The court explained that "this criterion limits takings recoveries to plaintiffs who can show the plaintiffs 'bought their property in reliance on a state of affairs that did not include the challenged regulatory regime'."\textsuperscript{120} The court did not adopt the view that the mere existence of a regulatory scheme automatically prohibited investment based expectations or allowed for an infinite expansion of regulation explaining that "[a]lthough regulations and lease provisions governed the property none prohibited plaintiff's drilling entirely."\textsuperscript{121} Plaintiff's expectations were reasonable despite the regulations and lease provisions. Knowledge of a general regulatory scheme did not justify regulations inconsistent with lease rights granted.\textsuperscript{122}

B. Guiding Principles for Regulatory Takings of Federal Oil and Gas Lease Rights

The Bass decision is important for several reasons, the most important of which is its straightforward analysis of the lease rights granted and its rejection of the government's argument that it could make a final decision "not to decide" whether to allow development and still claim not to have effected valid existence of those lease rights.\textsuperscript{123} In this way, the court illuminated guiding principles for future consideration of unanswered questions relating to the regulatory taking of federal oil and gas lease rights on issues such as perfecting a claim, recognizing fundamental attributes of ownership, partial takings and the relevant parcel. Each of these topics merits discussion in context of related authority which would further inform a court's consideration of such issues.

\textsuperscript{117} See Bass, 35 Fed. Cl. at 619.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 620.
\textsuperscript{120} See id. (citing Loveladies, 28 F.3d at 1177).
\textsuperscript{121} See id.
\textsuperscript{122} See Bass, 35 Fed. Cl. at 620.
\textsuperscript{123} See id. at 619.
1. Perfecting a Claim

While a federal oil and gas lease gives the lessee the "exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas," no drilling may be commenced without prior BLM approval of an application for permit to drill.\textsuperscript{124} Upon receipt of an APD, the regulations provide BLM with three basic choices to either (1) approve, (2) deny or (3) advise the applicant of the reasons why final action will be delayed along with the date such final action can be expected.\textsuperscript{125} Clearly, BLM's denial of an APD is sufficient to ripen a claim for inverse condemnation as a result of the denial. More troublesome is the potential for inordinate regulatory delay. Several factors, therefore, must control an analysis of whether or not a mineral lessee has perfected a claim despite BLM's decision to delay.

Implicitly, governmental delay contemplates the time reasonably necessary to complete a decision and therefore contemplates ongoing consideration of the proposed conduct of operations. To the extent "delays" are final decisions not to decide\textsuperscript{126} or are made final contingent on other decision makers\textsuperscript{127} or upon other unrelated factors,\textsuperscript{128} such decisions to "delay" should be challengeable as a sufficiently final decision giving rise to a potential claim for liability. Under these circumstances, the decision to delay is itself a final decision that may result in the taking of essential lease rights granted. Moreover, in situations where BLM adopts interpretative policies with respect to certain whole categories of APDs, a sufficient showing of such a pattern should allow mineral lessees to perfect a claim absent multiple permits and multiple denials.\textsuperscript{129} Finally, while the requirement that a property owner seek a permit may not generally give rise to a takings

\textsuperscript{124} 43 C.F.R. § 3162.3-1(c) (1996).
\textsuperscript{125} 43 C.F.R. § 3162.3-1(h)(1-3) (1996).
\textsuperscript{126} In Eastern Minerals Int'l, Inc. v. United States, 36 Fed. Cl. 541 (1996), "the Plaintiffs based their takings claim on a theory of extraordinary government delay that rendered their lease valueless." Id. at 548. "The Government recognizes that courts have found delay to be a basis for temporary takings, but never for a permanent taking." Id. The Court held that "[e]xtraordinary delay in the permit review process can result in a permanent taking without the necessity of final agency action." Id. The Court reasoned that "[w]ere defendant's theory to prevail, the Government could withhold action on a permit indefinitely and avoid liability for a taking. The Government would have no incentive to consider a permit application in a timely manner." Id.
\textsuperscript{127} See, e.g., United Nuclear Corp. v. United States, 912 F.2d 1432, 1434 (Fed. Cir. 1990).
\textsuperscript{128} See generally Bass, 35 Fed. Cl. at 618.
\textsuperscript{129} "The futility exception serves "to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." Eastern Minerals, 36 Fed. Cl. at 547 (quoting Southern Pacific v. Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990)). The Court held that Eastern did not need to submit permits for each and every tract included in its takings claim where the government's position was clear in response to the first application. Id."
claim, clearly the permit process itself cannot be used by the regulatory agency to take property such as might occur if a “delay” prevented the lessee from performing under the terms of the lease or otherwise caused the lease to expire for lack of production at the end of the primary term.

2. Recognizing the Right of Access

There are no known cases where a categorical taking as described by the United States Supreme Court in Lucas has been found in the context of a federal oil and gas lease. Prior to Lucas, though, other courts have held that prohibition of the only use of mineral rights or denial of access constitute compensable takings. In Whitney Benefits, Inc. v. United States, the United States Court of Appeals for the Federal Circuit upheld a decision by the Claims Court which held “the only property here involved is the right to surface mine a particular deposit of coal. The only possible use of that right is to surface mine that coal.” The Federal Circuit upheld the Claims Court’s finding that the prohibition of surface mining of Benefits’ coal, “deprive[d] Benefits of ‘all economically viable uses of its property’ and destroy[ed] its value.” Of all the attributes of ownership to be considered in determining whether governmental action has denied a federal oil and gas lessee all economically beneficial use of the lease, the most important is the regulation or decision’s impact on the lessee’s right of surface access on the lease. The right to exclusive access is in actuality the central lease right granted. In other contexts, regulation or governmental action which eliminates or severely burdens essential attributes of ownership have been regarded with greater suspicion. Given the importance of the right of access to give effect to the granting clause, similar consideration is warranted in cases where oil and gas lease rights are at issue. This is particularly true where the lease contains no stipulations upon which to justify prohibiting access.

The distinction between reasonable regulation and agency action inconsistent with the lease rights granted was studied in Sierra Club v.

130. Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 502 U.S. 952 (1991); Foster v. United States, 607 F.2d 943, 949 (Cl. Ct. 1979) (The United States’ “continued refusal of access to the [mineral] deposits constituted a taking within the Fifth Amendment for which [the owners] are entitled to compensation.”).
131. 926 F.2d at 1169.
132. Id. at 1172.
133. Id.
134. Id.
135. See Kaiser-Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding the right to exclude others an essential attribute of ownership); see also Hodel v. Irving, 481 U.S. 704, 715-16 (1987) (ability to transfer property to one’s heirs an essential right).
Peterson and Conner v. Burford. Both cases considered this distinction in determining at what stage in the oil and gas leasing process an environmental impact statement was required under NEPA. Two categories of leases were primarily considered. One category included leases with non-surface occupancy (NSO) stipulations attached prior to lease issuance (NSO leases). The other category included leases where such stipulations were not attached (non-NSO leases). The Conner court concluded that “sale of non-NSO leases entailed an irrevocable commitment of land to significant surface disturbing activities, including drilling and roadbuilding, and that such a commitment could not be made under NEPA without an EIS.” The court reasoned that the sale of a non-NSO lease did not reserve to the government the absolute right to prevent all surface-disturbing activity. The court’s decision was premised on the fact that the government’s right to take reasonable measures to minimize adverse impacts to other resource values, land uses or users not addressed in lease stipulations must be consistent with the lease rights granting surface access. The government’s authority to reasonably regulate surface disturbing activities was, therefore, not a sufficient basis upon which to prohibit surface access inconsistent with express provisions of the standard lease form. Prohibiting access to a federal oil and gas lease causes the loss of an essential attribute of ownership and prevents the lessee from the only real economic use of the property. It follows that in circumstances requiring the owner to forego all economically beneficial use of its property, there is the “heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”

137. 717 F.2d 1409, 1412-15 (D.C. Cir. 1983) ("We must decide whether the government’s right to regulate, rather than preclude, surface-disturbing activities protects the forest environment . . . ."). Id. at 1449.
138. 848 F.2d 1441 (9th Cir. 1988).
139. Id. at 1446.
140. Id. at 1447-49.
141. Id. at 1449 (citing Sierra Club, 717 F.2d at 1414-15).
142. Id.
143. Id. See also 43 C.F.R. § 3101.1-2 (1996).
144. Conner, 848 F.2d at 1449-50. The mere existence of a “stipulation” is also not controlling. A stipulation is a contract to which the general rules of contract interpretation apply. United States v. Ideal Cement Co., Inc., 5 IBLA 235, 241 (1972), aff’d, 542 F.2d 1364 (9th Cir. 1976). The stipulation must be considered as a whole with each provision given a reasonable meaning and none left useless. ITT Arctic Services, Inc. v. United States, 524 F.2d 680, 684 (Ct. Cl. 1975). In Conner and Peterson, one of the mitigation stipulations used specifically limited government control over post-lease activities to reasonable regulations which are consistent with oil and gas development and production. 848 F.2d at 1449.
145. Lucas, 505 U.S. at 1018.
3. Partial Takings - The Reasonably Prudent Operator Standard

Bearing in mind that the only real "use" connected with ownership of an oil and gas lease is the ability to access the sub-surface minerals and that absent a surface occupancy stipulation in a lease that provides for direct surface access to the sub-surface, the question of partial takings of oil and gas lease rights fundamentally revolves around how far away can the surface location be moved from that sought by the lessee and what drilling restrictions can be imposed before development becomes uneconomic or technically infeasible.

The lease form and regulations contemplate that in addition to lease stipulations and nondiscretionary statutes a lessee’s surface use rights are also subject to such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. Reasonable measures must be consistent with the lease rights granted and may include, but are not limited to,

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Section 6. Conduct of Operations - Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with the lease rights granted, such measures may include, but are not limited to, modification to siding or design of facilities, timing of operations, and specification of interim and final reclamation measures. Lessor reserves the right to continue existing uses and to authorize future uses upon or in the leased lands, including the approval of easements or right-of-way. Such uses shall be conditioned so as to prevent unnecessary or unreasonable interference with the rights of the lessee.

BLM's interpretation of this specific lease clause was published in Federal Register, Vol. 49, No. 77, pp. 15,641-15,643 on Thursday, April 19, 1984. The notice was published in conjunction with the BLM's publishing of Lease Form No. 3100-11 which became effective July 1, 1984. This notice provided BLM's response to comments regarding various sections of the lease generally and Section 6 specifically.

Several commentators were concerned that the language in Section 6 would provide the United States authority to prohibit reasonable operations on a leasehold. It was believed that if the language were interpreted to the extreme, a lessee would be severely limited with respect to use of the surface. This was not the intent of the Bureau of Land Management in drafting this section. Accordingly, the language has been revised to specify that requirements placed on lessees, through operations of this lease term, must be consistent with the lease rights granted.

"modification to siting or design of facilities, timing of operations and specification of interim and final reclamation measures." Specifically, the regulations recognize that

[a]t a minimum, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.\textsuperscript{148}

While the "200 meter/60 day rule" provides some indication of what BLM recognizes to be reasonable surface use restrictions, it clearly does not address circumstances where restrictions are imposed consistent with the regulation but which would render lease operations uneconomical or technically infeasible.\textsuperscript{149} Essentially at issue then is whether restrictions imposed which render lease operations uneconomical or technically infeasible result in a taking of lease rights granted.

In considering these circumstances, the reasonably prudent operator standard must control the determination of whether conditions short of absolute prohibition placed on development are fundamentally inconsistent with the lease rights granted. As discussed above, the reasonably prudent operator standard traditionally has been applied to determine whether the operator has complied with all the obligations expressed and implied under the terms of the lease vis-a-vis the lessor.\textsuperscript{150} Similarly, it is this standard which must control when considering whether the economic burdens placed on development constitute a taking. In other words, to the extent the movement of the surface location compromises the planned development making it technically infeasible so that no reasonably prudent operator would conduct operations under the circumstances, a partial taking should result. Similarly, should the BLM impose specific conditions of approval which make drilling the well itself uneconomic for

\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} On December 3, 1991, the BLM Director adopted Instruction Memorandum No. 92-67 (IM 92-67) to clarify its interpretation of the 200 meter/60 day rule. For a thorough discussion of these matters, see Charles L. Kaiser & Scott W. Hart, Surface Use Regulation of Federal Oil and Gas Leases: Exploring the Limits of Administrative Discretion, 38 ROCKY MTN. MIN. L. INST. 19-1, 19-28 through 31 (1992) (concluding that "while the BLM may impose surface use restrictions exceeding the 200 meter/60 day rule that are not provided for in stipulations, it may do so only in very limited circumstances after providing substantial documentation supporting its decision." In circumstances where the surface use restriction would render lease operations uneconomic or technically infeasible, acceptance of due degradation would be necessary for management of the oil and gas resource.).

\textsuperscript{150} See discussion supra II.B. generally and supra note 31 specifically.
a reasonably prudent operator, a partial taking should result. This is true because the mere existence of an approved use alone cannot mitigate against regulations which single out the development in question and while potentially benefiting the public at large are borne in such circumstances solely by the lessee.\footnote{151}

4. Relevant Parcel - Post Issuance Redrawing of Lease Boundaries\footnote{152}

Finally, in considering the relevant parcel question in the context of a federal oil and gas lease, attention must be paid to attempts by the United States to redraw lease boundaries after a lease has been issued. Prior to lease issuance, the United States has complete and unfettered discretion to determine the lease boundaries. After lease issuance, the expectations of the lessee for development are fully controlled by production related functions subject only to reasonable regulation. For example, more often than not the sub-surface mapping of a potential geologic prospect bears little relationship to the surface use. Oil and gas leases then place surface parameters on the lessee’s ability to translate a sub-surface geologic concept into actual production. To redefine a lease boundary post lease issuance and especially after exploration or production has substantiated the sub-surface geology is contrary to the lessee’s investment backed expectations and tantamount to a physical occupation of the property.\footnote{153} This is particularly true because under a federal oil and gas lease the minerals which are not produced revert back to the United States. While the United States may choose to forego any royalty which would be generated from lands carved out of an existing lease, it should not be able to require the same of a lessee absent just compensation.

Additionally, the Supreme Court in \textit{Lucas} indicated that the answer to the question of the relevant parcel also involves consideration of the owner’s reasonable expectations as shaped by state or other relevant property law.\footnote{155} Historically, state case law and regulation have recognized well spacing requirements for various stratigraphic depths as fundamental

\begin{footnotes}
\item[151] \textit{Cf. Florida Rock Indus. Inc.}, 18 F.3d at 1570.
\item[152] The relevant parcel issue has not been specifically addressed in the context of a federal oil and gas lease. Almost all of the recent lower court opinions arose in the context of wetlands and the denial of § 404 fill permits required in certain circumstances by the Clean Water Act, 33 U.S.C. § 1251-1387 (1994). \footnote{153}
\item[153] Moreover, courts have recognized that the physical occupation category includes situations in which the government effectively takes title, possession, or denies owners use of their land. See \textit{e.g.}, \textit{Kaiser Aetna v. United States}, 444 U.S. 164 (1979) (finding a navigational servitude imposed on a private marina to be compensable); \textit{Sheldon v. United States}, 7 F.3d 1022 (Fed. Cir. 1993) (finding a valid mortgage was appropriated when the underlying property was forfeited to the United States). \footnote{154}
\item[154] See discussion supra I.B.
\item[155] \textit{Lucas}, 505 U.S. at 1016 n.7.
\end{footnotes}
to the protection of correlative rights and prevention of waste of oil and gas
resources. 156 The well spacing regulations establish the minimum acreage
that must be dedicated to a well and the location of the well within a
governmental subdivision of a section. 157 The purpose of such regulations
is to avoid physical waste of the oil and gas resources and economic waste
by drilling more wells than are necessary for maximum resource
recovery. 158 Since spacing is determined by the drainage radius of a typical
well producing from a particular formation, an oil and gas lessee's
expectation therefore is bound up in the context of engineering principles
and the related regulations which provide for the maximum development
of the reservoir.

Needless to say, this system requires that some oil and gas be left
in place to insure the protection of correlative rights and the prevention of
waste. Such restrictions, though, have been historically recognized as
conveying a mutual benefit by applying a mutual burden on adjoining
mineral lessees. 159 Regulations, however, which would prohibit
development of identifiable spacing units and require that those resources
be left in their natural state inevitably single out specific lessees and
appropriate identifiable resources in total. Under such circumstances, it
cannot be similarly said that the prohibiting of development works both as
a benefit and burden to the lessee. 160 Even if a spacing unit is part of a larger
lease, the complete prohibition of development is inconsistent with the
expectations engendered by a reasonable reliance on regulations of the
industry that have developed over the course of years to protect both
resource owners and lessees adequately. "[W]hen no productive or
economically beneficial use of land is permitted, it is less realistic to indulge
our usual assumption that the legislature is 'simply adjusting the benefits

156. See New Mexico Oil Conservation Division Rule 501.
158. See 8 WILLIAMS & MEYERS OIL AND GAS LAW, MANUAL OF OIL AND GAS TERMS, WELL-
SPACING (definition citing Robert E. Hardwicke, 31 TEX. L. REV. 99 at 111 (1952)); N.M. STAT.
ANN. §§ 70-2-2, 70-2-3 (Michie Repl. Pamph. 1995)); New Mexico Oil Conservation Division
Rules 501-604.
159. When there is reciprocity of advantage, paradigmatically in a zoning case. See, for
example, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), then the claim that the Government
has taken private property has little force; the claimant has in a sense been compensated
by the public program "adjusting the benefits and burdens of economic life to promote the
common good." Penn Central, 438 U.S. at 124. Thus, shared economic impacts resulting from
certain types of land use controls have been held to be non-compensable. Agins v. Tiburon,
447 U.S. 255 (1980) (shared "benefits and burdens" of a zoning ordinance); Penn Central, 438
U.S. 104 at 131 (same).
160. See Lucas, 505 U.S. at 1017 (citing San Diego Gas & Elec. Co. v. San Diego, 450 U.S.
at 652 (Brennan, J. dissenting) (total deprivation of beneficial use is, from the landowner's
point of view, the equivalent of a physical appropriation)).
and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned.\(^{161}\)

V. LESSOR REGULATOR - A CONSISTENT VIEW

When the United States enters the arena of mineral lessors, it fundamentally commits its minerals to development. While reasonable regulation is certainly contemplated, the granting clause of a federal oil and gas lease issued pursuant to the MLA transfers an interest in property which is protected by the Fifth Amendment of the United States Constitution. Given the constitutional dictates of limited powers and its protection of individual liberties to include property rights, the grantor/grantee relationship must be validated in the Court of Federal Claims when conflict between government's multiple roles presents itself in the form of a takings claim.

Toward this end, determination of the nature and extent of the lease rights granted must be made at the time of the grant. Post issuance regulations or regulatory decisions should not be allowed to defeat the grant by denying all or substantially all economically beneficial use as a substitute for stipulations not imposed at the time of the grant. Nor can oil and gas exploration itself on lands subject to a valid existing lease newly be deemed a "nuisance" to prevent liability for taking. As noted by the Court in *Lucas*, "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis."\(^{162}\) If this distinction is to be made at all, it should be made prior to lease issuance. In a system of limited government, the United States should not be able to avoid its obligations by revising the lease rights granted any more than a private mineral lessor who later regrets granting of the lease. A simple example stripped of highly charged environmental issues is instructive on this point. Should the United States decide retroactively to increase its royalty, there would be little doubt that such a decision would be treated as absurd. Why then should retroactive non-surface occupancy stipulations be categorized differently?

Both decisions could under certain circumstances be justified as being for the public good and both would result in rewriting lease provisions. It is axiomatic that ordinary police powers protect the public and private lessors from lessee/operator malfeasance. In contrast, the stipulations attached to the lease, restrictions derived from specific nondiscretionary statutes, regulations and lease terms protect the public by providing for reasonable regulation of surface access not inconsistent with

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the lease rights granted. To construe these federal regulatory powers in such a way as to in effect rewrite lease terms regarding surface access is to go significantly beyond any non-compensable use of such powers. This is particularly true where the nature and extent of the grant is completely within the discretion of the BLM.

In short, the government's role as regulator cannot be used to redefine a lessee's property rights at some date where hindsight may indicate that they were less than providently granted. In this regard, Justice Holmes recognized in Pennsylvania Coal,\(^1\) that it was "the natural tendency of human nature to extend the qualification [by the police power] more and more until at last private property disappears,"\(^2\) and emphasized in this context that "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits."\(^3\)

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163. 260 U.S. 393 (1922).
164. Id. at 415.