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Will the Durational Element Endure - Only Time Will Tell: Temporary Regulatory Takings in the Court of Federal Claims and Federal Circuit after Tahoe-Sierra

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ABSTRACT

In the 2002 Tahoe-Sierra *case, the U.S. Supreme Court held that a 32-month moratorium on development imposed by a local government agency did not constitute a taking within the meaning of the Fifth Amendment of the U.S. Constitution. Although* Tahoe-Sierra *addressed the actions of a local government agency, the case has been equally instructive in federal takings litigation. The Court of Federal Claims is the exclusive forum in which to bring suits against the federal government, and, as such, it is the epicenter of federal takings litigation. In many federal cases in which takings are alleged, plaintiffs challenge the denial or delay of a permit. Prior to the* Tahoe-Sierra *decision, it was well established that a plaintiff seeking compensation for delay occasioned by a federally mandated permitting process would have to show that there had been "extraordinary delay." Notably, the Court of Federal Claims cases decided after* Tahoe-Sierra *appear to preserve the longstanding test of "extraordinary delay" with respect to permitting decisions. However, the Court of Federal Claims has added an interesting twist, now using "extraordinary delay" as a threshold requirement before ever reaching the* Penn Central *balancing test endorsed by* Tahoe-Sierra. *These cases suggest that there is a growing trend in federal courts to favor government defendants in Fifth Amendment takings cases where the claim is based on temporary regulatory action.*

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I. INTRODUCTION

The Takings Clause of the Fifth Amendment to the U.S. Constitution precludes the federal government from taking "private property" for "public use" without paying just compensation.[1] While physical takings, appropriations, and other confiscatory measures clearly justify compensation, recourse is less certain when the government action is regulatory in nature. Nowhere is this dispute more fraught with tension than in regulatory takings claims involving environmental protection measures. [2] The debate becomes even more heated when, rather than depriving a property owner of *all* use of the land, the regulation effects a temporary or a partial taking.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[3] the U.S. Supreme Court held that a 32-month moratorium on development did not effect a temporary regulatory taking of the plaintiffs' property. The case marked a decisive move away from the categorical, per se approach of *Lucas* and a return to the ad hoc balancing test of *Penn Central*. The case was also important because it recognized that, when courts identify the "relevant parcel" in such inquiries, they should consider the temporal dimension of landowner rights.[4] In other words, a landowner who is temporarily deprived of the use of his land but still enjoys the right of future use arguably suffers little damage to his "parcel." Advocates of thoughtful and deliberate land use planning heralded the decision as a landmark case in takings jurisprudence. Indeed, after *Tahoe-Sierra*, the viability of any temporary regulatory takings claim will be called into question.

Notably, subsequent cases decided by the U.S. Court of Federal Claims (CFC) and the Federal Circuit support the *Tahoe-Sierra* holding and renew the emphasis on the *duration* of such temporary restraints. The CFC, with appeals to the Federal Circuit, is the exclusive forum in which to bring suits against the federal government, and is therefore the epicenter of federal takings litigation.[5] These courts have taken *Tahoe-*

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1. U.S. CONST. amend. V.

2. *See* Courtney Harrington, Penn Central *to* Palazzolo*: Regulatory Takings Decisions and Their Implications for the Future of Environmental Regulation*, 15 TUL. ENVTL. L.J. 383, 385 (2002). Environmental regulations and policies affecting a landowner's ability to develop have skyrocketed over the last 30 years. *See* Nancy G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed, in* LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION 1, 15 (Bruce Yandle ed., 1995).

3. 535 U.S. 302 (2002). Justice Stevens wrote for the 6-3 majority.

4. *Tahoe-Sierra* indicated that courts should evaluate many different considerations, "*one of which* is the length of the delay." *Id.* at 338 n.34 (emphasis added).

5. 28 U.S.C. §§ 1346(a)(2), 1491 (2000) (the Tucker Act).

Sierra a step further; they appear to have supplemented the *Penn Central* test with an additional and dispositive element, requiring plaintiff landowners to make a showing of "extraordinary delay" before they are even allowed to make a *Penn Central* argument. This suggests that there is a trend afoot in the judiciary to favor government defendants in temporary regulatory takings, perhaps to further a general policy of upholding development controls in aid of environmentally friendly land use and development.

Justice Stevens' majority opinion in *Tahoe-Sierra* suggested that temporary takings claims might never prevail. However, there are important limitations on the *Tahoe-Sierra* decision, and the subsequent cases decided by the Federal Circuit must be read in light of those limitations. One such limitation is the fact that the challenge in *Tahoe-Sierra* was aimed at a local government agency's moratorium on development. Therefore, some would argue, *Tahoe-Sierra*'s application is limited to moratoria mandated by state or local government agencies. Since states are entitled to significant deference when they act pursuant to their police powers,[6] state-imposed moratoria may be more insulated from Fifth Amendment takings allegations than federal regulation. Also, because moratoria apply broadly to all individuals within a certain locality, they affect a wide range of people equally rather than singling anyone out. Thus, embedded within the *Tahoe-Sierra* decision is the idea that these "state moratoria" cases are not compelling Fifth Amendment cases and will infrequently result in a finding of a taking.

In contrast, most Fifth Amendment takings claims are as-applied challenges, many of which involve delays in permitting where a federal agency is the defendant. Because the permitting process is inherently individualized, the delays occasioned by the process should arguably be evaluated with more scrutiny than moratoria that apply to a broad range of individuals.

II. HOW HAS *TAHOE-SIERRA* AFFECTED THE DECISIONS OF THE COURT OF FEDERAL CLAIMS?

In light of the distinctions between federal permitting cases and state moratoria cases, the question is this: after *Tahoe-Sierra*, are courts more sympathetic to individual plaintiff's that are seeking permits

6. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *See also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978) (noting that where a State "reasonably conclude[s] that the 'health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," the government does not owe the landowner compensation).

pursuant to federal statue than to plaintiffs that are affected generally by a state or local moratorium? Court of Federal Claims cases appear to say no. As it turns out, "federal permit" cases are being decided under the same test, if not a more stringent one, than "state moratoria" cases. Prior to the *Tahoe-Sierra* decision, it was well established that a plaintiff seeking compensation for delay occasioned by a permitting process would have to show that there had been "extraordinary delay."[7] Notably, the CFC cases decided during 2002 and 2003 appear to preserve the longstanding test of "extraordinary delay"[8] with respect to permitting decisions. However, the CFC has added an interesting twist to *Tahoe-Sierra*. Now, the CFC appears to use "extraordinary delay" as a *threshold* requirement, before ever reaching the *Penn Central* balancing test endorsed by *Tahoe-Sierra*. This suggests that there is a trend in U.S. courts to favor government defendants in Fifth Amendment takings cases where the claim is based on temporary regulatory action. It is significant that this trend exists even when adverse effects are doled out on an individualized basis through the denial or delay of a permit. The logical conclusion is that there is wider, and growing, acceptance in the U.S. court system for interim development controls and recognition for the need for sensible development and environmental protection. The result is that occasionally individual landowners will have to bear the brunt of a government's implementation of comprehensive land-use plans.

This article begins with an overview of the history of temporary regulatory takings and the merits of moratoria and permits as interim development controls. Next, this article will evaluate post-*Tahoe-Sierra* decisions from the CFC and the Federal Circuit involving temporary regulatory takings claims. The cases will be discussed in light of two related issues: (1) whether the CFC and Federal Circuit have applied the same reasoning in "federal permit" cases that the U.S. Supreme Court used in the *Tahoe-Sierra* "state moratoria" case, and (2) what test these courts are applying to temporary regulatory takings cases in the wake of *Tahoe-Sierra*. Before exploring this in more detail, a discussion of the history of regulatory takings will provide some context.

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7. Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980); Danforth v. United States, 308 U.S. 271, 285 (1939).

8. Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115, 131 (2003); Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001); Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (2002); Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003).

III. A HISTORICAL ACCOUNT OF REGULATORY TAKINGS

A. Physical Takings

Property rights perhaps are among the most cherished and protected rights in our system of jurisprudence. The Fifth Amendment was one of the early incarnations of laws enacted to protect them; however, courts have struggled for a century to define the parameters of its Takings Clause. Clearly, the Fifth Amendment was designed for physical appropriations of private property by the government. At least initially, this was understood to apply strictly to the tangible aspect of property ownership. However, property ownership clearly involves other, less tangible, benefits. One court characterized it as follows: "'Property' is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible."[9] At root, the Fifth Amendment's guarantee of compensation was 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."[10]

B. Regulatory Takings

By its plain language, the Fifth Amendment requires compensation for the physical appropriation of property. But the Constitution is silent with respect to regulatory takings, which may prohibit a property owner from using private property just as effectively as would a physical appropriation. To fill this gap, the U.S. Supreme Court has inferred from the Takings Clause that government regulations affecting land use can trigger constitutionally-compelled compensation. In the seminal *Pennsylvania Coal* case, Chief Justice Oliver Wendell Holmes penned the now-famous maxim: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[11]

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9. Passailaigue v. United States, 224 F. Supp. 682, 686 (M.D. Ga. 1963).

10. Armstrong v. United States, 364 U.S. 40, 49 (1960).

11. *Pa. Coal*, 260 U.S. at 415. A separate issue, beyond the scope of this article, is the remedy available for plaintiffs who prevail under such a theory. Plaintiffs may either receive just compensation or the regulation itself may be invalidated. Although physical and regulatory takings claims share a constitutional origin, the Court in *Tahoe-Sierra* warned that they should not be used interchangeably as controlling precedents; regulatory takings cases should be understood to occupy a separate "fork" in takings jurisprudence.

Claims of regulatory takings in the United States originated in the early twentieth century.[12] The Supreme Court first recognized regulatory takings as compensable in its watershed decision in *Pennsylvania Coal*.[13] This case heralded the proposition that regulations could effect a taking if they were unduly burdensome.[14] The Court refrained, however, from suggesting a bright-line test for identifying regulatory takings. This ambiguity became the focus of subsequent regulatory takings claims, which were ubiquitous during the growth of the administrative state and the attendant evolution of regulatory law.

1. Penn Central: Evaluating the "Parcel as a Whole"

Half a century after *Pennsylvania Coal*, the Court finally proposed a balancing test for regulatory takings claims in *Penn Central Transportation Co. v. New York City*.[15] There, the owners of Grand Central Station sought to construct a tower above the terminal. The city prohibited such construction because of the property's designation as a historical landmark. The Court decided that the owners were not due just compensation as a result of this restriction on the use of their property. To explain its reasoning, the Court set forth a three-pronged test, evaluating (1) the regulation's economic impact on the landowner, (2) the regulation's interference with distinct investment-backed expectations of the landowner, and (3) the character of the governmental action.[16] Because the landowners in this case were free to explore other, non-prohibited development activities, any adverse economic impact caused by the regulation was mitigated and therefore did not warrant compensation from the government.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 303 (2002).

12. Not coincidentally, claims of regulatory takings originated during the same period as the growth of administrative government. With the burgeoning number of federal regulations enacted over the last century, regulatory takings claims have risen correspondingly. In the last few years, the High Court has delivered a series of opinions commenting on the issues inherent in such disputes. *Tahoe-Sierra* represents their latest position.

13. 260 U.S. at 415. Prior to *Pennsylvania Coal*, the doctrine of takings was restricted to physical acquisitions of property.

14. *Id.* at 414–15. The case also introduced the "diminution of value" standard for evaluating regulatory takings by examining the regulation's financial impact on property. *Id.* at 414.

15. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

16. *Penn Central*, 438 U.S. at 124.

Justice Brennan, who delivered the opinion of the Court, also used the opportunity to articulate the "parcel as a whole" approach to takings assessments. He wrote,

> "Taking" 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]...this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[17]

Justice Brennan thus required that the "aggregate...be viewed in its entirety"[18] and, in so stating, set forth an important principle about the "parcel" that would shape takings jurisprudence over the next few decades.

The U.S. Supreme Court again explored the extent of the government's authority to act in the public interest in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[19] There, a state statute required that a certain portion of subterranean coal remain in place to prevent instability on the surface. The plaintiffs argued that this regulation was a taking of their "support estate," which was recognized in Pennsylvania law as a separate estate in real property. In spite of the state law to the contrary, the Court refused to recognize the support estate as a piece of property that could be "taken" and upheld the regulation. In doing so, the Court supported the "parcel as a whole" principle, which dictates that uses of property cannot be segregated and evaluated separately. Rather, the overall use of the property is the appropriate "denominator" to evaluate.[20] The *Keystone* case is thus regarded as articulating the "denominator" principle.[21]

2. The Legal Anomaly of Lucas v. South Carolina Coastal Council

The "parcel as a whole" and "denominator" principles were characterized quite differently in the controversial 1992 *Lucas v. South*

17. *Id.* at 130-31.

18. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002).

19. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987).

20. In a departure from this rule, the Oregon Court of Appeals recently decided that the "whole parcel" rule does not apply in Oregon. Oregon courts thus will examine only those portions of property that are subject to the use regulation. Coast Range Conifers, LLC v. State, 76 P.3d 1148 (Or. Ct. App. 2003) (holding that a regulation that affected nine acres of a 40-acre parcel did effect a regulatory taking).

21. *See also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

Carolina Coastal Council decision. [22] After purchasing two beachfront lots, David Lucas was prohibited by a subsequently-enacted statute from developing the land.[23] The *Lucas* Court ruled that regulations that deprive owners of "all economically beneficial use" of their property are takings requiring just compensation.[24] Significantly, the Court equated the *regulatory* taking that deprived Lucas of all economic use of his land with traditional *physical* takings, calling them both "per se" takings that warrant just compensation. To use the jargon of *Keystone*, the *Lucas* Court identified the "denominator" as the economic use of the property, even the *temporary* use of that property. In so deciding, the Court declined to consider other characterizations of the denominator, such as the possibility of future use or other beneficial, though non-economic, uses.

Significantly, *Lucas* helped lay the groundwork for the petitioners' arguments in *Tahoe-Sierra*. They argued that a temporary taking occasioned by a moratorium on development amounted to a per se taking, no matter how brief the deprivation of rights, because it deprived owners of all economic use. The Court in *Tahoe-Sierra* was not convinced by the per se argument and took pains to carefully delineate the rare circumstances under which such an argument might prevail.

C. Temporary versus Partial Takings

The bundle of rights metaphor, when applied to takings problems, requires an analysis of whether a taking of one stick in the bundle entitles a landowner to compensation. Takings jurisprudence gets muddled when claimants allege partial or temporary takings. Partial takings usually involve physical takings, while temporary takings are generally regulatory in nature. This is an important distinction to recognize, especially in light of the Supreme Court's emphasis in *Tahoe-Sierra* that physical and regulatory takings should be evaluated using two different tests.[25]

Partial takings are often raised in the context of leaseholds to surface and mineral rights.[26] They also arise when a particular segment

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22. 505 U.S. 1003 (1992).

23. South Carolina Beachfront Management Act, S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (West, WESTLAW through 2004 legislation).

24. *Lucas*, 505 U.S. at 1027.

25. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 303 (2002). *See also* discussion *infra* note 87 and accompanying text.

26. *See, e.g.*, Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (2002); Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100 (2002); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Walcek v. United States, 303 F.3d 1349 (Fed. Cir. 2002); Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa. 2002).

of property is regulated while the remaining portion remains unregulated; for example, when 15 acres on a 20-acre lot are subject to the Endangered Species Act by virtue of the presence of a listed bird's habitat.

Temporary takings are distinct from partial takings, in that they are generally regulatory rather than physical in nature. Temporary takings deny a landowner the right to use his property for a limited period of time. Courts struggle with the issue of whether a temporary regulatory restriction on land development should trigger a Fifth Amendment right to compensation. The problem becomes more complex when landowners are prohibited from enjoying the full use of their property, but for a brief time only. Significantly, temporary takings sometimes deny a landowner the use of an *entire* physical parcel of land, though not indefinitely. Temporary regulatory takings claims are based on the underlying belief that the power to use and enjoy property derives its power from the owner's ability to enjoy and use her land whenever she sees fit. *Tahoe-Sierra's* denial of a temporary regulatory takings claim is significant because, in using the "parcel as a whole" standard, the Court acknowledged that landowners who cannot develop land presently still retain a valuable interest in being able to use and enjoy the land at a future, though unspecified, date. Taken literally, *Tahoe-Sierra* would seem to preclude any temporary regulatory takings claim, no matter how long the duration.

The Supreme Court recognized that a regulation could trigger a *temporary* taking for the first time in a 1982 decision. In *First English Evangelical Church of Glendale v. County of Los Angeles*, the Court held that temporary land use restrictions that deprive a landowner of all economically beneficial use, even if ultimately lifted, justify the payment of just compensation.[27] The plaintiff in that case was a church that owned land located in a canyon along a watershed area. The church used the land as a campground and retreat center for handicapped children. When a flood destroyed the buildings in 1978, Los Angeles County adopted an interim ordinance forbidding the construction or reconstruction of any building within a certain flood-prone region.[28] The church's property fell within the protected area. The church filed suit against the county soon after, alleging that the interim ordinance stripped the church of all use of the property. The Supreme Court noted that "'temporary' takings which, as here, deny a landowner all use of his

27. 482 U.S. 304, 318 (1987). Importantly, the case has subsequently been characterized as addressing the "remedial" question only, and not issuing a formal holding on the "takings" issue. *See Tahoe-Sierra*, 535 U.S. at 328.

28. *First English*, 482 U.S. at 307.

property are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[29] In dicta, the Court in *First English* indicated that "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" might not warrant compensation.[30]

The Court was divided in *First English*; Justices Stevens, Blackmun, and O'Connor joined in dissent.[31] They noted that regulations are three-dimensional in terms of their depth, width, and length. They wrote,

> As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred.[32]

The cases highlighted in this article review various methods of interim development controls, regulatory devices used to bring development to a halt temporarily while the impact of such development is assessed. Interim development controls come in all shapes and sizes and can include statutes, ordinances, moratoria, or permit requirements. *First English*, for example, dealt with an interim ordinance forbidding development. In *Tahoe-Sierra*, petitioners challenged the use of moratoria. In contrast, many of the temporary takings claims heard in the Court of Federal Claims involve disputes over the delay or the denial of a permit.[33] The next section of this article will review these various development controls before summarizing the events leading up to the *Tahoe-Sierra* case.

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29. *Id.* at 318.
30. *Id.* at 321.
31. *Id.* at 322.
32. *Id.* at 330.
33. 28 U.S.C. § 1491 (2000). The Court of Federal Claims has jurisdiction over suits in which the federal government is a defendant, arising from a statute or regulation, among other things. Plaintiffs often bring suit against the government as the result of a permitting requirement contained in a federal statute. This is the exclusive forum for such claims if the plaintiff seeks compensation in excess of $10,000.

IV. INTERIM DEVELOPMENT CONTROLS: THE DIFFERENT POLICY OBJECTIVES BEHIND MORATORIA AND PERMITS

Both federal and state governmental entities employ the use of interim development controls as a means of promoting orderly community development and reducing hazards and inconvenience. Government entities retain the ultimate authority to utilize zoning statutes, ordinances, moratoria or permit requirements in order to implement comprehensive, long-term land use plans. Zoning statutes are arguably the most widely accepted devices, as zoning has long been regarded as a constitutional exercise of state police power.[34] But a state's uses of other devices, such as moratoria or permit requirements, have not enjoyed such widespread acceptance. Indeed, some landowners challenge the use of these land use tools on constitutional grounds, arguing that they compromise individual liberties.

Permit requirements and moratoria both fall under the broad umbrella of land use controls, but the two devices serve different policy concerns. Stated simply, permits affect individuals, while moratoria affect a wider group of landowners.

A. Moratoria

Tahoe-Sierra dealt with a series of moratoria that stymied development for 32 months. Moratoria are frequently used when government entities require extra time to maintain the status quo and assess the environmental impact of development. These interim development controls are an important component in wisely planned growth and are generally recognized as permissible exercises of a state's police powers.[35] They are sometimes referred to as "stop-gap" zoning devices, and are used to "temporarily freez[e] land development" by allowing only uses that are "consistent with a contemplated zoning plan or zoning change."[36] The *Tahoe-Sierra* decision lauded the use of development moratoria, characterizing them as "an essential tool of successful development."[37] The Court also pointed to decisions from

34. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

35. *Id.*

36. Mark. S. Dennison, *Zoning: Proof of Unreasonableness of Interim Zoning and Building Moratoria*, 32 AM. J. POF 3d 485, § 3 (2003).

37. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 338 (2002). The Court also expressed its concern for the implications of a different decision, pointing out that "land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments

around the nation that had held development moratoria were not takings within the meaning of the Fifth Amendment.[38]

Moratoria, although characterized as "interim" controls, sometimes prohibit development for long periods of time. There is no bright-line rule regarding the permissible duration of moratoria. Courts have upheld the validity of moratoria ranging from nine months[39] to six years or more.[40] Occasionally, even "open-ended" moratoria, without termination points, have been upheld.[41] The only limits on moratoria are that they must "protect a significant public interest, be narrowly tailored and of the shortest reasonable duration, and provide limited use of the property during the moratorium, if possible."[42]

B. Permits

While moratoria occasionally hinder a landowner's ability to develop, more frequently, a landowner's ability to develop is hindered by a permitting process.[43] Permits are required for development in a

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could afford." *Id.* at 324. *See also* J. JUERGENSMEYER & T. ROBERTS, LAND USE PLANNING AND CONTROL LAW §§ 5.28(G), 9.6 (1998); Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, 48 LAND USE L. & ZONING DIG. 3 (June 1996); Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 U. DET. J. URB. L. 65 (1971); Kenneth H. Young, *Interim Controls*, *in* 2 ANDERSON'S AMERICAN LAW OF ZONING § 10:03 (4th ed. 1996 & Supp. 2003); Adam L. Wekstein, *Land Use and Zoning*, 485 PRAC. L. INST. REAL EST. L. & PRAC. 489, 504–06 (2002).

38. *See, e.g.*, Santa Fe Village Venture v. City of Albuquerque, 914 F. Supp. 478, 483 (D.N.M. 1995) (30-month moratorium not a taking); Williams v. City of Central, 907 P.2d 701, 703–06 (Colo. App. 1995) (10-month moratorium not a taking); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1198 (N.D. Cal. 1988) (18-month moratorium not a taking).

39. Friel v. Triangle Oil Co., 76 Md. App. 96 (1988).

40. Offen v. County Council for Prince George's County, 625 A.2d 424 (Md. Ct. Spec. App. 1993) (upholding eight-year sewer moratorium on development in most of the county), *rev'd on other grounds*, 639 A.2d 1070 (Md. 1994); Ord v. Kitsap County, 929 P.2d 1172 (Wash. Ct. App. 1997) (upholding six-year moratorium on building required by state forestry statute); HBP Assoc. v. Marsh, 893 F. Supp. 271 (S.D.N.Y. 1995) (upholding ten-year moratorium on sewer extensions).

41. *See, e.g.*, Dallas v. Crownrich, 506 S.W.2d 654, 656 (Tex. Civ. App. 1974); Metro. Dade County v. Rosell Constr. Corp., 297 So. 2d 46 (Fla. App. 1974); *see generally* Matthew G. St. Amand & Dwight H. Merriam, *Defensible Moratoria: The Law Before and After the* Tahoe-Sierra *Decision*, SJ015 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 925, 936–41 (2003).

42. St. Armand & Merriam, *supra* note 41, at 951; *see also* ROBERT MELTZ ET AL., THE TAKINGS ISSUE 272–78 (1999). "Escape hatches" are also favored to allow property owners a way out. *In re* Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (1972) (moratorium with a capital improvement buyout provision upheld).

43. Incidentally, although *Tahoe-Sierra* was principally concerned with the constitutionality of the development moratoria, the Court also briefly addressed permitting delays. The Court pointed out that, under the modified categorical rule the petitioners were

wide variety of contexts through federal statutes and are most frequently used to protect environmentally fragile zones.[44] For example, the Surface Mining Control and Reclamation Act (SMCRA) requires permits as a precondition to surface mining as a means of mitigating the adverse environmental effects of coal mining operations.[45] Through the permitting process, the permitting agency or office evaluates the applicant's ability to comply with the applicable regulations and, when necessary, adhere to certain mitigation measures. In the case of the SMCRA, for example, the permit-holder must "restore the approximate original contour of the land."[46] This becomes one of the many factors that the Office of Surface Mining will consider when weighing a permit application. When a permit is denied, or the granting of a permit is delayed during the decision-making process, developers often cry takings.

C. The Individualized Impact of Permit Denials

Permits are distinct from moratoria in a number of senses. For one thing, moratoria are generally enacted pursuant to state statute or local ordinances.[47] As such, they are often entitled to deference because they arise from state police power. In contrast, many permitting requirements derive from federal statutes or state systems that have met with federal approval.[48] Permits also differ from moratoria in terms of the scope of their application. Moratoria allow government agencies to make well-reasoned decisions about long-range plans and goals. Moratoria create a "reciprocity of advantage," because they protect the interests of many even if they simultaneously restrain permissible activity.[49] Permits, on the other hand, affect individuals. This is the crux of landowner complaints in permitting cases.

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arguing for, there would be no per se taking if the TRPA had delayed a permitting process in order to wait for an environmental assessment plan. *See Tahoe-Sierra*, 535 U.S. at 337 n.31.

44. *See, e.g.*, Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (2000); Endangered Species Act, 16 U.S.C. § 1539(a) (2000) (incidental take permits); Clean Water Act, 33 U.S.C. § 1344 (2000) (fill permits required on federally regulated wetlands); Solid Waste Disposal Act, 42 U.S.C. § 6901-6902 (2000) (permits to comply with disposal regulations); Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579, 106 Stat. 4777 (1992) (requiring permits for drilling from outside the withdrawn lands).

45. Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (2000).

46. *Id.* § 1265(b)(3).

47. *See Tahoe-Sierra*, 535 U.S. at 342 n. 37.

48. The CFC's jurisdictional statute, for example, says that the CFC has jurisdiction over any claim against the federal government to recover damages founded on the Constitution, a statute, or a regulation, among other things. 28 U.S.C. § 1491(a)(1) (2000).

49. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

When challenging a government entity's denial or delay in the permitting process, landowners point to the inherent inequity in a process that deprives an individual of constitutionally protected rights. In other words, denials of permits or delays in the permitting process are likely to make individuals feel "singled out" rather than feeling as though they are part of a long-term plan that affects everyone equally.[50] A "reciprocity of advantage" is harder to justify when individuals bear the brunt of the restriction.[51] Thus, the policy objectives behind protecting slow, deliberate assessments of regional plans lose strength when applied to an individual property owner. The Supreme Court compared permitting processes with bans on development: "the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel."[52] Landowners would argue that findings of takings might therefore be easier to justify in the permitting context.

Yet there are strong counterarguments that weigh against the angry landowner's contentions. Notably, the federal statutes that require permits as a prerequisite for development often address the most critically endangered resources, whether the resources are water, air, land, or flora and fauna.[53] Permits are usually required in places of heightened concern such as areas that are ecologically fragile or easily compromised. Permits in these situations ensure, through affirmative steps, that each and every attempt to develop will be scrutinized and that appropriate safeguards will be adhered to. In contrast, the primary function of a moratorium is to simply maintain the status quo through inaction.

D. The "Extraordinary Delay" Factor

Outright denials of permits are not frequently litigated. However, plaintiffs often bring suit due to the delay in obtaining a permit. Because of the delays inherent in a permitting process,

50. *Tahoe-Sierra*, 535 U.S. at 341. Interestingly, the Court in *Tahoe-Sierra* noted that one distinction between physical and regulatory takings was that "physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights," while regulations stem from a public program meant to "promote the common good." *Id.* at 321–24 (quoting from Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). If the Court considered physical appropriations a "greater affront" to individuals, perhaps it might draw a similar distinction between regulations that affect individuals more than other regulations (for example, individual permits as opposed to moratoria).

51. *Tahoe-Sierra*, 535 U.S. at 341.

52. *Id.* at 304.

53. *See* statutes cited *supra* note 44.

developers allege temporary regulatory takings for the temporary loss of use of their land. The Court of Federal Claims often hears these suits, because they are brought against the federal government as the result of a permit requirement in a federal statute.[54]

Prior to the *Tahoe-Sierra* case, the Court of Federal Claims and the Federal Circuit employed a test of "extraordinary delay" to assess whether a takings claim for a permit delay was viable.[55] In other words, a takings claim was not ripe for review unless the government had denied a permit.[56] If the government had not denied a permit request, the firmly-held rule was that only "extraordinary delays" would justify a takings allegation.[57] "Extraordinary delay" has been a component of takings cases for most of the century. An early case noted that "[m]ere fluctuations in value during the process of governmental decision making, *absent extraordinary delay*, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'"[58]

After the *Tahoe-Sierra* case, these courts continued to utilize this test of extraordinary delay but placed more emphasis on it than they had before. In fact, post-*Tahoe-Sierra* cases from the CFC and Federal Circuit suggest that this element has become a dispositive one, and that plaintiffs cannot reach their *Penn Central* argument without first showing an "extraordinary delay." Several CFC decisions cited *Tahoe-Sierra* for the proposition that an extraordinary delay in the permitting process, coupled with bad faith on the part of the government, will result in a compensable taking.[59] The notion of "extraordinary delay" in these cases is nothing new. However, the use of this requirement as a *dispositive* element *is* a new and important development in takings jurisprudence in

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54. *See* statutes cited *supra* note 44.

55. Agins v. City of Tiburon, 447 U.S. 225, 263 n.9 (1980); Danforth v. United States, 308 U.S. 271, 285 (1939).

56. *Agins*, 447 U.S. at 263 n.9; *Danforth*, 308 U.S. at 285; *see also* United States v. Riverside Bayview, 474 U.S. 121 (1985).

57. *See* Fed. Circuit Bar Ass'n, *Cases and Recent Developments*, 12 FED. CIR. B.J. 331, 333 (2002).

58. *Agins*, 447 U.S. at 263 n.9 (quoting *Danforth*, 308 U.S. at 285).

59. Fed. Circuit Bar Ass'n, *Takings Claim Premised on a Denial of a Permit to Fill Wetlands Is Not Rendered Unripe by Issuance of a Provisional Permit During Litigation, but Permit Issuance May Affect Takings Analysis by Rendering Any Taking Temporary*, 13 FED. CIR. B.J. 139, 141 (2003); *see also* Cooley v. United States, 324 F.3d 1297, 1305 (Fed. Cir. 2003). *Tahoe-Sierra* has also prompted the CFC to recognize the parcel as a whole as the relevant parcel, upholding the principle articulated by the Supreme Court; *see, e.g.*, Walcek v. United States, 303 F.3d 1349 (Fed. Cir. 2002); Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100 (Fed. Cl. 2002); Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (Fed. Cl. 2002). For a pre-*Tahoe-Sierra* CFC-equivalent of the *Lucas* decision, see *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989).

the CFC. Before discussing this in more depth, it will be useful to review the Supreme Court's decision in *Tahoe-Sierra*.

V. RETURN TO THE PENN CENTRAL BALANCING TEST: THE *TAHOE-SIERRA* DECISION

A. The Dispute over the Moratoria

The Supreme Court's decision in *Tahoe-Sierra* focused on the use of moratoria on development in the implementation of a comprehensive land use plan. Development of the Lake Tahoe area experienced an upsurge in the 1950s and 1960s. The lake's famously crystal-blue waters and striking clarity drew an onslaught of new developers to the region over the next few decades. In this era of rapid development, the lake experienced an increase in "nutrient loading," which clouded the water significantly.[60]

Specialists attributed the additional nutrients to the steep slope of the basin and the increased amount of impervious coverage of the land, such as concrete, asphalt, and building foundations. Where impervious material covered soil, precipitation gathered and pooled in certain areas. This in turn created forceful runoff from developed areas on steeper slopes in the Basin. Specialists identified the increased runoff and corresponding erosive effect as the principle cause of the muddying of the lake's waters. In response, the areas on steeper slopes, or those located closest to the lake's shores, were identified as Stream Environment Zones (SEZs).[61] These critical zones became the focus of subsequent conservation efforts. Because the Basin straddled two states and a variety of jurisdictions, the legislatures of both Nevada and California jointly adopted the Tahoe Regional Planning Compact in 1968. The compact created the Tahoe Regional Planning Agency (TRPA) to oversee and regulate the development of the area.[62] The compact also articulated the states' mutual goal of protecting the Basin and conserving the area's natural resources.

After a bumpy start, the compact was amended in 1980. The amended compact redefined the objectives of TRPA, ordering it to articulate "regional environmental threshold carrying capacities."[63] A series of strict deadlines was outlined for TRPA's objectives. It further

60. *Tahoe-Sierra*, 535 U.S. at 307–08.

61. *Id.* at 308–09.

62. *Id.*

63. *Id.* at 310. Carrying capacities are generally understood to represent the theoretical maximum number of individuals that a specific environment or habitat can support.

instructed TRPA to adopt a regional plan consistent with its determination of carrying capacities within one year of assessing those capacities. The compact notably included a finding by the Nevada and California legislatures that, "in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan."[64]

The first moratorium arose out of TRPA's duty to implement the regional plan. Acknowledging that it was not able to meet the compact's deadlines, in 1981 TRPA enacted the first of the two challenged moratoria. Ordinance 81-5 halted development in the SEZ lands and certain other parcels in the state of California. It took effect on August 24, 1981, and was scheduled to continue until the adoption of the permanent regional plan.[65] After two years, TRPA was still unable to propose a regional plan that complied with the strictures of the compact. As a result, TRPA adopted Resolution 83-21. This directive halted "all project reviews and approvals, including the acceptance of new proposals."[66] The moratorium remained in effect until the regional plan was ultimately adopted on April 26, 1984.[67] Together, Ordinance 81-5 and Resolution 83-21 suspended construction on all SEZ lands in the Basin for 32 months. Some sensitive non-SEZ lands in California and Nevada were also affected.

Even when the regional plan was finally adopted in 1984, troubles continued. The day of its adoption, the State of California filed an action to enjoin implementation of the regional plan, asserting that it failed to propose sufficiently strict land use regulations to protect the Basin. The district court agreed and granted the injunction,[68] which was upheld by the Court of Appeals.[69] The injunction continued until 1987, when a revised plan was approved and adopted.

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64. *Tahoe-Sierra*, 535 U.S. at 310 (quoting the amendment made to the Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233, 3243 (codified at CAL. GOV'T CODE ANN, § 66801 (West Supp. 2002); NEV. REV. STAT. § 277.200 (1980)).

65. *Tahoe-Sierra*, 535 U.S. at 311.

66. *Id.*

67. *Id.*

68. *See* U.S. Supreme Court Petitioner's Brief at 7, *Tahoe-Sierra* (No. 00-1167, 2001 WL 1692011).

69. *Id.* Before reaching the U.S. Supreme Court, the *Tahoe-Sierra* case had resulted in many decisions published by the district court in Nevada and the Ninth Circuit. For a complete list of cites to those opinions, see the district court opinion dealing with the issue of whether the defendants had waived their right to raise the correct statute of limitations as an affirmative defense at *Tahoe-Sierra*, 992 F. Supp. 1218, 1219 n.1 (1998).

Shortly after the 1984 plan was adopted, the Tahoe Sierra Preservation Council (TSPC), together with approximately four hundred individual landowners, brought suit against TRPA, alleging a taking of private property without just compensation in violation of the Fifth Amendment of the U.S. Constitution. The individual landowners claimed that they had purchased their land with the intent of constructing single-family homes prior to the implementation of the 1980 compact.[70] Those that purchased their land after 1972 had already been subject to the regulations associated with SEZ land and other sensitive zones.[71] Specifically, the petitioners identified the two-year Ordinance 81-5, the eight-month Resolution 83-21, and the 1984 regional plan as the causes of their woes.[72]

B. The District Court Decision

The lower court decision illustrates the confusion surrounding takings jurisprudence in regulatory, temporary takings claims. The District Court for the District of Nevada used no fewer than three different tests in reaching its decision. The court began its Fifth Amendment analysis by identifying the case as a regulatory takings case and proceeded to evaluate the facts under the *Agins v. City of Tiburon* two-prong test.[73] The court first weighed whether the moratoria substantially advanced a legitimate state interest (pursuant to the first prong of the *Agins* test), and determined that this prong was satisfied.[74] It subsequently evaluated the facts under *Agins'* second prong: whether the regulation denied the owners economically viable use of their land. Here, the court ran into some complications. It acknowledged that the moratoria might have effected a "partial taking," and that the series of partial takings might have amounted to a "total taking."[75] In order to answer the second question posed by *Agins*, the court rather awkwardly looked to the *Penn Central* balancing test, shoehorning the two tests into one analysis.

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70. *Tahoe-Sierra*, 535 U.S. at 311.

71. *Id.*

72. *Id.* The claim based on the 1984 plan was dismissed. The district court found that the injuries resulting to the plaintiffs during the post-1984 plan period were the result of the California injunction rather than the plan itself. Plaintiffs later asserted a claim based on the 1987 plan, which was dismissed because the statute of limitations had passed. *Id.* at 313.

73. Tahoe-Sierra, 34 F. Supp. 2d 1226, 1238 (D. Nev. 1999); Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).

74. *Tahoe-Sierra*, 34 F. Supp. 2d at 1239.

75. *Id.* at 1240.

After weighing the economic effect on the landowner, interference with investment-backed expectations, and the character of the government action, (as suggested by *Penn Central*) the court determined that the regulation did not deny the landowners economically viable use of their land; thus there was no taking.[76] Among the factors the court found determinative were the temporary nature of the moratoria, the lengthy delays between land purchase and construction in the Basin, and the failure of the plaintiffs to provide evidence of specific harm.[77]

However, the court did not stop there. Instead, it continued in its analysis to evaluate the facts according to *Lucas*. While TRPA argued that the moratoria represented reasonable efforts to plan development in the Basin, the court disagreed. Although the court acknowledged that the property retained some value for the duration of the moratoria, it arrived at the conclusion that the plaintiffs had been "*temporarily* deprived of *all* economically viable use of their land."[78] As such, TRPA's action amounted to a categorical taking under the *Lucas* rule. The court explained that the failure of the moratoria to provide explicit termination dates weighed heavily in their decision. The court recognized the difficulty of its decision when it considered whether all moratoria on development should automatically constitute takings. Accordingly, the court dismissed the complaint under the 1984 and 1987 plans, but found that a taking occurred in the 32-months of moratoria imposed; it ordered TRPA to pay damages to a number of the plaintiffs as a result.[79]

C. The Ninth Circuit Decision

In the wake of the district court decision, the plaintiffs appealed the dismissal of their allegations based on the 1984 and 1987 plans. Notably, however, the plaintiffs failed to challenge on appeal the district court's findings or their use of the *Penn Central* factors.[80] In fact, the plaintiffs expressly stated on appeal that they did not dispute whether the moratoria amounted to a taking under the *Penn Central* approach.[81] This omission would prove significant in light of the Supreme Court's final decision. The defendants, meanwhile, challenged the takings decision. The main issue on appeal, then, was whether the district court

76. *Id.*
77. *Id.*
78. *Id.* at 1245 (emphasis added).
79. *Id.* at 1255.
80. *Tahoe-Sierra*, 216 F.3d 764 (9th Cir. 2000).
81. *Id.* at 773.

properly used the *Lucas* categorical rule in the context of a temporary regulatory restriction on land use.

The court of appeals reversed the lower court decision, holding that the impact on the landowners had been temporary, and therefore not "categorical" within the meaning of *Lucas*.[82] The court acknowledged that property interests are multidimensional and consist of physical, functional, and temporal elements. However, upholding the *Penn Central* mandate that the parcel be considered as a whole, the court declined to sever those dimensions in evaluating a takings claim.[83] The landowners in this case had not been denied all productive use of the entire parcel. Furthermore, the court reasoned that the moratoria implemented by TRPA were "widespread and well established" forms of regulation.[84] The Ninth Circuit in its opinion held that the ad hoc balancing under *Penn Central* was the appropriate test in this case. Plaintiffs, undoubtedly crestfallen at their failure to dispute the applicability of *Penn Central* on appeal, applied for rehearing, which was denied. The appeal to the Supreme Court followed shortly thereafter.

D. The Supreme Court Decision

Constrained by the narrow issues on appeal,[85] the Supreme Court did not decide whether a compensable taking had occurred under the *Penn Central* factors. Instead, the Court simply affirmed the Ninth Circuit's refusal to apply the *Lucas* categorical rule to the facts of this case and identified the *Penn Central* framework as the appropriate inquiry given the circumstances of the case.[86] Justice Stevens wrote for the 6-3 majority. Although the central holdings were that (1) the 32-month moratoria did not constitute a per se taking and (2) temporary regulatory takings are to be evaluated under *Penn Central*, Justice Stevens also clarified some key concepts that had been muddled in light of the uncertain state of takings law.

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82. *Id.* at 774.

83. *Id.*

84. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 319 (2002).

85. *Id.* at 331-36. The Court seemed to focus on the procedural posture of the case. For example, it listed seven arguments that the plaintiffs had not made and briefly evaluated whether they would have been successful. The seven hypothetical scenarios might be used by future petitioners as rough guidelines. *See infra* note 103.

86. *Id.* at 331-33.

Notably, the Court drew a definitive line between physical takings and regulatory takings.[87] In its discussion, the Court emphasized that the two physical and regulatory takings should *not* be evaluated using the same test. Justice Stevens wrote:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.[88]

In case it was not already clear, the Court went on to say that "we do not apply our precedent from the physical takings context to regulatory takings claims."[89] This was a careful and deliberate attempt to rein in the scope of the *Lucas* decision.[90]

The Supreme Court's distinction between physical and regulatory takings is important for another reason: physical takings enjoy a presumption of compensation, while regulatory takings require a much higher standard. The Court restated the general rule that, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a *categorical* duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[91] The Court then declined to extend this categorical duty to cases involving regulatory cases, stating that "[t]he first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of governmental actions."[92] Temporary physical takings, therefore, trigger this categorical duty to compensate the owner, regardless of whether the entire parcel or merely a part of the parcel is taken. Claims of temporary regulatory takings, on the other hand, do not

87. *Id.* at 322–23. This in and of itself had a significant impact on lower tribunals. Idaho courts, for example, until *Tahoe-Sierra*, had been using the test for physical takings in regulatory contexts. Edward F. Wroe & Andrew Wright, *Inverse Condemnation in Idaho (In the Wake of the* Tahoe-Sierra Preservation *Case)*, ADVOC. (IDAHO), Nov. 2002, at 22, 23.

88. *Tahoe-Sierra*, 535 U.S. at 323. In clarifying the difference between the two strands of analysis, Justice Stevens pointed out that the elements of "physical appropriation" and "public use" are not components of a regulatory taking. *Id.*

89. *Id.* at 323–24.

90. *Id.* at 330. The Court pointed out that, in a footnote in the *Lucas* decision, it had warned that "the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Tahoe-Sierra*, 535 U.S. at 330 (referring to *Lucas*, 505 U.S. at 1019 n.8).

91. *Tahoe-Sierra*, 535 U.S. at 322 (emphasis added) (internal citations omitted).

92. *Id.* at 323 (quoting Yee v. Esconido, 503 U.S. 519, 523 (1992).

warrant this presumption of compensation, and instead are subjected to the ad hoc balancing test articulated by *Penn Central.*

Despite the Court's relatively narrow holding that a 32-month moratorium on development will not constitute a temporary per se taking, the *Tahoe-Sierra* case was significant because it signaled the revival of important doctrines in takings jurisprudence. For one thing, the case represented a shift away from the per se rule of *Lucas* and embraced the ad hoc approach of *Penn Central.* Quoting Justice O'Connor's concurring opinion in *Palazzolo,* the Court wrote, "[We resist] the temptation to adopt what amounts to per se rules in either direction."[93]

The *Tahoe-Sierra* case represents the revival of other important principles as well. It endorsed a broader understanding of the meaning of "parcel as a whole" and what constitutes the "denominator" of the property. Relying on Justice Brennan's opinion in *Penn Central,* the Court noted that, "even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on the 'parcel as a whole.'"[94] In this sense, too, it represented a shift away from *Lucas* and the categorical approach. In focusing on the "parcel as a whole," the Court rejected the landowners' argument that there had been a "conceptual severance."[95] The Court recognized that a regulation might restrict a landowner's use of one stick in the bundle of rights, but that it would not preclude the use of other sticks in the bundle. The decision suggests that, as long as the parcel as a whole retains some value, there will be no finding of a temporary regulatory taking. The Court implicitly recognized that a temporary prohibition on the development of land in the present does not strip the land of all its value. Rather, the landowner retains a valuable interest in the future right to use and enjoy the land. Because those "sticks" in the bundle of rights are not usurped by temporary restrictions, there can be no taking. Quoting *Andrus,*[96] the Court stated that, "'where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' in the bundle is not a taking.'"[97]

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93. Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

94. *Tahoe-Sierra,* 535 U.S. at 318. It also acknowledged the fact that no bright-line test exists and emphasized that the articulation of such clear-cut tests are better designed by Congress. *Id.* at 335.

95. *Id.* at 331. *Tahoe-Sierra*'s endorsement of the "parcel as a whole" as the relevant parcel in temporary takings cases has been uniformly followed by later cases. This approach will eschew courts from too quickly using categorical, *Lucas*-like analyses and will militate against findings that temporary takings are compensable.

96. Andrus v. Allard, 444 U.S. 51, 66 (1979).

97. *Tahoe-Sierra,* 535 U.S. at 327 (quoting *Andrus,* 444 U.S. at 65–66). It appears that only one court since then has taken the rogue position that the "parcel as a whole" is not the

The Court acknowledged that exceptions might exist, but limited them to *Lucas*-like cases of "extraordinary" situations, where "*no* productive or economically beneficial use of land is permitted."[98]

Related to the parcel as a whole discussion, the Supreme Court also defined "interests" in real property as including both geographic *and temporal* dimensions. Citing the *Restatement of Property*,[99] the Court noted that "an interest in real property is defined by the metes and bounds that describe its geographical dimensions and the term of years that describes the temporal aspect of the owner's interest."[100] *Tahoe-Sierra* indicated that courts should evaluate many different considerations, "*one of which* is the length of delay."[101] In order to evaluate the "parcel as a whole," the Court noted that both the geographical *and the temporal* dimensions must be evaluated. The Court reasoned that

> a permanent deprivation of the owner's use of the entire area is a taking of the 'parcel as a whole', whereas a temporary restriction that merely causes a diminution in value is not. Logically, *a fee simple estate cannot be rendered valueless by a temporary prohibition* on economic use, because the property will recover value as soon as the prohibition is lifted.[102]

This is strong language and, if it stood alone, would appear to close the door on temporary regulatory takings. However, the Court stopped short of deciding the case on this principle. Indeed, rather than foreclosing the possibility of succeeding on temporary regulatory takings claims, the Court examined seven alternative theories that might have been argued and under which the claimants might have prevailed.[103]

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proper denominator. *See* Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa. 2002) (relying on a state law that explicitly recognized three separate estates); *see also* Matthew J. Bauer, *Absent Physical Invasion, Governmental Interference with Private Property Will Not Likely Violate the Fifth Amendment's Takings Clause:* Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 41 DUQ. L. REV. 619 (2003).

98. *Tahoe-Sierra*, 535 U.S at 330 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992)).

99. RESTATEMENT OF PROPERTY §§ 7-9 (1936).

100. *Tahoe-Sierra*, 535 U.S. at 331-32.

101. *Id.* at 338 n.34 (emphasis added).

102. *Id.* at 332 (emphasis added). This language is strongly worded and appears to foreclose the possibility of succeeding on a Fifth Amendment claim where a regulation imposes temporary restrictions on use. However, the Court stopped short of so ruling in this case, instead falling back on the *Penn Central* balancing test as the appropriate inquiry. Note also that the majority's focus on "value" of the estate rather than the use of the estate drew criticism from Justices Thomas and Scalia in their dissent.

103. Sometimes called the "hypothetical seven," these alternative theories were (1) adoption of a categorical rule; (2) articulation of a narrower rule, allowing for takings in all

Several of these theories addressed the issue of time and delay and whether such temporally based claims can ever justify compensation. Only three of the seven alternative theories would have applied in the *Tahoe-Sierra* case, and the Court rejected all three in turn.

E. Dicta in *Tahoe-Sierra*: Alternative Theories Considered and Rejected

First, the Court considered the adoption of a categorical rule that would require courts to find a taking wherever government "temporarily deprive[d] an owner of all economically viable use of her property."[104] This was rejected because (a) it would apply to the many normal delays that are occasioned by permits, ordinances, and variances; (b) the rule would require changes in state practice that have long been accepted as proper exercises of the police power; (c) routine governmental processes would become prohibitively expensive; and (d) categorical rules are best left to the legislative branch of government.

Secondly, the Court weighed whether it should fashion a narrower rule, which would cover "all temporary land-use restrictions *except* those 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.'"[105] This was similarly rejected. Although such a rule would have a less severe impact than a categorical rule, the Court noted that it would still result in "serious financial constraints on the planning process."[106]

Finally, the Court considered implementing a grace period (using the example of a one-year deadline), after which time the government would be required to compensate a landowner. This theory was rejected mostly on public policy grounds. The Court reasoned that government officials would be pressured to make hasty decisions within the grace period, and landowners would be under similar pressure to

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cases except those normal delays in permitting and zoning ordinances; (3) a bright-line rule that would require compensation to kick in after a "grace period" of a year; (4) characterization of the restrictions as "rolling moratoria" that became the functional equivalent of a taking; (5) a determination that the TRPA "stalled" the process and therefore acted in bad faith; (6) a decision that the moratoria did not substantially advance a legitimate state interest; or (7) the utilization of an "as applied" rather than a facial challenge to the moratoria. The Supreme Court noted that, because of the procedural posture of the case, theories (4) through (7) were unavailable. However, the Court did evaluate theories (1) through (3) and dismissed each in turn. *See id.* at 333–40.

104. *Id.* at 333. The Court stated at the outset that these alternative tests were being considered in the interest of "fairness and justice," perhaps a reference to one of the foundational principles under the Fifth Amendment.

105. *Id.* (quoting First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

106. *Tahoe-Sierra*, 535 U.S. at 337.

quickly develop their land before a plan was enacted that governed it. This, the Court guessed, would result in "inefficient and ill-conceived growth."[107]

F. Limitations on the *Tahoe-Sierra* Holding

The cases decided by the Federal Circuit must be read in light of the limitations of the *Tahoe-Sierra* holding. Because *Tahoe-Sierra* addressed a local government agency's moratorium on development, some would argue that *Tahoe-Sierra*'s application is limited to moratoria mandated by state or local government agencies. As states enjoy broad deference when acting pursuant to their police powers,[108] state-imposed moratoria may be more immune from Fifth Amendment takings than federal regulation. Also, because moratoria apply broadly, they affect a wider range of people and affect each one equally rather than singling anyone out. As a cautionary note, *Tahoe-Sierra* should be read within its context; many argue that these "state moratoria" cases are not compelling Fifth Amendment cases and will only infrequently result in a finding of a taking. In contrast, the CFC reviews mostly as-applied challenges, many of them involving delays in permitting where a federal agency is the defendant. Such an inherently individualized process should arguably be evaluated with more scrutiny than moratoria that apply to a wider group of constituents.

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107. *Id.* at 339. There were two dissenting opinions: one written by Chief Justice Rehnquist, in which Justices Scalia and Thomas joined, and another written by Justice Thomas and joined by Justice Scalia. In the first of the dissenting opinions, Chief Justice Rehnquist argued that the moratoria had actually extended for six years, rather than only 32 months, and that a six-year moratorium was far in excess of any justifiable control by the state. *Id.* at 345–46. Chief Justice Rehnquist also argued that the majority had misinterpreted *Lucas* and focused improperly on the regulation's impact on the *value* of land rather than the regulation's impact on the owners' *use* of the land. Justices Thomas and Scalia, in the second dissent, rejected the majority's reliance on the "parcel as a whole" approach. *Id.* at 355. Using *First English* as support, they argued that a regulation that prohibits all productive use of land should be compensable, regardless of whether the property owner will be able to later develop the property after the regulation is lifted.

108. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978) (noting that where a State "reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," the government does not owe the landowner compensation). *See generally* Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87 (1926); Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).

VI. CASES DECIDED BY THE CFC AND THE FEDERAL CIRCUIT IN THE WAKE OF *TAHOE-SIERRA*

A. Jurisdiction of the Court of Federal Claims

The Court of Federal Claims,[109] with appeals to the U.S. Court of Appeals for the Federal Circuit, has "the most active and expansive takings docket within the federal court system."[110] Historically, the CFC and the Federal Circuit have arrived at "idiosyncratic results"[111] in takings cases, resulting in "little doctrinal coherence"[112] in these forums. During the early 1990s, the CFC exhibited a trend of favoring plaintiffs in takings claims, as demonstrated by the significant number of such claims decided in favor of the landowners.[113] Notably, many of these cases dealt

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109. The focus of this article is decisions from the CFC, but occasionally cases from the appellate division of this tribunal, the Federal Circuit, will be discussed as well.

110. David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 822 (1999). Mr. Coursen has worked in the Office of General Counsel of the Environmental Protection Agency as senior takings counsel and as an Assistant Attorney General in the Appellate Division of the Oregon Department of Justice as a takings litigator. *Id.* at 821 n.a1. *See* 28 U.S.C. §§ 1346(a)(2), 1491 (2000) (defining the CFC's jurisdiction). The CFC's enabling statute provides that

> [t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of...[a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States....

28 U.S.C. § 1346(a)(2) (2000). Accordingly, cases involving suits against the federal government are heard in this forum. The CFC is an Article I tribunal, which precludes it from reviewing the actions of Article III courts. *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1344 (Fed. Cir. 2002). CFC jurisdiction is determined by the underlying relief sought rather than the parties' cause of action. 32B AM. JUR. 2D *Federal Courts* § 2308 (2002). The Federal Circuit has exclusive appellate jurisdiction over CFC cases. 28 U.S.C. § 1295(a)(3) (2000).

111. Coursen, *supra* note 110, at 822.

112. *Id.* at 823. The Court has also been criticized for being too conservative and "ideological" in its approach to takings cases. *Id.* at 829. *See also* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998); Victoria Slind-Flor, *Federal Circuit Judged Flawed*, NAT'L L.J., Aug. 3, 1998, at A1. Compounding the problem is the fact that Congress has attempted to legislate standards for just compensation and redefine the proper role of the CFC in addressing regulatory conduct by the government. David F. Coursen, *Property Rights Legislation: A Survey of Federal and State Assessment and Compensation Measures*, [26 News & Analysis] ENVTL. L. REP. 10,239 (May 1996).

113. Coursen, *supra* note 110, at 828 (noting that over half of the decisions in 1990 were decided in favor of the plaintiffs).

with environmental regulations.[114] However, that trend came to a halt after the *Lucas* decision. In fact, the trend reversed; after *Lucas*, the government has been much more successful in takings litigation. In fact, the government prevailed in 90 percent of reported decisions between 1993 and 1996.[115]

In the wake of the *Tahoe-Sierra* decision, the CFC appears to be supplementing the ad hoc, *Penn Central* balancing test approach with an additional element of "extraordinary delay," thereby making it more difficult for plaintiff landowners to prevail on Fifth Amendment temporary regulatory takings claims. This suggests that there is a trend growing in U.S. courts to disfavor plaintiff developers and landowners in temporary regulatory takings litigation. The logical inference is that this tribunal has implicitly endorsed the use of interim development controls and delays as a function of sensible growth and environmental protection.

B. The Additional Requirement of "Extraordinary Delay" Used by the CFC after *Tahoe-Sierra*

In at least one CFC case predating *Tahoe-Sierra*, the court dissected the meaning of "extraordinary delay" and determined that a ten-year delay was *not*, in and of itself, unreasonable.[116] In *Wyatt v. United States*, a Tennessee office of the Office of Surface Mining Reclamation and Enforcement (OSM) of the Department of the Interior denied the plaintiff a permit after receiving inadequate information in the application. The court, in reaching the decision that there was no extraordinary delay, considered the agency's expertise in the area, and the "significant deference owed to OSM in its processing of plaintiff's permit application."[117]

Plaintiff Wyatt appealed, but, despite repeated attempts to provide the requested information, the permit was ultimately denied a second time. Following the second denial, the plaintiff filed suit for a

114. *See, e.g.*, Hendler v. United States, 952 F.2d 1364, 1378 (Fed. Cir. 1991) (Superfund cleanup project); Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1174 (Fed. Cir. 1991) (surface mining control and reclamation); United Nuclear Corp. v. United States, 912 F.2d 1432, 1435–38 (Fed. Cir. 1990) (restriction on uranium mining); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 160 (1990) (wetlands regulation); Yancey v. United States, 915 F.2d 1534, 1543 (Fed. Cir. 1990) (turkey quarantine).

115. Coursen, *supra* note 110, at 828–29. The U.S. Supreme Court has never found a taking of land when applying the *Penn Central* test. *Id.* at 823 n.12.

116. Wyatt v. United States, 271 F.3d 1090, 1097–1100 (Fed. Cir. 2001); *see also* Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993) (standing for the proposition that a taking occurs only after a delay becomes unreasonable).

117. *See* Appolo Fuels v. United States, 54 Fed. Cl. 717, 737 (2002).

temporary taking. The court, in rendering its decision, acknowledged that a temporary taking could occur if the government decision-making process posed an extraordinary delay. However, the court also noted that the "length of the delay is not necessarily the primary factor to be considered when determining whether there is an extraordinary government delay."[118] The court also warned that, "[b]ecause delay is inherent in complex regulatory permitting schemes, [a court] must examine the nature of the permitting process as well as the reasons for any delay."[119] Thus, although the length of the delay is germane, it is not the only or necessarily the most important factor in the evaluation of a temporary takings claim. In an even more rigid tone, the court cautioned, "it is the rare circumstance that [a court] will find a taking based on extraordinary delay without a showing of bad faith."[120]

Tahoe-Sierra indicated that courts should evaluate many different considerations, "*one of which* is the length of delay."[121] Using a strict interpretation of that phrase, a court might reasonably conclude that it is not *required* to evaluate the length of time; instead, it is merely a discretionary factor that may be evaluated. Interestingly, in some post-*Tahoe-Sierra* decisions, the CFC has decided to make the length of time an *obligatory* consideration, in addition to the *Penn Central* factors.[122] Plaintiff landowners will argue that this is decidedly more than what the *Tahoe-Sierra* court envisioned. However, government defendants should contend that *Tahoe-Sierra* implicitly endorses this approach via its discussion of policy concerns with respect to planning.

It is unclear whether these courts are simply using the same analytical framework that they utilized prior to *Tahoe-Sierra* or whether this is their interpretation of the Supreme Court case. At least three cases suggest that it may be the latter: *Cane Tennessee*, *Appolo Fuels*, and *Cooley*.

1. Cane Tennessee I and II

In *Cane Tennessee Inc. v. United States*, decided in October 2002, plaintiffs sued the federal government alleging that the Secretary of the Interior's designation of land as unsuitable for surface mining was a

118. *Wyatt*, 271 F.3d at 1098.
119. *Id.*
120. *Id.* (citing *Tabb Lakes*, 10 F.3d at 799).
121. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 339 n.34 (2002) (emphasis added).
122. *See, e.g.*, Boise Cascade Corp. v. United States, 296 F.3d 1339, 1350 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 906 (2003).

temporary taking of their property.[123] To comply with the Surface Mining Control and Reclamation Act (SMCRA), a landowner or miner must obtain a permit from the appropriate regulatory authority before commencing surface mining.[124] In order to receive a permit, the petitioner must demonstrate that he or she will be able to comply with a number of environmental requirements.[125] In the meantime, citizens may petition the regulatory authority to request that an area be designated as unsuitable for such mining.[126]

In this case, the Department of the Interior and the Secretary of the Interior had considered an unsuitability petition regarding plaintiffs' property. The Secretary ultimately decided that the property was unsuitable for surface mining. As a result of the decision, the Secretary restricted the plaintiffs' right to mine embedded coal, first on a temporary basis and then permanently. Plaintiffs argued that, because the unsuitability process resulted in a moratorium on mining, they were entitled to compensation. Specifically, the plaintiffs argued that the "four year, eight-month, twelve day mining moratorium...'was just one link in a sixteen-year chain of events by which mining Cane's coal estates has been forestalled...."'[127]

Defendants countered this argument by pointing out that the plaintiffs had failed to plead the required element of "extraordinary delay."[128] Plaintiffs responded that the *Penn Central* test did not require a showing of extraordinary delay, and that *Tahoe-Sierra* instructed courts

123. Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100 (2002); *see also* Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400 (2002).

124. Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (2002).

125. *Id.* §§ 1256, 1260.

126. *Id.* § 1272(c).

127. *Cane Tenn.*, 54 Fed. Cl. at 110.

128. Defendants cited *Dufau v. United States*, 22 Cl. Ct. 156 (1990), for the proposition that "extraordinary delay" is a required element. *Cane Tenn.*, 54 Fed. Cl. at 111 (citations omitted). The defendants also argued that the moratorium was merely preliminary action on the part of the government. Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993)

> *Danforth* and *Agins* hold that the government is not responsible for diminution in value caused by preliminary activity....While *Danforth* and *Agins* leave open the possibility that a taking may occur by reason of "extraordinary delay" in governmental decisionmaking, nothing in case law suggests that unreasonable delay converts the first preliminary act into the date of the taking....Thus, only after the delay becomes unreasonable would a taking *begin*....

Id. (citations omitted).

to assess several considerations, "only one of which is the length of delay."[129]

The court in *Cane Tennessee*, however, pointed out that the *Boise Cascade*[130] decision, written shortly after *Tahoe-Sierra, did* appear to require a showing of extraordinary delay. The court wrote,

> extraordinary delay is an essential element of regulatory takings cases....The Federal Circuit was explicit in *Boise*, stating "whether a taking occurred should be analyzed under *Penn Central*. This does not affect the longstanding rule that, absent denial of a permit, only extraordinary delays in the permitting process ripen into a compensable taking. Whether a particular extraordinary delay constitutes a taking is governed by *Penn Central*, just as are temporary moratoria."[131]

Plaintiffs then attempted to characterize their case as one involving "rolling moratoria." Their argument was that the case fell outside of the framework of *Boise* and should be examined in light of the Supreme Court's discussion of the "hypothetical seven" in *Tahoe-Sierra*. The plaintiffs contended that the unsuitability petition process was one part of a series of rolling moratoria that became the functional equivalent of a permanent taking. The court seemed to acknowledge this possibility and declined to decide whether the rule of extraordinary delay applied to this case. Instead, the court remanded for further development under the *Penn Central* factors.

The court thus reserved its decision of whether "extraordinary delay" was required for another day. That time arrived when the court reexamined the case in *Cane Tennessee II*, decided in June 2003.[132] This

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129. *Cane Tenn.*, 54 Fed. Cl. at 111 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 338 n.34 (2002).

130. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352 (Fed. Cir. 2002). Boise Cascade is not discussed at any length in this article because the Federal Circuit decided that the regulatory takings claims there were not ripe for review. Its discussion of the extraordinary delay factor, while informative, was ancillary to its holding and therefore of limited relevance for the analysis discussed herein.

131. *Cane Tenn.*, 54 Fed. Cl. at 111 (quoting *Boise Cascade Corp.*, 296 F.3d at 1352); *see also* Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400 (2002) (reversing earlier decision on motion for reconsideration and now holding that lessees who were denied permission to drill by the Bureau of Land Management did not suffer a taking of their leases that warranted compensation). The earlier decision had ruled that plaintiffs were entitled to just compensation for the temporary taking of their oil and gas leases and entered judgment for $1,137,808 plus costs and fees pursuant to 42 U.S.C. § 4654(c)). *Bass Enters. Prod. Co.*, 54 Fed. Cl. at 402.

132. Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115 (2003).

time, the plaintiff again argued that extraordinary delay was not an essential element of a temporary takings claim, and, alternatively, that they should prevail under a "rolling moratoria" claim.[133] There, the defendants responded that, according to *Tahoe-Sierra* and the *Boise Cascade* cases, it was clear that, "in a temporary takings claim that is premised on that phase of a regulatory decision-making process that precedes a final decision by the government agency in question, *extraordinary delay during that process is required* to ripen the temporary takings claim."[134] The plaintiffs countered that *Tahoe-Sierra* required the use of the *Penn Central* factors in temporary takings cases, and that the "length of delay is only one factor to take into consideration."[135] The Court flatly rejected that argument.

More importantly, the court held that a finding of extraordinary delay was an essential element of a temporary takings claim. Quoting *Cooley v. United States* (discussed below), which had just been decided by the Federal Circuit, the court held that "plaintiffs must show there was extraordinary delay to prevail on their temporary takings claim."[136] Even more significantly, the court went a step further and held that, "*[b]efore* the court can analyze the facts of this case utilizing the *Penn Central* factors, plaintiffs must *first* show that there was unreasonable delay in the petition process."[137] Thus, the CFC in *Cane Tennessee II* held that, at least in permitting cases, a showing of extraordinary delay is a threshold, and a *dispositive,* issue. The CFC thus inferred from *Tahoe-Sierra* an additional element in the *Penn Central* equation.

2. Appolo Fuels, Inc.

Other CFC and Federal Circuit cases have been decided using a similar rationale. *Appolo Fuels, Inc. v. United States,* decided in December 2002, also dealt with an unsuitability petition. There too, the restriction in question was the decision by the government to prevent surface mining on their property after evaluating a citizens' unsuitability petition.[138] The government designated a portion of the plaintiffs' property as unsuitable

133. *Id.* at 118.

134. *Id.* at 131 (quoting Defendant's Motion for Summary Judgment, at 50) (emphasis added).

135. *Id.* at 131-32 (citations omitted). The court rejected plaintiff's argument that the "rolling moratoria" in the present case were the functional equivalent of a permanent taking. The court acknowledged that *Tahoe-Sierra,* in dicta, had endorsed such an approach to takings, but noted that the Supreme Court had refrained from providing any guidance about how to evaluate such a claim. *Id.* at 132.

136. *Id.* at 132 (discussing Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003)).

137. *Id.* at 133 (emphasis added).

138. Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (2002).

for mining because of its proximity to a creek watershed. However, the Office of Surface Mining (OSM) did not make its decision for one year, while the citizen petition was processed. The plaintiffs alleged permanent and temporary regulatory takings. To buttress their claims, the plaintiffs pointed out that the OSM is required by statute to render decisions on citizen petitions under section 1272 within a 12-month period.[139]

Defendants in *Appolo Fuels* argued that the Federal Circuit, "in addition to the *Penn Central* criteria, requires plaintiff to show 'extraordinary delay on the part of the permitting agency' to establish that a temporary taking occurred."[140] Defendants further argued that a delay of only one year was not sufficient to meet the standard. The court began its analysis by recognizing that *Tahoe-Sierra* mandated application of the *Penn Central* factors to temporary regulatory restrictions. But it also agreed with the defendants that, "absent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking."[141] The court then went on to explore the meaning of "extraordinary delay," pointing out that in *Wyatt* a ten-year delay was insufficient. The court also found informative the discussion of "extraordinary delay" in *Tabb Lakes*. There, the Federal Circuit had pointed out that "delay in the permitting process may be attributable to the applicant as well as the government"[142] and that "it is the rare circumstance that [a court] will find a taking based on extraordinary delay without a showing of bad faith."[143] After considering the precedent, the court in *Appolo Fuels* determined that the one-year delay did not constitute a temporary regulatory taking. Because the court determined there was no extraordinary delay, it never reached the *Penn Central* factors. Thus, once again, the element of "extraordinary delay" was dispositive.

3. Cooley v. United States

If any doubt remained, *Cooley v. United States* settled the matter.[144] In *Cooley*, the plaintiffs were property owners who brought suit against the government after the Army Corps of Engineers denied

139. *Id.* at 736.
140. *Id.*
141. *Id.* (quoting Boise Cascade Corp. v. United States, 296 F.3d 1339, 1350 (Fed. Cir. 2002).
142. *Appolo Fuels*, 54 Fed. Cl. at 737 (quoting Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993)).
143. *Id.*
144. Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003).

their request for a permit to fill a wetland. Plaintiff Cooley had hoped to construct hotels, restaurants, and other commercial buildings in Minnesota. When he began securing permits for development, the Corps informed him that he would need a permit under the Clean Water Act because most of the site consisted of wetlands.[145] Cooley spent the next three years filing applications for a wetlands fill permit. The Corps ultimately denied the permit and Cooley brought suit alleging a permanent and categorical taking of his property. During the litigation, the Corps offered to issue Cooley a provisional permit. Cooley turned it down.[146] The CFC decided that he had suffered a categorical taking and that his land was worth 98.8% less than it would have been otherwise,[147] and awarded Cooley approximately $2 million in damages.[148] The Corps appealed, and the case advanced to the Federal Circuit.

In April 2003, the Federal Circuit vacated the CFC's finding of a categorical taking, because, although Cooley had lost a substantial amount of the value of his property, he had not lost it all.[149] Because "the record shows that the 1993 denial apparently destroyed less than all of Cooley's property value, [it] constitutes a non-categorical taking."[150] The Federal Circuit court remanded the case to the CFC, instructing the lower court to assess the takings claim under the *Penn Central* factors. Notably, the *Cooley* court further reaffirmed the *Cane Tennessee* and *Appolo Fuels* decisions, holding that a showing of "extraordinary delay" *is* required in temporary takings cases.[151] As a subsequent case noted, the implication from *Cooley* is that "a finding of extraordinary delay is a *condition precedent* to undertaking the *Penn Central* analysis of whether a taking had occurred."[152] Therefore, in order for a plaintiff to prevail in a temporary takings claim, she must demonstrate that there has been an

145. Clean Water Act, 33 U.S.C. § 1344 (2000).

146. Ironically, because the provisional permit was issued, the Federal Circuit court was forced to determine that the taking, if it occurred at all, was only temporary rather than categorical. *Cooley*, 324 F.3d at 1305.

147. *Id.* at 1304; *see also* Fed. Circuit Bar Ass'n, *supra* note 59, at 140.

148. *Cooley*, 324 F.3d at 1301.

149. Interestingly, the court also stated that there would be no distinction made between permitting cases and other situations in which a government entity has affected a landowner's ability to use his property. This appears to be in accordance with what the majority in *Tahoe-Sierra* meant when they wrote that "defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided,...*the moratorium and the permit process alike* would constitute categorical takings." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002) (emphasis added).

150. *Cooley*, 324 F.3d at 1305.

151. *Id.* at 1306.

152. Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115, 132 (2003) (emphasis added) (citing *Boise Cascade* and *Wyatt*).

extraordinary delay *and* she must additionally prevail under the *Penn Central* factors. The court also advised the lower court, on remand, to consider whether the Corps' conduct evinced bad faith, stating that it would be rare for the court to find "a taking based on extraordinary delay without a concomitant showing of bad faith."[153]

VII. CONCLUSION: IMPLICATIONS OF THE POST-*TAHOE-SIERRA* CFC AND FEDERAL CIRCUIT DECISIONS

The net effect of these CFC and Federal Circuit cases is that it will be virtually impossible for future plaintiff landowners to succeed using a theory of temporary regulatory takings. This is a good sign for all government entities, whether federal, state or local, because it signals judicial support for restraints on unchecked development. The test is no longer a straightforward application of *Penn Central.* Rather, courts must now first consider whether an "extraordinary delay" has been occasioned, and might additionally require a showing of bad faith.[154] To summarize, the sequence of the analysis for temporary regulatory restrictions on land use, and specifically those involving permits,[155] is now the following:

> (1) Identify the relevant parcel or the "denominator." If the entire parcel has been stripped permanently of all economic and productive use, it is a categorical taking and is entitled

153. *Cooley,* 324 F.3d at 1306–07.

154. *See id.* (noting that it would be rare for this court to "find a taking based on extraordinary delay without a concomitant showing of bad faith").

155. Outside of the scope of this article, but equally fascinating, are the temporary regulatory takings cases that deal with other types of regulations and legislation. For example, see *Cienega Gardens v. United States,* 331 F.3d 1319 (Fed. Cir. 2003) (holding that the government committed a regulatory taking by enacting legislation that would have prohibited mortgage pre-payment). *See also* Lois G. Jacobs, *Owners Win Major Victory in Federal Circuit on Regulatory Takings Claim in Prepayment Litigation,* 31 No. CD-13 HDR CURRENT DEV. (Human Dev. Rep., New York, N.Y.), June 23, 2003, at 1; Chancellor Manor v. United States, 331 F.3d 891 (Fed. Cir. 2003) (discussing regulatory takings claims in the context of federal legislation that prohibited the prepayment of federally subsidized mortgages for low-income housing). *Chancellor Manor* was remanded to the CFC for a determination of whether the *Penn Central* factors were satisfied. *Cases and Recent Developments,* 13 FED. CIR. B.J. 295, 296 (2003); Maritrans, Inc. v. United States, 342 F.3d 1344 (Fed. Cir. 2003) (holding that the Oil Pollution Act of 1990 and its requirement of double hulls did not effect a regulatory taking of property interests in single-hull barges); Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003) (holding that the Connecticut Hazardous Waste Management Service's announcement that the plaintiff's property was being considered as a candidate for the location of a low-level radioactive waste disposal facility was not a regulatory taking because it constituted only preliminary activity).

to compensation.[156] If only part of the parcel has been regulated, or if the entire parcel is regulated, but only temporarily, move on to the next step.

(2) Inquire whether the plaintiff has suffered extraordinary delay. If there is no showing of extraordinary delay, the case should be dismissed.

(3) Inquire as to whether bad faith is an issue.

(4) Apply the *Penn Central* factors.

In light of the Federal Circuit's decisions in the wake of *Tahoe-Sierra*, some questions remain unresolved. Is this the working test that the Supreme Court envisioned when it penned *Tahoe-Sierra*? *Tahoe-Sierra* seemed explicit when it reiterated that "[o]ur polestar instead remains the principles set forth in *Penn Central*."[157] Yet *Penn Central* did not have an explicit requirement of "extraordinary delay."[158] There are a number of possible explanations for the CFC's judicially created approach to temporary regulatory takings in the permitting context.

The first possible explanation is that the CFC and Federal Circuit believe that they are implementing *Penn Central* in precisely the way that *Tahoe-Sierra* suggested, and that the adoption of this additional element is consistent with *Tahoe-Sierra*. Perhaps the CFC is drawing from *Tahoe-Sierra*'s discussion of exceptions to the general rule. After all, the Supreme Court acknowledged that exceptions might exist but limited them to *Lucas*-like cases of "extraordinary" situations, where "*no*

156. Plaintiffs will have to keep in mind that the relevant parcel in regulatory takings claims is now the "parcel as a whole." Plaintiffs will not succeed using an argument that the regulated portion of land is the relevant parcel; instead, courts will evaluate the land in its entirety. *See* Walcek v. United States, 303 F.3d 1349 (Fed. Cir. 2002) (holding that the CFC properly considered the entire 14.5 acre property to be the relevant parcel, rather than the 13.2 acres of wetlands that were regulated, and finding no regulatory taking under *Penn Central*).

157. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 326 n.23 (2002) (quoting Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001).

158. In fact, the only one of the three *Penn Central* factors that might conceivably embody the "extraordinary delay" element is the second one: the plaintiff's investment-backed expectations. Still, even this is a stretch. In *Palazzolo*, Justice O'Connor did discuss the factor of time. She wrote that courts should consider "'the temporal relationship' between the regulation's enactment and title acquisition, since 'the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness' of plaintiff's investment-backed expectations." *Palazzolo*, 533 U.S. at 634. But this is relevant only to the lapse of time between a regulation's enactment and the plaintiff's acquisition of the property.

productive or economically beneficial use of land is permitted."[159] In a similar vein, the CFC and Federal Circuit may have inferred this additional requirement from *Tahoe-Sierra*'s discussion of interim development controls. In that sense, the CFC and Federal Circuit would be justified in believing that the extra step would have the effect of frustrating temporary regulatory takings claims and would believe that the new test was consistent with the policy objectives highlighted by *Tahoe-Sierra*.

Stated another way, perhaps the CFC and Federal Circuit have implicitly recognized the different policy objectives behind moratoria on the one hand and permitting requirements on the other. After all, ordinances forbidding development and moratoria on development occupy one end of the spectrum, while individual permits occupy the opposite end. Common sense would dictate that permits should not necessarily be treated in the same manner as moratoria, because they each protect different interests. These post-*Tahoe-Sierra* CFC cases, therefore, simply reflect heightened concern for critically endangered resources and the logical corollary that individuals will be required to endure more when those resources are jeopardized by proposed development.

Alternately, the CFC and Federal Circuit may have recognized the ambiguity that remained in temporary takings jurisprudence after *Tahoe-Sierra* and are simply attempting to bring some clarity to the analysis. Perhaps the CFC, by inserting a threshold requirement, is merely fashioning a brighter line than the ad hoc analysis favored by the Supreme Court as a way of disposing of cases more cleanly.

A third possible explanation (and an admittedly empty one) is this: perhaps, despite all of the academic chatter surrounding *Tahoe-Sierra*, it really did not have as significant an impact on the CFC as some believe. After all, the use of "extraordinary delay" is not new in federal permitting cases. If the CFC is simply utilizing a variant form of a test they had already used widely before the *Tahoe-Sierra* decision, perhaps not all that much has changed. Perhaps its true value is in the policy objectives it furthers rather than any "test" or "analysis" it articulates.

No matter which explanation is the correct one, the fact that the CFC is treating "permit" cases in the same way that it would treat a "moratorium" case, and in fact requiring a *stricter* test by making "extraordinary delay" a dispositive factor, is significant. In doing so, the

159. *Tahoe-Sierra*, 535 U.S. at 330 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992)).

CFC and Federal Circuit, with *Tahoe-Sierra* as *their* polestar,[160] have constructed a nearly insurmountable test for landowner plaintiffs and, in so doing, have effectively guaranteed that environmentally friendly government bars to development will be upheld as constitutional. This suggests that there is a trend in current U.S. takings jurisprudence toward favoring government defendants in Fifth Amendment takings cases where the claim is based on temporary regulatory action. This trend further reflects recognition of important safeguards on unchecked development, *even when* the safeguards (*i.e.*, permits or moratoria) affect individuals and are mandated from the federal level. This in turn suggests that there is wider acceptance in the U.S. court system for interim development controls and recognition for the need for sensible development and environmental protection. Will this trend continue? Will the durational element of "extraordinary delay" endure as a dispositive factor? For the time being, practitioners will have to find comfort in an exquisitely worded adage: "only time will tell."

160. To borrow from Justice O'Connor's phraseology in *Palazzolo*, 533 U.S, at 633 (O'Connor, J., concurring).