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The Supreme Court Rediscovers Property Rights: Six Recent Decisions

-name redacted-
Legislative Attorney

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Summary

In 2010, the Supreme Court ended a five-year period when it accepted no property rights cases, granting certiorari in no less than six such cases between 2010 and 2012. This large number of cases suggests a renewed interest by the Court in property rights, and particularly in the Fifth Amendment Takings Clause at issue in four of the cases. The Takings Clause is the Constitution's principal protection of property rights, promising just compensation when property rights are "taken" by government for a "public use."

The first case, decided in 2010, was *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection.* There, a four-Justice plurality endorsed the idea that courts, just as other branches of government, could be subject to takings liability. This question of "judicial takings" often arises when courts articulate new principles of common law that extinguish existing property rights.

The next two cases were decided during the Court's 2011-2012 term. In *PPL Montana LLC v. Montana*, the Court fleshed out its test for "title navigability"—important because title to only streambeds under "navigable" waters passes to a state upon its admission to the Union. In *Sackett v. Environmental Protection Agency*, enforcement of the wetlands permitting program in the Clean Water Act was at issue. The holding was that when property owners receive an order from the Environmental Protection Agency (EPA) under the act, they have a right to "pre-enforcement review"—that is, a right to judicially challenge the order right away, before EPA seeks to enforce it and impose potentially large penalties. The number of other federal programs that, due to this decision, must now afford pre-enforcement review of agency orders is unclear.

Finally, the Court decided three takings cases during its 2012-2013 term. In *Arkansas Game & Fish Comm'n v. United States*, the Court jettisoned its long-standing rule that when a government project induces flooding of private property, only flooding that is continual or at least "intermittent but inevitably recurring" can result in takings liability. Temporary flooding, the Court now says, may also subject the government to such liability. In *Horne v. Dep't of Agriculture*, the Court held that penalties imposed under a Depression-era statute for the support of agricultural commodity prices may be challenged on the ground that they punish a person's refusal to accede to an unconstitutional taking. Broad issues radiate from this narrow ruling—such as the availability of takings defenses in enforcement actions generally when the compensation remedy has been withdrawn. In *Koontz v. St. Johns River Water Management District*, the Court addressed its previously announced test for when exaction conditions on land-development permits constitute takings. The Court clarified that this test—viewed as more favorable to property owners than the alternative—applies even when the landowner refuses the exaction conditions imposed and, as a result, the permit is denied. It also covers not only land-dedication exactions, the context in which the test was originally articulated, but purely monetary exactions as well.

Typically, one can only speculate why the Supreme Court takes a case; the Court's reasons generally are not easily discerned. Still, an informed guess can be made that the six cases discussed in this report point to a reawakened interest by the Court in property rights. In all six cases, the decision below had been against the property owner, suggesting that the Justices (or some of them) are looking anew for circumstances where property rights are unfairly burdened. And indeed, in five of the six decisions rendered by the Court, the private property owners were vindicated. Decisions yet to be rendered on remand, however, may not necessarily go their way.

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Introduction

In the late 1970s, the Supreme Court launched an effort to construct a coherent jurisprudence under the Fifth Amendment Takings Clause. This Clause contains the Constitution's principal safeguard of private property rights against the actions of government, mandating "just compensation" when property is "taken" by the government.[1] From the late 1970s until 2005, the Court's output in this area was prolific, with one or more decisions on Takings Clause issues handed down almost every year.[2] In mid-2005, however, the decisions came to a halt, and the Court decided no more takings cases until mid-2010. Beginning then, the Court seemed intent on making up for lost time. In June 2010, the Court decided one taking case, followed by two non-taking but property-rights-related decisions in the Court's 2011-2012 term, followed by no less than three takings decisions in the just-concluded 2012-2013 term. This recent turn-about in the Court's case-acceptance pattern raises the prospect that it is becoming interested anew in property rights. The fact that the Court ruled in favor of the property owner and against the government in five out of six of these cases buttresses that impression.

The taking case decided in 2010 is *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*.[3] There, a four-Justice plurality concluded that courts, just as other branches of government, could be subject to taking liability, as when they change the law in a manner that divests existing property rights.

The two property-rights-related cases decided in the Court's 2011-2012 term did not involve the Takings Clause. One is *PPL Montana LLC v. Montana*,[4] making clear that the Court's test for "title navigability" requires a court to entertain claims of nonnavigability in a generally navigable river for all but the shortest river segments. The consequence of nonnavigability when a state was admitted to the Union is that title to that river segment did not pass to the state. The other decision is *Sackett v. Environmental Protection Agency*,[5] holding that when property owners receive an administrative order from the Environmental Protection Agency (EPA) under the Clean Water Act, they may challenge at least the jurisdictional basis of that order, and likely any other legal inadequacies therein, right away—before EPA seeks to enforce the order in court, requesting the court to impose potentially large penalties.

The three property-rights-related decisions during the Court's 2012-2013 term, all takings cases, began with *Arkansas Game & Fish Comm'n v. United States*.[6] There, the Court jettisoned its long-standing rule that when a government project induces flooding of private property, only flooding that is continual or at least "intermittent but inevitably recurring" can result in takings liability. Temporary flooding, the Court now says, may also in appropriate cases subject the

[1] U.S. Const. amend. 5: "[N]or shall private property be taken for public use, without just compensation."

[2] *See* CRS Report 97-122, *Takings Decisions of the U.S. Supreme Court: A Chronology*, by (name redacted). This report lists about 120 Supreme Court decisions from 1870 to 2005 under the Fifth Amendment Takings Clause alone. Other constitutional provisions, such as the Due Process Clauses of the Fifth and Fourteenth Amendments and the Fourth Amendment protection against unreasonable search and seizure, implicate property rights concerns as well, and have also generated a large number of Supreme Court decisions.

[3] 130 S. Ct. 2592 (2010).

[4] 132 S. Ct. 1215 (2012).

[5] 132 S. Ct. 1367 (2012).

[6] 133 S. Ct. 511 (2012).

government to takings liability. Next, the Court decided *Horne v. Department of Agriculture*,[7] ruling that a takings defense may be raised in federal district court—rather than the usual Court of Federal Claims—to federal administrative penalties imposed under a Depression-era commodity-price-support statute. The narrow decision raises broader questions about when a property owner subject to a directive it regards as a taking can elect not to comply and then defend any subsequent enforcement action by asserting a taking defense. Last, the Court decided *Koontz v. St. Johns River Water Management District*,[8] holding that its previously announced test for when exaction conditions on land development approvals constitute takings applies even when a permit is denied because the landowner refused to accede to the conditions, and to monetary exactions as well as land-dedication conditions.

All six decisions confine themselves to general legal issues. For property-owner-petitioners in five of the six cases, this meant that the Supreme Court had to remand the case to the lower courts to determine, based on the Court's ruling, the merits of the property owner's particular claims. As a result, while each of these five petitioners won in the Supreme Court, they may or may not obtain ultimate redress.

This report discusses each of these decisions in turn, noting their importance for federal programs. It then comments on their aggregate significance.

Decided During the Supreme Court's 2009-2010 Term

Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection: "Judicial Takings"

Facts: Stop the Beach Renourishment, Inc. consists of a handful of beachfront property owners on the Gulf Coast of Florida.[9] They objected to a state "beach renourishment" project (the mechanical addition of sand to widen an eroded beach) that bordered their properties. In particular, they claimed a Fifth Amendment taking of two common law rights they held as littoral (ocean or bay abutting) property owners. First, wherever beach renourishment is carried out in Florida, the governing state statute freezes at the current mean high water mark (MHWM) the property line between privately owned beach above the MHWM and state-owned beach and submerged land below the MHWM. This freezing of the property line negates the common law right of accretion, under which a gradual seaward shift in the MHWM results in the beachfront owner gaining additional land (or losing it if the MHWM shifts landward). Second, under the state statute the added strip of beach is state-owned, trenching on the common law right of littoral owners to have their land be in direct contact with the water.

Decisions below: The lower Florida court found that the beach renourishment project eliminated two of the beachfront property owners' littoral rights: the right to receive accretions to their

[7] 133 S. Ct. 2053 (2013).

[8] 133 S. Ct. 2586 (2013).

[9] The facts in this paragraph are taken from the Supreme Court's plurality opinion in this case. *See* 130 S. Ct. 2592, 2599-2600 (2010).

property and the right to have their land in direct contact with the water. On certified questions, however, the Florida Supreme Court found neither right adequate to ground a taking.[10] The common law right of littoral owners to accreted land was not involved here, the court said, because its historic justification was irrelevant to the eroded beach situations addressed by the Florida beach renourishment statute. The right to direct contact with the water, the court continued, is merely ancillary to the beachfront property owner's right of access to the water, a right that the state statute expressly preserved.

Supreme Court decision: Unsuccessful in the state high court, the plaintiff made a new argument in the U.S. Supreme Court. It asserted that the state supreme court had *itself* caused a taking—a "judicial taking"—by rewriting Florida common law to subordinate the property rights of accretion and direct contact with the water to the renourishment project.

Owing to Justice Stevens's recusal, only eight of the Justices ruled on this novel question of whether courts, like other branches of government, can bring about takings. They split 4-4.[11] An opinion by Justice Scalia for himself and three other Justices concluded that nothing in the text of the Takings Clause justifies exempting courts from its reach. If a court declares "that what was once an established right of private property no longer exists, it has taken that property," he wrote.[12] By contrast, the four other Justices noted in two opinions that since the Court was unanimous that the Florida Supreme Court's characterization of the common law rights at issue was well grounded in precedent, there was simply no need in the present case to resolve whether there can be judicial takings. Based on this unanimity, the state supreme court was affirmed.

Comments: The notion of judicial takings was first broached by the Supreme Court in a 1967 concurring opinion by Justice Stewart,[13] then noted in a 1994 dissent from denial of certiorari.[14] The concept was not squarely presented to the Supreme Court, however, until *Stop the Beach Renourishment*. One difficulty with the idea of judicial takings is that the common law has always evolved in the courts, sometimes (as with the public trust doctrine) in a way that narrows property rights, yet few until recently have discerned a constitutional issue in that evolution. There is also the highly nuanced question whether a court articulating a common law principle not previously stated is merely clarifying what the law has always been, or stating a wholly new principle. Only the latter seems to qualify as a possible judicial taking.

Following *Stop the Beach Renourishment*, lower court reaction to the plurality's recognition of judicial takings has been mixed,[15] though no court since the decision, or before for that matter, has found a judicial taking in a final opinion.[16] The possibility cannot be dismissed, however, that

[10] 998 So. 2d 1102 (Fla. 2008).

[11] 130 S. Ct. 2592 (2010).

[12] *Id.* at 2602.

[13] Hughes v. Washington, 389 U.S. 290, 296-297 (1967).

[14] Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J., joined by O'Connor, J.).

[15] *Compare* Vandevere v. Lloyd, 644 F.3d 957, 964 n.4 (9th Cir.) (stating that "any branch of state government could, in theory, effect a taking" and citing *Stop the Beach Renourishment* plurality opinion), *cert. denied*, 132 S. Ct. 850 (2011), and Smith v. United States, 709 F.3d 1114, 1116-1117 (Fed. Cir. 2013) (judicial taking concept had been recognized prior to *Stop the Beach Renourishment* plurality) *with* Burton v. American Cyanimid Co., 775 F. Supp. 2d 1093, 1099 (E.D. Wash. 2011) (noting that defendants cited no authority for proposition there can be a judicial taking and that *Stop the Beach Renourishment* plurality decision is not binding precedent).

[16] The text qualifier "in a final opinion" is inserted because of a Ninth Circuit decision finding a judicial taking in a Hawaiian water rights case. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985). This decision was vacated and (continued...)

some future court may discern a judicial taking should another court announce an abrupt and unforeseeable change in a common law principle with the effect of divesting property rights.

Decided During the Supreme Court's 2011-2012 Term

PPL Montana LLC v. Montana: Title Navigability

Facts and background: PPL Montana, LLC owns hydroelectric dams in Montana.[17] The State of Montana, however, argued that 10 of these dams sit on riverbeds owned by the state, invoking the constitutional "equal footing doctrine." This doctrine holds that the 13 original states were admitted to the Union on the basis that they held title to the beds under waters then commercially navigable, and that later-admitted states like Montana are admitted on an "equal footing" with the original states and thus have the same ownership right to such beds.[18] Claiming that the riverbeds under PPL's dams lay under waters commercially navigable in 1889 when Montana was admitted, the state asserted ownership of those riverbeds and sought to collect rent from PPL.

Decisions below: The Montana trial court ruled for the state, ordering PPL Montana to pay the state $41 million for its use of state-owned riverbeds from 2000 to 2007 at its hydropower sites. The Montana Supreme Court affirmed.[19]

Supreme Court decision: The U.S. Supreme Court unanimously reversed.[20] It held that the state supreme court erred in finding the riverbeds in question navigable, for two key reasons. First, the state court had rejected the applicability here of the rule that for purposes of title, the navigability of a waterway must be determined on a *segment-by-segment* basis, reasoning that it does not apply to short interruptions of navigability. Contrary to the state court, the U.S. Supreme Court held that even if, in general, some nonnavigable river segments might be so short as to warrant treatment as part of a longer, navigable river, "it is doubtful that any of the segments in this case would meet that standard."[21] Second, the state supreme court was wrong, in the U.S. Supreme Court's view, because it rejected land route portaging on the rivers in question as evidence of nonnavigability. Finally, the federal Supreme Court found the state high court's analysis deficient in its acceptance of present-day, primarily recreational use of a river as evidence of commercial navigability at the time the state was admitted to the United States.

(...continued)

remanded by the Supreme Court, whereupon the appellate court concluded that the taking claim was premature. 887 F.2d 215, 219 (9th Cir. 1989).

[17] The facts in this paragraph are taken from the Supreme Court's opinion in the case. *See* 132 S. Ct. 1215, 1225 (2012).

[18] *See, e.g.,* Utah v. United States, 403 U.S. 9, 10 (1971). "Navigability" for purposes of establishing state title under the equal footing doctrine is defined differently than navigability for purposes of defining the reach of admiralty law or the reach of Congress's regulatory power under the Constitution's Commerce Clause. The fine points of these distinctions are beyond the scope of this report.

[19] 229 P.3d 421 (Mont. 2010).

[20] 132 S. Ct. 1215 (2012).

[21] *Id.* at 1230.

The U.S. Supreme Court therefore sent the case back to the Montana high court for further proceedings based on this corrected view of the title navigability test.

Comments: On remand, the Montana courts may or may not find some or all of the river segments at issue to be nonnavigable, hence not in state ownership. In any event, the U.S. Supreme Court's decision likely means that hydroelectric power suppliers will encounter fewer state demands for streambed rent as the result of the location of their dams. The rent payments avoided are potentially large—as noted, the Montana courts had awarded that state $41 million in the current case. The federal government, though not a party, also has an interest in this case. For one thing, hydroelectric dams are licensed under a federal scheme in the Federal Power Act.[22] For another, the United States has asserted ownership of various riverbeds throughout the nation, including by issuing permits, licenses, and patents.

Sackett v. Environmental Protection Agency: Pre-Enforcement Review of Administrative Orders[23]

Facts: Michael and Chantelle Sackett filled in their subdivision lot in Idaho to prepare it for house construction.[24] EPA then issued an "administrative compliance order" (ACO) alleging that the lot contained a "jurisdictional wetland"—that is, was covered by Clean Water Act (CWA) section 404,[25] which requires a permit to fill in such wetlands. The Sacketts had not obtained such a permit. The ACO, an enforcement tool frequently used by EPA, required the Sacketts to remove the fill material and restore the lot to its pre-fill condition. It also invited them to discuss the order with EPA and indicated that the order could be amended to provide for alternative methods of complying with the CWA. Finally, it stated that failure to comply with the order could trigger severe civil penalties in federal court.

The Sacketts sought an EPA hearing to challenge the jurisdictional finding, which the agency denied, saying that pre-enforcement review of ACOs is not available under the CWA (as many lower courts have held). So the Sacketts faced a dilemma. They could comply with the ACO at considerable expense, despite disagreeing with the underlying jurisdictional determination. Alternatively, they could do nothing and wait to challenge the jurisdictional determination when EPA eventually brought a court action against them. This course risked, if they lost in court, large civil penalties for the period of noncompliance with the ACO and, separately, for the period of noncompliance with the CWA. The Sacketts sued.

Decisions below: Agreeing with EPA, the district court held that the CWA precludes judicial review of ACOs before EPA has filed an enforcement action in court, and so dismissed the case. On appeal, the Ninth Circuit affirmed, holding both that the CWA prohibits pre-enforcement review of ACOs, and that the Due Process Clause is not offended thereby.[26]

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[22] Federal Power Act § 4(e); 16 U.S.C. § 797(e).

[23] For a more detailed analysis of the *Sackett* decision, see CRS Report R42450, *The Supreme Court Allows Pre-enforcement Review of Clean Water Act Section 404 Compliance Orders: Sackett v. EPA*, by (name redacted).

[24] The facts in this paragraph are taken from the Supreme Court's decision in the case. *See* 132 S. Ct. 1367, 1370-1372 (2012).

[25] 33 U.S.C. § 1344.

[26] 622 F.3d 1139 (9th Cir. 2010).

Supreme Court decision: The Supreme Court reversed, ruling unanimously for the Sacketts.[27] It found that the ACO against the Sacketts "is final agency action for which there is no adequate remedy other than [Administrative Procedure Act] review, and that the Clean Water Act does not preclude that review."[28] Therefore, it held that pre-enforcement review of CWA ACOs is available in district courts under the Administrative Procedure Act. Finding such review available on statutory grounds, the Court had no need to address the constitutional due process issue.

Comments: This decision is not *explicitly* concerned with property rights, as are the others in this report, yet the large impact of EPA (and Corps of Engineers) CWA jurisdictional determinations on property use and value warrants its inclusion here.

Given the Supreme Court ruling, the Sacketts now may seek judicial review of EPA's jurisdictional determination underlying the ACO and need not await the agency's enforcing the order in a court, risking large civil penalties. The larger significance of *Sackett* will turn on how far beyond CWA section 404 it is applied. The number of section 404 ACOs issued by EPA during any given year is but a small fraction of the total number of ACOs issued by EPA,[29] and other agencies issue ACOs, too.

In response to *Sackett*, EPA could forego compliance orders in some instances and proceed directly to civil enforcement actions in court seeking money penalties. This would reduce opportunities for negotiating with the recipient, who, under ACOs, typically does not wind up paying penalties. Another option might be increased EPA use of noncompliance letters, sometimes called notices of violation. These inform recipients of a suspected violation, instruct on how to come into compliance, and invite negotiations. In sharp contrast with ACOs, however, they have no direct legal consequences. In particular, no penalties attach to failing to heed the letter, only to violating the underlying statute. Not being the consummation of the agency's decision-making process nor determining any rights or obligations, a noncompliance letter of this kind would not likely be deemed "final agency action" under the APA and so entitled to review.

EPA has embraced a third option, not necessarily to the exclusion of the two above. Following *Sackett*, EPA began adding language to unilateral CWA compliance orders informing recipients of their right to seek pre-enforcement review of the order. More dramatically, the agency in March 2013 instructed its regional staff to add language to 10 additional types of agency orders informing recipients of their right to judicial review.[30] Besides the CWA ACOs at issue in *Sackett* itself, regional staff is to insert this language in specified orders under the Resource Conservation and Recovery Act, Clean Air Act, Safe Drinking Water Act, Emergency Planning and Community Right to Know Act, and Federal Insecticide, Fungicide, and Rodenticide Act. (For at least some of

[27] 132 S. Ct. 1367 (2012).

[28] *Id.* at 1374.

[29] See table labeled *FY 1994—FY 2011, Administrative Compliance Orders*, prepared by EPA and available at http://www.epa.gov/compliance/resources/reports/nets/nets-e4-acos.pdf.

[30] Memorandum from Susan Shinkman, Director, EPA Office of Enforcement, and Elliott J. Gilberg, EPA Director of Site Remediation Enforcement, to EPA regional officials, "Language Regarding Judicial Review of Certain Administrative Enforcement Orders Following the Supreme Court Decision in *Sackett v. EPA*" (March 21, 2013). The memorandum does not expressly concede the legal point that *Sackett* demands the pre-enforcement reviewability of each listed type of agency order. But it comes close, acknowledging that after a review of *Sackett* and other legal sources, "EPA has determined that it generally would be appropriate to include language regarding a respondent's ability to seek judicial review in certain categories of unilateral administrative enforcement orders issued under other statutes."

these types of orders, the courts already have ruled or assumed that pre-enforcement review is available.) The headquarters directive is confined to "typical orders issued under typical circumstances," making clear that it states only a presumption in favor of inserting the review clause and that regional staff "should analyze each administrative enforcement order individually."

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is the only EPA statute with express language barring pre-enforcement judicial review of challenges to agency orders,[31] and thus is unaffected by *Sackett* and not covered by the memorandum.

Sackett should be contrasted with current lower-court case law *denying* judicial reviewability for Corps of Engineers formal jurisdictional determinations. Such determinations may be made by Corps district offices at the request of those contemplating a project on their land and unclear as to whether a Corps permitting authority such as CWA section 404 applies. They are separate from and prior to the permit application process. It seems unlikely, though not unthinkable, that *Sackett* would be deemed to undermine this line of case authority denying review.

Decided During the Supreme Court's 2012-2013 Term

Arkansas Game & Fish Comm'n v. United States: Temporary Government-Induced Flooding

Facts: The Commission owns a wildlife management area 115 miles downstream from a Corps of Engineers flood control dam.[32] In 1993 through 2000, the Corps adopted a series of interim deviations from its approved water release plan for the dam, at the request of downstream farmers. The effect of the adjusted water releases was to lengthen the flooding period to which the wildlife management area was subjected in six of the eight years in question, relative to either before or after the dam was built. These lengthened flooding periods, occurring as they did during the growing season, resulted in the death of numerous bottomland hardwood trees in the management area, amounting to a loss of 18 million board feet of timber.

Decisions below: The Commission sued, claiming that the deviations from the Corps' approved plan took a temporary flowage easement for the six years of lengthened flooding. The court agreed, finding the flooding to be "inevitably recurring." Under long-standing case law cited by the court, government-caused flooding that is either continual or "intermittent but inevitably recurring" is an automatic physical taking. On appeal, however, the Federal Circuit reversed 2-1,[33] finding no taking based on a complementary and equally long-standing case law rule—that intermittent government-caused flooding that is not inevitably recurring is a categorical *non-*

[31] *See* CERCLA § 113(h), 42 U.S.C. § 9613(h), barring pre-enforcement judicial review of challenges to EPA cleanup orders issued under CERCLA § 106, 42 U.S.C. § 9606.

[32] The facts in this paragraph are taken from the Supreme Court decision in the case. *See* 133 S. Ct. 511, 515-516 (2012).

[33] 637 F.3d 1366 (Fed. Cir. 2011).

taking. Each of the Corps' deviations from its approved release plan, the circuit found, was adopted on a separate, interim basis and so was not inevitably recurring.

Supreme Court decision: On December 4, 2012, the Supreme Court unanimously reversed.[34] In its view, the absolute rule underlying the Federal Circuit's decision—that takings can occur only when the government flooding is continual or inevitably recurring—was unsupportable. To the extent that a single statement in a 1924 decision of the Supreme Court supported that rule,[35] the Court explained, it was only dictum. As important, that early decision came at a time when the Court had only ruled in *permanent* flooding cases and had yet to establish, as it did decades later, that temporary physical invasions by government can be takings just as permanent ones are. The reigning rule since 1924 that flooding was somehow different from other physical invasions—was *categorically exempt* from takings liability when temporary—was inconsistent with the Court's modern takings jurisprudence.

Accordingly, the Court explained, temporary flooding, like temporary physical invasions generally, is to be assessed as a possible taking under a diffuse, multifactor balancing test—one that necessarily is less plaintiff-friendly than the *per se* taking rule for permanent flooding and other permanent physical occupations. Factors listed by the Court as relevant to the taking determination for a temporary government-caused flood are its duration, its foreseeability, the character of the flooded land, the landowner's "reasonable investment-backed expectations," and the severity of the interference. The Supreme Court sent the case back to the Federal Circuit to address these factors in the case; it did not resolve the taking issue itself.

Comments: The United States has long had the benefit of legal principles largely shielding the federal Treasury from liability for flooding caused by federal water projects. As for tort claims, the Flood Control Act of 1928 asserts an absolute bar to liability stemming from flood control activity of the United States,[36] and the "discretionary function exemption" in the Federal Tort Claims Act exempts all federal decisions with a policy/discretionary element.[37] As for Fifth Amendment takings liability, the rule that temporary flooding cannot be a taking has been the reigning law for over 80 years.

Now *Arkansas Game & Fish Comm'n* has jettisoned the takings bar for temporary flooding, and because takings liability is constitutionally based, Congress, should it wish to shield federal dams and other water facilities from this new liability, will not be able to legislate immunity as it did for tort claims. How often such facilities cause temporary as opposed to permanent flooding of private property, and thus how much new takings liability is potentially involved, is beyond the scope of this report. It should be noted, however, that a major determinant of the amount of new liability will be whether *Arkansas Game & Fish Comm'n* is construed by lower courts to be limited to *repeated*, though temporary, government-caused floods, leaving single floods under the old automatic-non-taking rule.[38]

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[34] 133 S. Ct. 511 (2012).

[35] Sanguinetti v. United States, 264 U.S. 146, 150 (1924).

[36] 33 U.S.C. § 702c ("[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by flood waters at any place.... ").

[37] 28 U.S.C. § 2680(a). For more detailed discussion of the Flood Control Act of 1928 and the discretionary function exemption in the Federal Tort Claims Act, see CRS Report RL34131, *Flood Damage Related to Army Corps of Engineers Projects: Selected Legal Issues*, by Cynthia Brougher.

[38] Language in the Court's decision points in both directions. Suggesting that the ruling is limited to recurrent flooding (continued...)

Moreover, it is unknown how the lower courts will construe the takings factors listed by the *Arkansas Game & Fish Comm'n* Court. It seems likely, at a minimum, that the listed factors are not exhaustive, and that as with the multifactor "*Penn Central* balancing test" for regulatory takings generally, almost any circumstance surrounding an instance of flooding may be relevant to the taking analysis.[39] Beyond this, the cues point in opposite directions. On the one hand, if the courts follow the pattern with the *Penn Central* cases, very few temporary government-induced floods will lead to payments from the Treasury. Justice Ginsburg, the author of the opinion, seemed to predict this result, asserting that "[t]o reject a categorical bar to temporary-flooding takings claims ... is scarcely to credit all, *or even many*, such claims."[40] On the other hand, multifactor analysis under the *Penn Central* test has almost always been applied to purely regulatory (non-physical) interferences with property. The decision itself instructs that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government,"[41] such as floods.

Finally, the United States still retains several defenses in flooding-taking cases—first, that the property injury is noncompensable "consequential damages" (the United States argued before the Supreme Court in this case that *all* downstream damage from dam operation is merely consequential, but the Court's decision expressly did not reach the issue); second, that the flooding was no worse than if the dam had not been built; and third, that the flooding was not caused by the dam.

Depending on how broadly the lower courts construe *Arkansas Game & Fish Comm'n*, the decision might increase the cost to water-project agencies of accommodating special, short-lived circumstances brought on by extreme weather events widely thought to be associated with climate change.

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is the Court's statement: "We ... conclude that *recurrent* floodings, even if of finite duration, are not categorically exempt from takings liability." 133 S. Ct. at 515 (emphasis added). In addition, the facts that the Court was addressing in the case involved recurrent flooding. Contrariwise, suggesting the absence of a recurrent-flooding limitation to the ruling is that there is no modern takings law principle by which any type of physical invasion should be categorically exempted. Moreover, in its key statement summarizing its ruling, the Court stated unqualifiedly: "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id*. at 522.

[39] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The seminal *Penn Central* multifactor balancing test requires a court, in assessing a regulatory taking claim, to look at three broad aspects of the challenged government action: (1) its economic impact on the property owner; (2) the degree to which it interferes with the owner's distinct, reasonable investment-backed expectations, and (3) its "character." *Id*. at 124. It is not entirely clear that the multifactor balancing test contemplated by *Arkansas Game & Fish Comm'n* is this very same test. The Court's ambiguity on this point may stem from the fact that the *Penn Central* test is solely for takings brought about by a *regulatory* act, while some physical invasions, such as floods, are not so initiated. The only thing that is clear is that at no point in the decision does the Court expressly *say* that the multifactor balancing test for temporary physical invasions such as flooding is the same as the multifactor balancing test in *Penn Central*. Critics of the *Penn Central* test would doubtless comment that in light of the test's amorphousness, this issue is not yet worth pursuing.

[40] 133 S. Ct. at 521 (emphasis added). In the same vein, she wrote that "today's modest decision augurs no deluge of takings liability." *Id*.

[41] 438 U.S. at 124.

Horne v. Department of Agriculture: Availability of a Takings Defense to an Enforcement Action

Facts: Marvin and Laura Horne produce raisins in California.[42] Being "handlers" of such raisins as well as producers, they are subject to a raisin marketing order issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA). The declared purpose of this Depression-era statute is to help farmers maintain price parity for their goods and to protect farmers and consumers alike from unreasonable fluctuations in supplies and prices. To achieve these goals, the raisin marketing order establishes annual reserve pools, which remove surplus raisins from the market and thus control prices. Upon delivery of raisins to a handler, however, a producer is not paid for the portion of the raisins that go into the reserve pool, unless, after the handler sells the reserve raisins in noncompetitive markets and pays the costs of the program, there are funds left over.

Disillusioned with the entire price-support program, the Hornes reorganized their operations around 2000 in the belief that, as reorganized, they were no longer within the AMAA's definition of handler and thus were not obligated to place raisins into the reserve pool. Based on that belief, they failed to set aside the prescribed percentage of reserve raisins in two crop years. The Department of Agriculture, however, saw things differently. In an administrative enforcement action against the Hornes, the Department found them still to be handlers subject to the reserve-pool contribution requirement, assessing them $484,000, the value of the raisins they should have set aside, plus $204,000 in civil penalties.

Decisions below: The Hornes sought review of the penalty order in a federal district court in California, arguing among other things that the requirement of transferring title to the reserve raisins was a *per se* physical taking. The district court disagreed, but on appeal the Ninth Circuit held that the district court lacked jurisdiction to hear the taking claim in the case. The reason: exclusive jurisdiction over takings claims against the United States is vested by the Tucker Act in the U.S. Court of Federal Claims (CFC).[43] Contrary to the Hornes' argument, the Ninth Circuit concluded, the AMAA did not impliedly withdraw their Tucker Act remedy, since the Hornes' taking claim was based on their status as producers, not handlers, and the former are not covered by the AMAA. Since the Hornes had not gone to the Court of Federal Claims, their taking claim in federal district court was premature.

Supreme Court decision: On June 10, 2013, the Supreme Court unanimously reversed.[44] Its overall holding was succinctly stated: "Petitioners' takings claim, raised as an affirmative defense to the [Department of Agriculture's] enforcement action, was properly before the [district] court because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claim by handlers."[45] This overall ruling was based on several sub-rulings—that the Hornes' taking claim was brought in their capacity as handlers, not producers, since the penalty was imposed on them in that role; that the taking claim in the federal district

[42] The facts in this paragraph and the immediately following one are taken from the Supreme Court decision in the case. *See* 133 S. Ct. 2053, 2056-2059 (2013).

[43] 28 U.S.C. § 1491(a). To be precise, the jurisdiction of the U.S. Court of Federal Claims to hear takings claims against the United States (for monetary compensation) is exclusive only when the claim exceeds $10,000. Such was the amount of the Hornes' claim.

[44] 133 S. Ct. 2053 (2013).

[45] *Id*. at 2056.

court was ripe in that the AMAA had withdrawn the Hornes' Tucker Act remedy in the Court of Federal Claims; and that nothing in the AMAA barred the Hornes from raising constitutional defenses in administrative enforcement actions, and hence during judicial review of such actions. The case was remanded to the Ninth Circuit to adjudicate the Hornes' taking defense.

Comments: As phrased by the Court, its decision was quite narrow, confined to review of administrative orders under a single statute, and it is possible that lower courts will keep it so confined. But there are so many ambiguities and arguable implications to the decision that one should not be surprised if its reach is ultimately found to extend well beyond the AMAA. At the outset, the taking claim seems to have transmuted twice. Initially, the courts construed it as a claim for a taking of raisins, but this claim runs into a brick wall in that the Hornes did not set aside the raisins. Later, it seemed the Hornes were asserting a taking of the money they would have to pay to satisfy the civil penalties the Department of Agriculture had imposed, but takings law has never recognized reasonable penalties for violating a law as a taking. Finally, the taking claim seems to have become a "takings-based defense" that one cannot be made to pay penalties for refusing to accede to an unconstitutional taking. This version of the taking claim presumably has in mind the AMAA's asserted withdrawal of Tucker Act jurisdiction in the CFC, but that withdrawal is only for handlers and the Hornes could easily have circumvented it by bringing their taking claim as producers, not covered by the AMAA.

The *Horne* decision's lasting legacy is likely to fall in two areas. One area is the use of a takings defense to enforcement. At least where the compensation remedy for a taking is withdrawn, *Horne* may open up the possibility that a property owner threatened with a government command he regards as a taking can elect not to comply and then assert a takings defense in any subsequent enforcement action. Limited to instances where the Tucker Act compensation remedy is withdrawn by Congress, this possibility leaves intact a fundamental rule of takings law that equitable relief is not available to enjoin a government action believed to be a taking; rather, one may sue only after the fact for compensation.[46] In short, compensation, if it is available, is all that the Takings Clause promises; if a forum for seeking such compensation is provided, the taking is perfectly proper.

The other lasting consequence of *Horne* may be to lower the threshold for inferring from a federal statute that Congress intended to withdraw the Tucker Act compensation remedy. It is well-established that Congress need not state the availability of Tucker Act suits in the CFC every time it enacts a statute. Rather, prior to *Horne*, the Court held that the Tucker Act remedy is presumed to be available, and that there must be "clear and unmistakable congressional intent ... to withdraw Tucker Act coverage."[47] In contrast, *Horne* asserts what is arguably a laxer standard: that the statute at issue establishes a "comprehensive remedial scheme,"[48] including a "ready avenue to bring takings claim [sic].... "[49] The decision fails to even mention the Court's earlier "clear and unmistakable congressional intent" standard. If lower courts construe *Horne* to have relaxed the standard for withdrawal of the Tucker Act remedy, it will heighten the importance of the first "lasting legacy," described above. More federal takings law will be made outside the

[46] *See, e.g.*, Ruckelshause v. Monsanto, 467 U.S. 986, 1016 (1984).

[47] *See, e.g.*, Preseault v. ICC, 494 U.S. 1, 14 (1990). *Accord*, Ruckelshaus v. Monsanto, 467 U.S. 986, 1019 (1984) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act "cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy").

[48] 133 S. Ct. at 2056, 2062, 2063.

[49] *Id.* at 2063.

CFC, in the district courts, and possibly limited to an invalidation, rather than compensation, remedy.

Koontz v. St. Johns River Water Management District: Exaction Conditions on Land Development Permits

Facts and background: Coy Koontz owns a 14.9-acre parcel in Florida.[50] He proposed to develop the 3.7 acres closest to the abutting highway, of which 3.4 acres were at the time designated wetlands. The issue in the case concerns the "exaction conditions" imposed by the water management district—the land use agency with permitting authority over Koontz's land—in return for granting him the necessary permits. It appears that a District staffer agreed to recommend permit approval if Koontz did two things: deed the remainder of his land (about 11 acres) into a conservation area, and perform "offsite mitigation" for the wetlands loss by enhancing wetlands on District-owned land miles away. Koontz was invited, however, to come up with "equivalent" alternatives. Alternatively, the District asked Koontz to reduce his development to 1 acre and deed the remainder of his land (about 14 acres) into a conservation area—this time with no off-site mitigation. Koontz refused either set of conditions, viewing the District's conditions as excessive relative to the environmental impacts of his development proposal. As a result, the District denied the permits.

Koontz then sued in state court, asserting a taking by virtue of the allegedly excessive exaction conditions sought to be imposed by the District. As background, exaction conditions are routinely used by local land use authorities to make development pay its own way, or to otherwise offset its impact.[51] The developer may be asked to dedicate acreage in its subdivision for a new school or roads, so-called *land-dedication exactions*. Or it may be asked simply to undertake expenditures or make a payment toward the costs of the added police and fire protection, sewage treatment capacity, schools, road widening, etc., which its proposed development makes necessary, so-called *monetary exactions*. Here, the monetary exaction came in the form of the District's above-described request that Mr. Koontz, as one option, offset the wetlands loss on his land by paying for off-site enhancement of wetlands on District-owned land.

As for Mr. Koontz's takings claim, the Supreme Court has a two-part test for when exaction conditions on land development approvals violate the Takings Clause. This test demands that in order not to be a taking, an exaction condition must, first, further the same purpose as the permit to which it is attached—known as the "essential nexus" test and announced in *Nollan v. California Coastal Comm'n* in 1987.[52] Second, the exaction condition must impose a burden on the landowner no greater than "roughly proportional" to the burden that the proposed development would impose on the community—known as the "rough proportionality" test and debuted by the Court in *Dolan v. City of Tigard* in 1994.[53] This *Nollan/Dolan* test is viewed as

[50] The facts in this paragraph are taken from the Supreme Court's decision in the case. *See* 133 S. Ct. 2586, 2591-2593 (2013).

[51] *See generally* Patrick J. Rohan and Eric D. Kelly, ZONING AND LAND USE CONTROLS § 1.03[8] (updated through March 2013).

[52] 483 U.S. 825 (1987).

[53] 512 U.S. 374 (1994).

friendlier to takings plaintiffs than the multifactor balancing test created by the Court for regulatory takings,[54] and thus property owners have long sought to expand its application.

Decisions below: Both the state trial court and the intermediate appellate court found that the exaction conditions imposed by the District offended *Nollan/Dolan*. On appeal, however, the Florida Supreme Court reversed, denying the property owner's effort to expand *Nollan/Dolan*.[55] First, the court held, there can be no *Nollan/Dolan* taking when, as in this case, the property owner refused to accept the offered conditions and as a result the permit was denied. How, asked the court, can there be a *Nollan/Dolan* taking when, owing to the owner's refusal, no conditions were ever imposed? Second, the state supreme court declined to expand *Nollan/Dolan* beyond the factual circumstances in those cases—which involved land-dedication exaction conditions rather than, as here, a requirement that the property owner merely spend money.

Supreme Court decision: On June 25, 2013, the Supreme reversed, ruling 5-4 for Mr. Koontz.[56] The Florida Supreme Court, it held, was wrong as to permit denials and as to monetary exactions. *Nollan/Dolan*, the Court concluded, covers both.

As to permit denials based on landowner refusal to accept offered conditions, the Court explained that the *Nollan/Dolan* test is based on the doctrine of unconstitutional conditions.[57] That being so, *Nollan/Dolan* is violated simply by the government *imposing* the exaction conditions—that is, whether or not the property owner accepts them. As a consequence, a permit denial based on landowner-refused permit exaction conditions does not relegate the owner to the lax regulatory takings test. The four dissenters agreed that permit denials based on refused conditions do not escape *Nollan/Dolan* review, making this portion of the *Koontz* decision unanimous. The ruling, however, leads to the difficult question of remedy given that no exaction transferred; the Court acknowledged that the Takings Clause only requires compensation when there is a taking, which did not occur here. That meant, said the Court, that whether money damages are available depends not on the federal constitution, but on the federal or state cause of action on which the landowner relies. Because Mr. Koontz brought his claim under a state law cause of action,[58] the Court left his remedy to be determined by the Florida courts on remand (if they find a taking).

As to monetary exactions, the Court placed them under *Nollan/Dolan* just as land-dedication exaction conditions. To hold to the contrary, reasoned the Court, would allow land-use agencies to bypass *Nollan/Dolan* simply by giving the landowner a choice between granting an easement and making a payment equal to the easement's value.[59] By leaving this payment outside *Nollan/Dolan*, such a choice would comply with that test because it requires only that the permit applicant be given *one* nonviolative condition. The Court also rejected the argument that putting monetary exactions under *Nollan/Dolan* leaves no principled way to distinguish impermissible land-use exactions from property taxes and user fees—taxes and reasonable user fees having long

[54] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[55] 77 So. 2d 1220 (Fla. 2011).

[56] 133 S. Ct. 2586 (2013).

[57] Under the doctrine of unconstitutional conditions as classically stated, the government may not burden (here, through exaction conditions) the exercise of a constitutional right (here, the right to compensation when property is taken) by withholding benefits (here, a land development permit).

[58] Fla. Stat. Ann. § 373.617(b)(2).

[59] Such "in-lieu fees" are in fact commonplace.

been held not to be takings.[60] Finally, the majority concluded that *Nollan/Dolan* coverage of monetary exactions will not deprive local government of the ability to charge reasonable permitting fees. Numerous lower courts, the majority pointed out, have previously applied *Nollan/Dolan* to monetary exactions, yet the dissenters' predicted "significant practical harm" had not, in the majority's view, come to pass. Also, the majority noted, state laws provide an independent check on land use permitting fees.

As in *Arkansas* and *Horne*, however, the Supreme Court did not opine on whether there was a taking on the particular facts before it, sending that question back to the Florida courts.

Comments: The reaction to *Koontz* was predictable. Property rights advocates hail the decision as eliminating technical constraints on the applicability of *Nollan/Dolan* that threatened to undercut that test, thus more effectively reining in the government temptation to use exaction conditions to pay for public improvements not connected to the proposed development. Government-side spokespersons see the decision as needlessly injecting the federal constitution into the multitude of fee conditions that local governments impose every day on land-use development, and raise the concern that local governments will now increasingly refuse to negotiate conditions with land-use permit applicants and instead deny permits outright.

Overall, the majority opinion displays a clear ambivalence about the use of exaction conditions on development approvals. On the one hand, the opinion notes the government's legitimate need to offset the public costs of development through exactions from the proponents of development. The opinion explicitly endorsed the state's interest in protecting against wetlands loss, and said that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy."[61] On the other hand, the majority opinion's choice of words suggests a suspicious view of land-use regulators. The words "extortion" or "extortionate" are used four times to describe exactions that do not display the requisite nexus and proportionality, though the majority offers no empirical evidence to indicate how often this happens in reality. The majority opinion also described the District as believing it had "circumvented" *Nollan/Dolan*.[62] And it said that "government can pressure an owner into voluntarily giving property,"[63] wielding its "substantial power ... in land-use permitting."[64]

Certainly *Koontz* will prompt much deliberation by local governments as to how best to conform to *Nollan/Dolan* as expanded by *Koontz*, or how to avoid its application. Some possibilities, besides more use of outright permit denials (or approvals), are

- greater use of pre-permit-application negotiation between government and landowner, preferably with assurances it be off the record;
- greater use of legislatively specified exactions imposed by broad rules, in contrast to case-by-case, adjudicatively imposed exactions, the Court having previously suggested that the former lie outside *Nollan/Dolan*;[65]

[60] *See, e.g.*, County of Mobile v. Kimball, 102 U.S. 691, 703 (1881) (taxes); United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989) (reasonable user fees).

[61] 133 S. Ct. at 2595.

[62] *Id.* at 2591.

[63] *Id.* at 2594.

[64] *Id*. at 2590.

[65] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994). Some lower courts have adopted the no-coverage-
(continued...)

- proffers by the landowner based on broadly specified government goals, instead of conditions imposed by the government, possibly with a variance mechanism for cases when proffers needed to meet the government's goals violate *Nollan/Dolan*;[66]
- better explanations by government during negotiations that its conditions satisfy *Nollan/Dolan*, so that landowners, who generally would rather build than litigate, are content with the conditions;
- more use of development agreements.[67]

All of these options, however, will likely be examined by the courts in light of the *Koontz* majority's unmistakable concern that *Nollan/Dolan* not be vitiated by overly technical distinctions and procedural ruses, such as the land dedication versus monetary exaction distinction rejected in *Koontz*.

Koontz certainly leaves open many issues:

- Does the decision undercut the view of some courts that *Nollan/Dolan* scrutiny is not triggered by legislatively imposed exactions, as opposed to adjudicatively imposed ones (see bulleted list above)?[68] Only the latter were involved in *Koontz*, and, for that matter, *Nollan* and *Dolan*.
- Precisely what constitutes "rough proportionality" under *Dolan*? This question preceded *Koontz*, and *Koontz* did not address it.
- In demonstrating "rough proportionality," how should governments account for societal values that can be monetized only with difficulty, such as protection of endangered species or mitigation of climate change?[69] Or are such factors, when going beyond impacts within a local government's territory, not within the cognizance of *Nollan/Dolan* at all?
- Can a landowner told it cannot carry out its ideal, most profitable development plan assert a *Nollan/Dolan* claim for the profit or land value difference between that plan and the one that it ultimately is allowed to build, characterizing the difference as a monetary exaction?
- As mentioned, *Koontz* leaves open the remedy question: On showing a violation of *Nollan/Dolan*, is a property owner limited to money damages allowed by federal or state law, perhaps the Civil Rights Act remedy known as a "section 1983 action"?[70] Or must the court instead provide injunctive relief, ordering the

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of-legislative-exactions view as well, *see, e.g.*, Parking Ass'n of Georgia v. City of Atlanta, 450 S.E.2d 200 (1994), though other courts have ruled to the contrary.

[66] This option, premised as stated on government goals set forth only "broadly," relies on *Koontz*'s apparent acknowledgement that government-imposed conditions on land-use permits must attain a certain level of specificity before coming under *Nollan/Dolan* scrutiny. 133 S. Ct. at 2598.

[67] *See, e.g.*, California's development agreement statute, Cal. Gov't Code §§ 65864-65869.5.

[68] *See, e.g.*, Parking Ass'n of Georgia v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994).

[69] Coastal wetlands, for example, protect against incoming storm surges and resultant threats to human safety and property.

[70] 42 U.S.C. § 1983. While originally enacted as part of the Civil Rights Act of 1871 to give the newly freed slaves (continued...)

locality to grant the requested permit with conditions pared down to *Nollan/Dolan*-compliant dimensions?

Because the overwhelming majority of land-use regulation in the United States occurs at the hands of local government, the importance of *Koontz* lies largely at that level. However, *Koontz* could have implications for the few federal programs that impose similar mitigation conditions on land development approvals. The most obviously relevant examples are the off-site mitigation conditions and in-lieu fee requirements often attached to wetlands fill permits under Clean Water Act section 404 (see discussion of *Sackett* above).[71] Also possibly implicated are mitigation conditions in habitat conservation plans under the Endangered Species Act. Preparation of such plans is required for issuance of "incidental take permits" needed when a proposed project is likely to harm incidentally members of a listed species.[72] Further afield, there may be an issue whether certain Clean Air Act preconditions for issuance of emission-source construction permits (such as installation of expensive pollution controls) are now subject to *Nollan/Dolan* as monetary-expenditure exaction conditions for land development.[73]

Finally, two parallels between *Horne* and *Koontz* should be mentioned. Both decisions recognize that the Takings Clause can constrain government action even in the absence of any taking: *Horne*, when the compensation remedy for the taking has been withdrawn, and *Koontz*, when a permit is denied based on a landowner's refusal to accept the exaction conditions offered. Also, both decisions raise the issue of whether government-compelled payments of money can implicate the Takings Clause: in *Horne*, through payment of civil money penalties, and in *Koontz*, though monetary expenditures for off-site mitigation of wetlands loss.

Overall Comments

Why the Supreme Court takes cases is usually speculative. The process by which the Court decides which cases in its discretionary docket it will hear is famously opaque, other than the fact that at least four Justices must approve any grant of certiorari. Few of the cases described in this report even involve a split in the circuit courts, a factor traditionally boosting the likelihood the Justices will take a case. Some have speculated that the period of no property-rights-related decisions began just as Chief Justice Rehnquist and Justice O'Connor left the Court, in 2005. These justices indicated a particular interest in property rights in their opinions, and their departure from the Court, some conjecture, may have left the issue without a strong champion. No one has yet suggested, however, why their replacements on the Court, Chief Justice Roberts and Justice Alito, or others on the Court should at this moment in time be motivated to reenter the area.

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access to federal courts for protection of their federal rights, this provision's broad language has led to its use in many other areas, often because of an accompanying provision, 42 U.S.C. § 1988, for recovery of attorneys' fees. In particular, takings claims against local governments are often brought under section 1983. As relevant to such claims, section 1983 states that every "person," held to include political subdivisions of states, "who ... subjects ... any citizen of the United States ... to the deprivation of any rights ... secured by the Constitution ... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.... "

[71] 33 C.F.R. § 320.4(r) and 33 C.F.R. part 332.

[72] 16 U.S.C. §§ 1536(b)(4), 1539(a)(2)(A)(ii).

[73] *See, e.g.*, Clean Air Act § 173(a)(1)(A), 42 U.S.C. § 7503(a)(1)(A).

Nonetheless, an informed guess can be made as to the Court's motives. In all six of the cases discussed here, the decisions below were *against* the private property owner. This suggests that the Justices (or at least some Justices) are looking for circumstances where property rights are unfairly burdened. And indeed, in five of its six decisions, the Court reversed, ruling (in four cases unanimously) *for* the aggrieved property owner. The one decision to go against the property owner was *Stop the Beach Renourishment*.

As to three of the six cases, there are more specific clues as to the Court's intentions. In both *Stop the Beach Renourishment* and *Koontz*, one or more of the Justices on the Court when certiorari was granted had previously signed onto a dissent from denial of certiorari expressing concern, or at least interest, in the key issue in the current cases. In *Koontz*, the Court noted its desire to resolve a split in the lower-court decisions.

Undoubtedly, the decision with the greatest potential to alter how government relates to property owners, and thus analyzed at greatest length here, is *Koontz*. Enlarging the reach of the Supreme Court's test for when exactions imposed as conditions on development approval effect takings could, depending on how the decision is read, bring in countless conditions used by local governments to induce land developers to spend money, invest labor, or supply equipment before they can proceed. Because the exactions taking test is viewed as friendlier to landowners than alternative takings tests that would otherwise apply, enlarging its scope may lead local governments to impose more modest exaction conditions or use them less frequently. As noted, *Koontz* has more limited relevance to federal programs.

For most of the Supreme Court decisions included here, major questions exist as to their scope and what they mean. A decade from now, with the benefit of lower-court interpretation, the significance of these decisions will likely be easier to evaluate.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....