# **2 The Law of Pooling and Unitization, 3rd Edition § 24.01**

***The Law of Pooling and Unitization, 3rd Edition* > *CHAPTER 24 Role of Conservation Agencies***

**§ 24.01 Substantive Due Process and Regulatory Takings**

1. **Defining the Police Powers of the State**

Under our federal system, the states are the primary repositories of the police power. The police power is the power of a government to act to promote and protect the public health, safety, morals, and general welfare. In the absence of federal or state constitutional limitations, a state’s exercise of the police power is plenary in nature. The state possesses the entire power, although the federal or state constitution may limit its exercise.

In the early days of conservation legislation, the principal fear of the supporters of that legislation was that the regulatory schemes would violate the federal constitutional mandate that federal or state laws not deprive citizens of liberty and property without due process of law. This so-called substantive due process claim was evident in the early cases that upheld the validity of state conservation statutes. A related claim that was often made was that the statute amounted to a taking of private property without just compensation, which was in violation of the Fifth Amendment.[[1]](#footnote-2)1 State regulation of economic activity during the post-Civil War period and extending through 1935, was coming under increasing judicial scrutiny under the substantive due process doctrine.[[2]](#footnote-3)2 The so-called *Lochner* era of judicial invalidation of state regulation of business relationships flourished at the time that state conservation laws were being enacted and then subjected to judicial review.[[3]](#footnote-4)3

These early challenges were “per se” attacks on the legislation. They did not challenge the application of the legislation “as applied” to an individual. It is obvious that while a general legislative scheme delegating regulatory power to an administrative agency may not violate the substantive due process limitations of the constitution, individual agency action may nonetheless violate constitutional limits as it is applied under a particular set of circumstances. These early cases, however, were mostly concerned with the “per se” validity of the legislation.

It is also important to remember that the substantive due process issues are substantially different than the procedural due process requirements of the Fourteenth Amendment. As was described earlier in § 11.04, and which will be described in greater detail later in this chapter, the procedural due process concept, which is also embodied in the Fifth and Fourteenth Amendments, requires that some process is due all individuals before they can be deprived of liberty or property.[[4]](#footnote-5)4 Agency action that affects individual property or liberty interests can only be taken after the affected parties have been afforded their due process rights. Depending on the nature of the agency action, these rights may include adequate notice, the opportunity to be heard, the right to an impartial decision-maker, the opportunity to cross-examine adverse witnesses, the opportunity to present evidence, the right to have an attorney present, and the right to demand that the decision be rendered only upon the evidence that was presented to the agency, along with a statement of reasons why the decision was reached.[[5]](#footnote-6)5

This initial section, however, will focus on the substantive due process issues that confronted conservation agencies that were delegated power to implement a regulatory program dealing with the development and conservation of the ***oil*** and gas resource.

One of the first reported cases in which a substantive due process attack was made on a state conservation statute was *Townsend v. State*.[[6]](#footnote-7)6 The defendant was convicted of violating an Indiana statute that prohibited the use of natural gas in “flambeau lights.” The principal challenge raised against the prohibition was that it deprived the defendant of liberty and property without due process of law. The state defended its action under its police power authority to regulate individuals for the protection of the public health, safety, morals, and general welfare. In reconciling these two competing arguments, the court emphasized that the plaintiff was not totally deprived of the full and free use of its property. It was merely restrained from wasting it. That act of waste would cause an injury to the public for which the police power was designed to prevent.

Unlike the growing activism of the Supreme Court of the United States in economic regulation cases, the Indiana Supreme Court took a hands-off approach to judicial review over the wisdom or rationality of the regulatory system. The court stated:

The state legislature possesses all legislative power, except such as has been delegated to congress and prohibited by the constitution of the United States, to be exercised by the states, and such as are expressly or impliedly withheld by the state constitution from the state legislature. The only limitations … [on the legislative power] are those imposed by the state constitution, the federal constitution … and acts of congress … . Therefore the doctrine invoked by the appellant that a statute may be overthrown by the courts on the ground that it is unreasonable, is contrary to our decisions, and has no place in our jurisprudence.[[7]](#footnote-8)7

The leading case that upheld the constitutionality of state conservation statutes was *Ohio* ***Oil*** *Co. v. Indiana.*[[8]](#footnote-9)8 Rather than dealing with the regulation of an end use of natural gas, the regulation in *Ohio* ***Oil*** prohibited the venting of natural gas at the wellhead.[[9]](#footnote-10)9 The state had taken enforcement action against the defendant because it was venting gas. The state was able to show that the venting, which was occurring in order to allow for the production of ***oil***, had external effects, namely the lessening of back pressure needed to prevent saltwater encroachment in a stratum that served nearby cities and industrial facilities with natural gas. Thus, the facts were somewhat stacked against the defendant from the outset, since there was proven external impacts that were injurious to both the private and public interests.

Ohio ***Oil*** argued that the statute denied it due process of law, partly because the state was taking private property without just compensation. The court rejected the substantive due process claims through two separate but related arguments. The court initially noted the unique nature of ***oil*** and gas development from a common source of supply. The state had a valid police power objective in preventing the waste of the common property interests in the reservoir. Thus, the flaring of gas by the defendant was causing an injury to the reservoir and damaging other private property interests that also shared the reservoir with the defendant. The court stated:

In view of the fact that regulations of natural deposits of ***oil*** and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the Supreme Court of Indiana, is but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character.[[10]](#footnote-11)10

The court’s second argument related to the definition of what was a “property interest” that was protected by the substantive due process limitations of the Fourteenth Amendment. The court noted that a state is free to define the nature of property interests in common sources of supply, and if Indiana chose to limit the right to make withdrawals from common sources in order to protect the interests of the other common owners, there was no vested property interest in Ohio ***Oil*** to continue to withdraw gas that injured the other common owners.

This second argument short-circuited both the substantive due process and taking claims. If the right to withdraw unlimited amounts of gas was not a property interest, there was no taking of a property interest that required compensation and also no deprivation of a property interest without due process of law.

It was perhaps fortuitous that *Ohio* ***Oil*** was decided prior to *Lochner v. New York.*[[11]](#footnote-12)11 Although the Supreme Court had committed itself to the substantive due process review of state economic regulation, it was not until the *Lochner* decision in 1905, five years after *Ohio* ***Oil****,* that the court began to regularly strike down state legislation as violative of the substantive due process limitations.[[12]](#footnote-13)12 Exercises of the state police power increasingly fell under the Supreme Court’s substantive due process axe.

Although this was an era of intrusive judicial intervention under the guise of substantive due process review, the state conservation statutes and agency decisions taken pursuant thereto, largely escaped invalidation at the hands of the state or federal judiciary.[[13]](#footnote-14)13

The only major judicial exceptions to this hands-off policy were a series of cases that arose in Texas shortly after the discovery of the East Texas Field with the consequent massive over-drilling and over-production of ***oil***.[[14]](#footnote-15)14 The leading case striking down the efforts of the state and the Railroad Commission to control the East Texas Field was *Macmillan v. Railroad Commission.*[[15]](#footnote-16)15 The court found that the attempt to institute a market-demand proration system was a subterfuge for a government imposed price-fixing scheme and was therefore violative of the substantive due process limitations of the constitution. This in part led to changes in the Texas proration statute in 1931, but before the *Macmillan* case made its way to the Supreme Court, that Court decided a similar substantive due process challenge to the Oklahoma market-demand proration system.

The Oklahoma decision that upheld the proration statute and the individual proration order was *Champlin Refining Co. v. Oklahoma Corporation Commission*.[[16]](#footnote-17)16 As with *Ohio* ***Oil****,* the plaintiffs’ basic challenge was on substantive due process and taking issue grounds. What led to the litigation was the commission’s proration order that substantially limited the ability of the plaintiff to produce gas from its wells in a part of the Oklahoma City Field.

The crucial point of the Court’s analysis was its definition of a property interest. While the Court admitted that the rule of capture allowed every mineral owner to reduce to possession of all the ***oil*** and gas that it can get, that interest was subject to valid police power regulations designed to prevent unnecessary waste, loss, or destruction of the hydrocarbons.[[17]](#footnote-18)17

The compulsory pooling statutes received the same judicial reception as the prior conservation laws. The leading case sustaining both a compulsory pooling statute and an individual order against constitutional challenge was *Patterson v. Stanolind* ***Oil*** *& Gas Co.*[[18]](#footnote-19)18 The plaintiff argued that the compulsory pooling order forcing it to share production with other working-interest owners within the ten-acre unit was a taking of its property and a deprivation of property without due process of law. The court rejected that argument largely by ignoring it and focusing on the positive effects of the regulation as well as the government’s important interest in preventing waste.

Similar treatment was also afforded a compulsory unitization statute and order in *Palmer* ***Oil*** *Corp. v. Phillips Petroleum Co.*[[19]](#footnote-20)19 Although the plaintiffs presented a multifaceted constitutional attack on the compulsory unitization statute, including substantive due process, taking, and equal protection arguments, the court in a 5-to-4 decision upheld the validity of the statute and the compulsory unitization order. *Palmer* ***Oil*** is representative of the modern approach to substantive due process challenges to economic regulation. One of the arguments of the plaintiffs was that the compulsory unitization statute and the specific Corporation Commission order were unreasonable and arbitrary and therefore a deprivation of property without due process of law. They argued that the statute and order forcing the unitization upon the plaintiffs could be accomplished without a finding being made that the unitization will accomplish the admitted valid police power objective of conserving ***oil*** and gas.

The court rejected that kind of frontal attack on the statute and order, characterizing the challenge as one that went not to the issue of power but to the issue of policy. Since it had been held in prior cases that ***oil*** and gas conservation, including pooling, unitization, and proration regulations, was a proper exercise of the police power, the plaintiffs were merely arguing that it was bad policy or a wrong choice. In response the court stated:

There is no contention that the standards prescribed are insufficient in any respect other than in not including the suggested finding. Therefore, it necessarily follows that the contention challenges the authority of the Legislature in dealing with matters of policy, which is a realm that is without the scope of judicial inquiry. The Supreme Court of the United States, … said: “… The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy.* Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.[[20]](#footnote-21)20

In *Energy Management Corp. v. City of Shreveport*,[[21]](#footnote-22)21 a lessee challenged a municipal ordinance prohibiting drilling within 100 feet of a municipal reservoir on the basis that such regulation was preempted by state statutes. After prevailing on that issue,[[22]](#footnote-23)22 the lessee sought damages arguing that the municipal regulation was a violation of its substantive due process rights. The test for substantive due process violations is a showing that the governmental action is without a rational basis and involves a constitutionally protected property right.[[23]](#footnote-24)23 Even though as a lessee, it had a protected property interest in drilling for, and producing ***oil*** and gas, the City had a rational basis—attempting to protect its drinking water supply—even though such an effort was invalid on preemption grounds.[[24]](#footnote-25)24

In modern constitutional law parlance, conservation statutes are the type of regulations that receive minimum scrutiny by the courts under the substantive due process doctrine.[[25]](#footnote-26)25 It is well beyond cavil that state conservation statutes will be upheld under a per se equal protection, taking, or due process argument. That is not to say that an individual application of a statutory scheme might not violate the relevant constitutional provisions. But individual application decisions are a far cry from the invalidation of general economic regulatory legislation that occurred in the early 1900s but that was not applied to the state regulation of the ***oil*** and gas industry.

Equal protection claims against state conservation agencies or local governmental bodies issuing well permits are reasonably rare and hard to prove.[[26]](#footnote-27)26 In *Maguire* ***Oil*** *Co. v. City of Houston*,[[27]](#footnote-28)27 an operator who was seeking to drill a well within 1,000 feet of Lake Houston argued that the city’s denial of that permit amounted to a violation of his equal protection rights due to the alleged selective enforcement of the drilling ordinance. While proving equal protection violations may be difficult unless a suspect class or fundamental right is involved, the court of appeals relied on a United States Supreme Court decision that recognized that even as to non-suspect classes an equal protection claim may be successfully made even though plaintiff constitutes a class of “one.”[[28]](#footnote-29)28 The court concluded that the equal protection/selective enforcement claim should not have been dismissed on the city’s motion for summary judgment. Affidavit evidence showed that the city had approved a number of well permits that were superficially similar in nature to the well permit application of the plaintiff. That raised a fact issue regarding the underlying rationale of the city in denying this permit.[[29]](#footnote-30)29 In cases arguing selective enforcement as the basis for an equal protection claim, Texas courts require the plaintiff to “establish that he was treated differently than other similarly situated parties without a reasonable basis. … A plaintiff must allege that he is being treated differently from those whose situation is directly comparable in all material respects.[[30]](#footnote-31)29.1

One due process issue that arises in a regulatory context relates to the retroactive nature of statutes or regulations.[[31]](#footnote-32)30 While it is often said that retroactive statutes and rules are disfavored,[[32]](#footnote-33)31 if the statute or rule clearly evinces a contrary intent, the courts will enforce the statute or rule retroactively. It is not a due process violation to modify or revoke the terms of an existing permit in order to protect the public health, safety, morals or general welfare unless the permit clearly gives the owner a vested right to engage in an activity without further modification.[[33]](#footnote-34)32

1. **Regulatory Takings**

Because many ***oil*** and gas conservation programs were found constitutional in an era before the “takings” issue took hold, there have been reasonably few takings cases involving such programs. While the modern takings era dates back to 1922,[[34]](#footnote-35)33 most ***oil*** and gas conservation programs that had a direct impact on private property rights had already received the constitutional blessing of the Supreme Court.[[35]](#footnote-36)34 In post-1922 cases, both the Supreme Court of the United States and various state supreme courts tended to combine the due process and takings analysis while upholding the validity of various state ***oil*** and gas conservation regulatory programs.[[36]](#footnote-37)35 The Oklahoma Supreme Court’s approach to takings analysis was typical of these early cases. The court stated:

All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.[[37]](#footnote-38)36

While facial or per se challenges to conservation statutes generally, and pooling and unitization statutes specifically, have been reasonably rare, the Arkansas Supreme Court in *Gawenis v. Arkansas* ***Oil*** *& Gas Commission*,[[38]](#footnote-39)37 largely relied on the rationale of the older cases in finding that the Arkansas compulsory pooling statute did not constitute a regulatory taking.[[39]](#footnote-40)38 It found that the options afforded an unleased and/or non-consenting owner did not constitute a regulatory taking but merely an adjustment to the owner’s interests in the common source of supply.

Similarly, in *Paczewski v. Antero Resources Corp*.,[[40]](#footnote-41)39 the Ohio Court of Appeals relied on the older conservation cases to conclude that a compulsory unitization order did not constitute an inverse condemnation of the property rights owned by a non-consenting owner. Such orders are a proper balance by which economic and physical waste of natural gas may be prevented, which is an important police power objective.[[41]](#footnote-42)40

Modern takings jurisprudence begins with *First English Evangelical Lutheran Church v. County of Los Angeles*,[[42]](#footnote-43)41 where the Supreme Court of the United States firmly held that if a regulation went so far as to constitute a taking of property under the Fifth Amendment, then compensation was due the property owner.[[43]](#footnote-44)42 What ensued following *First English* may aptly be described as attempts to categorize takings cases. It is clear that if the government physically occupies a property interest, there will always be a taking, no matter how small the physical occupation.[[44]](#footnote-45)43 There may be an exception to the per se physical invasion test where encroachments on the right to exclude will not rise to the level of a regulatory taking.[[45]](#footnote-46)44 But the appropriation, rather than a regulation of a portion of a property interest, will fall under the per se physical invasion rule.[[46]](#footnote-47)44.1 Likewise, where the government has deprived the owner of all beneficial use of the property interest, there is a per se taking.[[47]](#footnote-48)45 *Lucas*, however, carved out an exception to its per se test by stating that background principles of state property and nuisance law will be considered in determining whether there has been a total taking.[[48]](#footnote-49)45.1 In addition, there are special rules that apply to governmental permits requiring the transfer of property interests to the government in exchange for permit approval.[[49]](#footnote-50)46 If one cannot fit within one of the categories, presumably one is back to a balancing test, that is, by judicial admission, ad hoc in nature.[[50]](#footnote-51)47 After *Agins v. City of Tiburon*,[[51]](#footnote-52)48 it was presumed that one could show a regulatory taking if one could prove that the regulation did not substantially advance a legitimate state interest. In *Lingle v. Chevron U.S.A., Inc.*,[[52]](#footnote-53)49 however, the Supreme Court treated the *Agins* substantially advance test as dicta and said that such a regulation would not violate the Takings Clause.

Finally, there are procedural rules, most notably the requirement that a final governmental decision be rendered in order to make a takings challenge ripe, that affect this type of litigation.[[53]](#footnote-54)50 One procedural issue resolved by the Supreme Court is that the property owner is entitled to a jury trial in a § 1983 action based on an alleged regulatory taking.[[54]](#footnote-55)51 While facial attacks asserting a regulatory taking are rare, a recent North Dakota Supreme Court opinion allowed a facial attack against a statutory scheme that authorized mineral owners to use the pore space owned by the surface owners without compensation or interference.[[55]](#footnote-56)51.1

A key issue in determining whether a regulatory taking has occurred under the *Lucas* total taking or *Penn Central* ad hoc balancing tests is the so-called “denominator” problem.[[56]](#footnote-57)52 This is especially true where mineral interests are involved. The predominant test now in use attempts to look at the “parcel as a whole” taking into consideration the economic expectations of the property owner.[[57]](#footnote-58)53 Factors looked at to determine what the “whole” parcel entails include the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the regulated lands enhance the value of the remaining lands.[[58]](#footnote-59)54

The U.S. Supreme Court has recently attempted to articulate in *Murr v. Wisconsin*[[59]](#footnote-60)55 the appropriate test to apply in order to determine the relevant parcel to analyze in a regulatory takings context. As with the ad hoc test under *Penn Central*, the Supreme Court has opted for a multi-factor analysis in determining the parcel that is to serve as the basis for the regulatory takings claim. The Court notes two concepts and then several factors that lower courts should apply in determining the relevant parcel. The first concept is that the “Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation.”[[60]](#footnote-61)56 The second concept is “the view that property rights under the *Takings Clause* should be coextensive with those under state law.”[[61]](#footnote-62)57

The application of these two concepts leads the *Murr* court to announce the following approach or test:

[N]o single consideration can supply the exclusive test for determining the denominator. Instead courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.[[62]](#footnote-63)58

As with *Penn Central’s* three-part test, the *Murr* test is easy to recite and hard to apply especially outside of the factual context of *Murr* which involved separate tracts or lots that were combined and then separated.

A number of earlier state court opinions would seemingly be consistent with the *Murr* analysis in situations involving severed mineral interests. For example, in *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners*,[[63]](#footnote-64)59 the court applied the “parcel as a whole” analysis to defeat a regulatory taking claim made by the owner of a sand and gravel extraction operation. A county zoning ordinance prohibited certain types of mining activities. Some of the lands owned by the plaintiff fell within the prohibited area. The court determined that there was neither a *Lucas* nor a *Penn Central* taking because the entire parcel owned by the plaintiff included areas where economically viable activities could take place.[[64]](#footnote-65)60 There are a number of decisions, however, that tend to focus on the regulated parcel, rather than the parcel as a whole in applying either the *Lucas* or *Penn Central* tests.[[65]](#footnote-66)61 Not surprisingly, where the regulated parcel is treated as the denominator, the courts are quite likely to find either a *Lucas* or *Penn Central* taking.

The Ohio Supreme Court was the principal proponent of the regulated parcel as the denominator doctrine among the states.[[66]](#footnote-67)62 The basic concept was that even where there was a unified ownership of the surface and mineral estate, if the regulation only affected the mineral estate, it would be the mineral estate that would go into the denominator.[[67]](#footnote-68)63 But five years after the *R.T.G.* opinion, the Ohio Supreme Court in *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners*,[[68]](#footnote-69)64 all but overruled *R.T.G.* and reinstated the “parcel as a whole” rule for regulatory taking claims. A sand and gravel operator was denied a discretionary permit to quarry sand and gravel on a parcel where the operator had purchased both the surface and mineral estates. In rejecting the application of *R.T.G.*, the Ohio Supreme Court said that the “parcel as a whole” rule should apply in regulatory taking cases where there is no severance of the mineral and surface estates.[[69]](#footnote-70)65 The court said that *R.T.G.* should be limited to its facts, despite the broad language used in the syllabus and that its holding was dependent on “unique circumstances.” *Id.* Only where there has been a complete severance of the surface and mineral estates can the individual estates be treated as the denominator. The appropriate *Lucas*-taking analysis looks at the regulation’s effect on the unitary surface and mineral estate. While sand and gravel operations could not occur because of the denial of the discretionary permit there were other economically viable uses which could be developed on the parcel.[[70]](#footnote-71)66

The denominator problem also arises where there has been activity prior to regulation that either diminishes or totally negates the ability of the mineral owner to engage in further production activities. In *Rith Energy, Inc. v. United States*,[[71]](#footnote-72)67 the owner of a revoked coal mining permit argued that because it was no longer able to produce any coal, it had successfully asserted a *Lucas* total taking. The Federal Circuit rejected that view, holding that where there had been substantial production prior to the permit revocation, that production would defeat a *Lucas* takings claim and require the court to apply the ad hoc *Penn Central* balancing factors.

A confusing procedural issue may arise where a party files a diversity action in federal court alleging both a state inverse condemnation cause of action and a federal regulatory takings cause of action. While the federal action would not be ripe until the state action is final, the federal court may entertain the state inverse condemnation suit under its diversity jurisdiction power.[[72]](#footnote-73)68

An analogous problem to the “denominator” problem is defining the nature of the interest which has allegedly been taken. It must be a property interest and not a contract interest thus raising questions as to whether real covenants and contractual options are subject to an inverse condemnation claim. In *El Dorado Land Co. v. City of McKinney*,[[73]](#footnote-74)69 the Texas Supreme Court analyzed a deed granting land to the City but with the grantor retaining an option to re-purchase the land should it be used for any purpose other than a “community park.” The City built a library on a portion of the land conveyed and the grantor sought an inverse condemnation remedy since it could no longer exercise its option, which it defined as a right of entry, to re-purchase the land. The court concluded that the option was a classic right of entry which is a property interest.[[74]](#footnote-75)70 In cases involving alleged regulatory takings of a leasehold estate (fee simple determinable), the lessor as the owner of the possibility of reverter has its own inverse condemnation claim if the alleged taking involves both the leasehold and the future interest.

Pennsylvania uses the term “de facto taking” to describe inverse condemnation or regulatory takings.[[75]](#footnote-76)70.1 In a de facto taking case, the court had to determine whether the owner of a severed mineral estate could recover for an alleged de factor taking where an adjoining surface estate had been condemned for highway purposes that allegedly would prevent access to the adjoining severed mineral estate. In *PBS Coals, Inc. v. Department of Transportation*,[[76]](#footnote-77)70.2 the Pennsylvania Supreme Court applied the federal approach for regulatory takings and rejected the application of either *per se* test dealing with physical invasions or total takings. Instead, the court focused on the nature of the ownership of a severed mineral estate. The severed mineral owner and its lessee asserted that the condemnation of an adjacent surface tract would preclude it from having access to the severed mineral estate. But since there was no existing mining operations on the allegedly taken coal estate, the supreme court said that the coal owners needed to show that they could receive all required regulatory permits to actually mine their tract.[[77]](#footnote-78)70.3 The alleged use of the land for mining purposes would be speculative or conjectural and thus not support a finding of a de facto taking without the mineral owners being able to show that they could actually mine the coal.[[78]](#footnote-79)70.4 Without being able to show that the condemnation of an adjacent surface estate would interfere with the mineral owners’ beneficial use and enjoyment of their mineral estate there could be no de facto taking. The mineral owners did not suffer any interference with a use that they could not show would otherwise be allowed under existing regulatory programs.[[79]](#footnote-80)70.5

Under Pennsylvania law, there are three elements that must be shown in order for there to be a de facto taking.[[80]](#footnote-81)70.6 They are: (1) the condemnor must have the power to condemn; (2) the owner must show a substantial deprivation of the beneficial use and enjoyment of its property interest; and (3) the deprivation is the immediate, necessary and unavoidable consequence of the exercise of the power to condemn.[[81]](#footnote-82)70.7 In *Hughes v. UGI Storage Co.*,[[82]](#footnote-83)70.8 however, the Pennsylvania Supreme Court eliminated the requirement that the condemnor must have the power to condemn because it would be contrary to the constitutional protection afforded private property rights in the face of governmental action.

Traditional ***oil*** and gas property law principles will inform a court as to the nature of the property interest, if any, that has been condemned. In *Kenai Landing, Inc. v. Cook Inlet Natural Gas Storage Alaska, LLC*,[[83]](#footnote-84)71 a gas storage operator that had been statutorily delegated the power of eminent domin under Alaska law negotiated with an ***oil*** and gas lessee the purchase of the lessee’s rights under a tract of land. Part of the purchase included leaving natural gas in place to serve as cushion or base gas. The lessor asserted that as the owner of the reversionary interest in the native gas it was entitled to just compensation for the taking. The court concluded that as owner of that reversionary interest the lessor had no interest in the use, as opposed to the production of, the native gas. The lessor asserted that it owned the minerals in place and therefore had a property interest in its use, but the court without deciding whether Alaska is an ownership-in-place or non-ownership jurisdiction concluded that the lessor’s interest was not a present possessory estate.[[84]](#footnote-85)72 It was undisputed that the lessor, who was also the surface owner, was entitled to just compensation for the taking of the pore space that was being used for the storage of the injected natural gas.[[85]](#footnote-86)73

The complexity of bringing an inverse condemnation suit by a federal ***oil*** and gas lessee is reflected in *Del-Rio Programs, Inc. v. United States*.[[86]](#footnote-87)74 Del-Rio argued that a Bureau of Land Management decision requiring them to get Ute Indian Tribe consent to have access to their federal ***oil*** and gas leases constitutes a regulatory taking and a breach of contract. The Court of Federal Claims, in two opinions, first found that Del-Rio was not required under the Tribal Consent Act (*see* § 16.06)[[87]](#footnote-88)75 to obtain a surface right of way from the Tribe. It then, however, dismissed the regulatory takings and breach of contract claims as having been brought in the wrong court because the plaintiffs alleged that BLM had acted illegally.[[88]](#footnote-89)76

The court saw two preliminary issues it must resolve before it could find that the Court of Claims is the proper venue for a regulatory takings claim against the United States. The first is whether the governmental conduct that allegedly caused the taking is “authorized” or ultra vires. The second is whether the complaint is one for a regulatory taking or one for a statutory or other regulatory violation. The Court of Federal Claims had found that BLM actions were unauthorized under the Tribal Consent Act. The Federal Circuit, however, found that the BLM decision-makers were acting within the “general scope of their duties” even though their actions may have been unlawful.[[89]](#footnote-90)77 The BLM officials were responsible for the interpretation and application of the Tribal Consent Act and other public land laws. The fact that they misinterpreted the Act does not render their decision unauthorized. The gravamen of the regulatory takings claim was that Del-Rio, as a federal ***oil*** and gas lessee had a property right for surface access over Tribal or trust lands. The Tucker Act gives the Court of Federal Claims jurisdiction to determine the scope of those property interests, even though it includes an analysis and/or interpretation of federal statutes.[[90]](#footnote-91)77.1 The claimant need not seek judicial review in the federal district court of the agency decision interpreting or applying the statute.[[91]](#footnote-92)78

As state conservation agencies and other regulatory programs have expanded, so have the takings challenges. In *Miller Brothers v. Department of Natural Resources*,[[92]](#footnote-93)79 several mineral owners and lessees challenged a departmental prohibition against drilling in the environmentally sensitive Nordhouse Dunes Area. The court, somewhat simplistically, treated the prohibition as falling in the per se takings categories for deprivations of all beneficial uses of property. It ignored the possibility raised by the state that directional drilling was still feasible for a number of the parcels of land.[[93]](#footnote-94)80 The Department also argued that the takings claim was not ripe since none of the owners had sought a permit for ***oil*** and gas development within the restricted area. The court, however, found that the departmental order precluded any drilling, thus making an application for a drilling permit futile. Futile permit applications are not required to satisfy the ripeness requirement.[[94]](#footnote-95)81 A taking having occurred, the Department was left with two choices: repeal the prohibition and pay temporary takings damages, or retain the prohibition and pay for the full value of the mineral and leasehold interests, receiving in exchange title to the mineral interests.

*Miller Bros*. was distinguished in *Schmude* ***Oil****, Inc. v. Department of Environmental Quality*.[[95]](#footnote-96)82 In *Schmude* ***Oil***, you had drilling restrictions within a state forest that had been adopted pursuant to a consent order and legislation that essentially incorporated by reference that consent order. Unlike *Miller Bros*. where the court held that no ***oil*** and gas drilling activities were allowed, in *Schmude* ***Oil***, the regulatory scheme had areas where no drilling was allowed and areas where limited drilling was allowed.[[96]](#footnote-97)83 The inclusion of limited drill areas eliminated the *Lucas* total taking claim and thrust the claim into the ad hoc *Penn Central* balancing test. Furthermore, the court noted that even as to the ***oil*** and gas located beneath the surface with the no drill restrictions, those minerals could be produced if horizontal drilling techniques were used, a factor not present in *Miller Bros*.[[97]](#footnote-98)84 These two factors also played a role in the court’s application of the *Penn Central* test. While there was some diminution in the value of the leasehold estates due to the limited vertical well surface locations and increased costs and risks associated with horizontal drilling, those factors were not able to overcome the fact that the restrictions were put in place well before Schmude ***Oil*** purchased the leases. In addition, the restrictions were of general applicability effecting not only Schmude ***Oil***’s leasehold estate but all other ***oil*** and gas leases within the state forest.

In *Panhandle Eastern Pipe Line Co. v. Madison County Drainage Board*,[[98]](#footnote-99)85 a pipeline claimed that an Indiana statute and a Drainage Board’s decision requiring it to relocate an existing pipeline at its own expense was a taking of property. An Indiana statute authorizes Drainage Boards to impose on public utilities the costs of reburying pipe, necessitated by the Board’s decision to construct and operate drainage ditches.[[99]](#footnote-100)86 Panhandle was considered a public utility and therefore had to pay the relocation costs after the Drainage Board decided to widen and deepen an existing drainage ditch.

In analyzing the takings claim made by Panhandle, the court did not rely on the recent Supreme Court takings cases. Instead, it had to deal with two earlier lines of Supreme Court cases dealing with analogous situations. The first is represented by *Panhandle Eastern Pipe Line Co. v. State Highway Commission*.[[100]](#footnote-101)87 There, the Supreme Court held that a statute imposing relocation costs on public utility pipelines as applied to new highway construction constituted a taking of property without just compensation. Arrayed against the highway cases was a series of cases imposing upon railroads the costs imposed in order to accommodate new streets and highways.[[101]](#footnote-102)88 The court here found the reasoning of the highway cases persuasive as it distinguished the railroad cases on the basis that railroads posed a constant hazard to the public and thus they had implicitly agreed to make reasonable changes for protection of the public safety. Underground pipelines were not treated as creating the same public safety hazard. Other earlier cases approving the imposition of relocation costs on pipelines were similarly distinguished on the basis that there was an implied or express agreement to pay for such costs.[[102]](#footnote-103)89 As the district court noted, merely because a case is old does not necessarily make it bad law. But the court’s failure to revisit the highway case and the implied agreement cases leaves a vacuum that needs to be filled. The argument that railroads are hazards while natural gas pipelines are not hazards is hard to defend.

The court tries to put this case into the physical occupation and invasion case category, although, on its face, this is merely a land use regulation which imposes monetary expenses on the property interest owner. The court relies on a strained analysis to buttress its physical invasion conclusion. It creates a strawperson in the guise of the pipeline’s failure to comply with the demand to relocate. The court presumes that judicial relief would be forthcoming, allowing public officials to move the pipeline. One might think that an injunction requiring the pipeline to comply with the statute would be a more likely scenario and one that does not involve a governmental physical occupation. That would subject many state regulations to the physical invasion category, a category that many courts have tried to narrow, rather than expand.[[103]](#footnote-104)90

Indiana also tried to distinguish the highway case on a factual basis. The state argued that the Supreme Court emphasized that the easement being burdened by the cost of relocation antedated the highways being constructed. The court here agrees with the legal proposition that easement owners who construct pipelines with constructive or actual notice that the state has the statutory power to expand pre-existing easements or uses do not have their property interests taken when the state exercises that power.[[104]](#footnote-105)91 The court concluded:

The holding of the … highway case and the constitutional requirement of just compensation do not apply to such a situation where the owner of private property has chosen to improve it in a way that is likely to interfere with the government’s foreseeable use of property rights the government has already acquired … .[[105]](#footnote-106)92

This, in part, could be based on the implied agreement rationale whereby the pipeline company impliedly agrees not to interfere with a pre-existing governmental property interest, even if the governmental body has not fully exercised that interest at the time the pipeline lays its pipe.[[106]](#footnote-107)93 Unfortunately for the state in this particular case, it could not factually support the claim that the particular drainage ditch in question antedated the pipeline company’s easement.

A classic inverse condemnation claim was made by an ***oil*** and gas lessee against the City of Houston which by ordinance had prohibited the drilling of ***oil*** and gas wells within the watershed of a municipally owned lake. In *Trail Enterprises, Inc. v. City of Houston*,[[107]](#footnote-108)94 the court was able to avoid the difficult substantive regulatory takings issue posed by a total prohibition against ***oil*** and gas drilling because it concluded that the takings claim was barred by the application of the appropriate 10-year statute of limitations.[[108]](#footnote-109)95 The ordinance which prohibited drilling in and around Lake Houston was enacted in 1967. Plaintiff, an ***oil*** and gas lessee, did not challenge the validity of the ordinance until 1995. The court concluded that the regulatory takings cause of action arose when the ordinance was enacted, not when the plaintiff sought a variance in 1994.[[109]](#footnote-110)96 The court also rejected the notion that no statute of limitations applies to regulatory takings cases, concluding that the adverse possession limitations period is applicable. While applying the adverse possession limitations period, the court did not otherwise apply the judicial gloss relating to adverse possession so that the city need not show that its actions were open and notorious and hostile.[[110]](#footnote-111)97

In the second iteration of this case, *Trail Enterprises, Inc. v. City of Houston*,[[111]](#footnote-112)98 the plaintiffs reprised their inverse condemnation claim based on the City’s amendment to its zoning ordinance that expanded the areal scope of the drilling prohibition to mineral interests located with the city limits. Because the ordinance amendment had been enacted within 10 years of the filing of the petition there was no statute of limitations issue. The court applied a three-part analysis to determine whether a successful inverse condemnation claim had been pled.[[112]](#footnote-113)99 The first is a regulation that does not substantially advance a legitimate state interest.[[113]](#footnote-114)100 The second is a regulation that denies an owner of all economically viable use of her property and the this is a regulation that unreasonably interferes with an owner’s right to use and enjoy her property. The second and third tests are essentially the *Lucas* and *Penn* Central tests respectively. As to both the second and third tests the court found that triable issues of fact remain and remanded the case back to the trial court.[[114]](#footnote-115)101

In the third iteration of this case, *Trail Enterprises, Inc. v. City of Houston*,[[115]](#footnote-116)102 the court found that the regulatory takings claim was ripe even though the plaintiff had neither filed for a permit nor sought a variance or exception. The jury had awarded damages to the plaintiff but the trial judge found that the case was not ripe since no application for a permit to drill had been filed with the City. Because Texas treats the cause of action as arising upon the enactment of the zoning ordinance prohibiting the ***oil*** and gas drilling operations, the court finds it would be futile to have to wait until a permit or variance is sought because at the moment of the enactment of the ordinance the permissible uses of the land are known.[[116]](#footnote-117)103 Furthermore the court finds that a formal application was unnecessary to ripen the claim because it would have been futile.

What is most interesting about this decision, however, is the fact that the Court of Appeals rendered a judgment for the mineral owner. In its initial, and then withdrawn opinion, it awarded the mineral owner nearly $16,850,000.00 plus interest and required the owner to transfer title to the minerals to the City. Upon granting the motion for rehearing, however, the court found that the mineral estate was merely “damaged” and not “taken” so it still awarded the full monetary claim but withdrew its requirement that the mineral owner transfer title. Because the damage amount represented a before and after value, the court determined that title need not be transferred. Plaintiff was victorious on its *Penn Central*, not its *Lucas*, theory of regulatory takings and therefore, according to the court, was entitled to retain ownership of the mineral estate.[[117]](#footnote-118)104

In our opinion the court fundamentally misconstrues the nature of the *Penn Central* balancing test in concluding that the plaintiff is entitled to damages and the property. Because the court’s opinion does not provide the jury instructions on how to measure the damages it is hard to know whether the damage figure is a true before and after figure or a near total loss figure. The diminution in value analysis required by the *Penn Central* balancing test, at least at the federal level, determines whether there has been a taking. Once that determination has been made then the governmental entity is responsible for the fair market value of the property interest being taken. A number of states, including Texas, however, add the word damaged to their constitutional takings clauses. In *Trail Enterprises*, the court is applying the damages language even though it is using the *Penn Central* analysis. Once the court finds that the mineral estate has been taken, regardless of the test that it applies, then the result should be a payment of the fair market value and a transfer of the property interest, or a repeal of the offending regulation and the payment of temporary damages.

While not commenting on the merits of the takings award criticized in the paragraph above, the Texas Supreme Court did reverse the Court of Appeals decision and remanded the case back to the trial court in *City of Houston v. Trail Enterprises, Inc*.[[118]](#footnote-119)105 While agreeing that the inverse condemnation claim was ripe because a variance request would have been futile, the court noted that the trial court had relied on the ripeness doctrine in making its initial decision and that issues relating to liability for either a total or temporary taking would need to be raised at a new trial.

On remand, the jury found that there was an inverse condemnation of Trail’s mineral estate and awarded $17 million in damages. In *City of Houston v. Trail Enterprises, Inc.*,[[119]](#footnote-120)106 the Court of Appeals reversed the inverse condemnation award and rendered a judgment that Trail Enterprises take nothing. The court applied the balancing test of *Penn Central* as had been adopted in an earlier Texas Supreme Court decision.[[120]](#footnote-121)107 The three *Penn Central* factors are: 1. the character of the governmental action/interest, 2. the extent to which the regulation interferes with reasonable and distinct investment-backed expectations, and 3. the economic impact of the regulation on the property owner. Without giving deference to the trial court findings, the Court of Appeals concludes that the first two factors weigh heavily in favor of the City, while the third factor favors the property owner. The court particularly emphasized the reasonable and distinct investment-backed expectations factor. The court found that the plaintiffs did not expend any funds with the expectation that new wells could be drilled on the premises. Likewise, a number of the leases were executed after the date of the enactment of the ordinance. While post-ordinance actions are not determinative of this factor, they are clearly relevant.[[121]](#footnote-122)108

The same Houston drilling ordinance challenged in *Trail Enterprises* was the subject of an inverse condemnation suit in *Maguire* ***Oil*** *Co. v. City of Houston*.[[122]](#footnote-123)109 In this case, Maguire ***Oil*** received several permits to drill within 1,000 feet of Lake Houston, notwithstanding the city ordinance’s prohibition against such drilling. The city argued that since the suit was filed more than 10 years after the enactment of the ordinance, the statute of limitations had run on the inverse condemnation claim. Maguire ***Oil*** successfully argued that it was not challenging the ordinance in its inverse condemnation claim because the ordinance on its face did not apply to its drilling permits and operations. The court interpreted the applicable drilling prohibition as only including proposed drilling within 1,000 feet of Lake Houston and within the city’s extra-territorial jurisdiction (ETJ).[[123]](#footnote-124)110 Without deferring to the city’s interpretation of its own ordinance, that only applied the 1,000 foot criteria, the court concluded that the ordinance on its face only affected drilling operations within the ETJ.[[124]](#footnote-125)111 Thus, Maguire ***Oil*** was not claiming that the ordinance caused the regulatory taking, but that the permit revocation decision, made within a few years of this filing of this litigation, was the cause.

The court also analyzed the issue of what constitutes relevant and competent evidence to show loss of value. The plaintiff had filed two affidavits regarding the alleged loss of value, one by an expert and one by the owner of the company. The expert’s opinion utilized two methodologies to determine the value of the minerals in place that could not be produced. The first involved estimating the amount of hydrocarbons in place and then multiplying that figure by the transactional value of purchasing proved reserves in the ground. The second involved a discounted cash flow analysis. The expert did not provide any evidence of what a willing buyer would pay a willing seller nor did he provide any evidence of comparable sales. The owner merely provided a gross figure for the value of the hydrocarbons in place. The trial court had found the evidence insufficient to withstand the city’s motion for summary judgment, but the court of appeals reversed. While clearly noting that the standard for an inverse condemnation award is market value, best determined by comparable sales, the court concluded that plaintiff’s summary judgment evidence was sufficient to create a jury question.[[125]](#footnote-126)112 While there were issues relating to whether or not there were any “proved” reserves, those issues needed to be decided by the finder of fact. Because the trial court had erroneously granted the city’s motion for summary judgment, the court of appeals remanded for a trial on the inverse condemnation claim.

After the trial court on remand summarily dismissed Maguire ***Oil***’s inverse condemnation claim on ripeness grounds, the Court of Appeals once again reversed and held that the claim was ripe for review.[[126]](#footnote-127)113 The court applies the futility exception to the final decision rule asserting that it would have been futile for Maguire ***Oil*** to petition the City Council not to revoke its drilling permits since the City Council is not the entity with the power to issue the permits. Likewise, Maguire ***Oil*** is not required to exhaust administrative remedies because the ordinance clearly prohibited using its proposed drill site.

In *City of Houston v. Maguire* ***Oil*** *Co.*,[[127]](#footnote-128)114 the court of appeals was reviewing a jury verdict on behalf of Maguire ***Oil*** for $2,000,000 in inverse condemnation damages. While noting that Maguire ***Oil*** started its almost 20-year litigation effort pleading four different inverse condemnation theories, the court finds that the ultimate jury verdict was based on a *Penn Central*[[128]](#footnote-129)115 regulatory takings theory based on the City’s unreasonable interference with its mineral interest by virtue of its attempted application of the drilling prohibition to the Maguire ***Oil*** drillsite.[[129]](#footnote-130)116

The City changes its argument by now agreeing with the prior court decisions that concluded that the ordinance did not apply to the Maguire ***Oil*** drillsite when the stop work order was originally issued in 1991.[[130]](#footnote-131)117 Since the ordinance did not apply, the City asserts that the actions of its employees were “unauthorized” and were thus not actions of the City for which it can be held responsible in inverse condemnation damages.[[131]](#footnote-132)118 The court finds that while “unauthorized acts” by municipal employees might be relevant in determining whether sovereign immunity is applicable, it is not relevant to determining whether the City engaged in a regulatory taking by virtue of its interference with Maguire ***Oil***’s drilling efforts.

The court also rejects the City’s claim that intent is required before a *Penn Central* taking may be found. There is language in the initial appellate decision in *Maguire* ***Oil*** *I* that would support such a conclusion,[[132]](#footnote-133)119 but this court in dicta states that the intent element that is imposed in physical taking and breach of contract cases should not apply to a regulatory takings case.[[133]](#footnote-134)120 The court eschews deciding whether intent is a required finding for a regulatory taking and if so what the appropriate test for intent is, since it finds that the City employees who were enforcing the invalidly applied drilling prohibition ordinance had the requisite intent. To the extent that intent is relevant it is the intent of the final decisionmaker, in this case the employee authorized to grant or deny drilling permits, and not the intent of the City Council, which is critical. The revocation and subsequent denial of the permit constitutes an intentional and unreasonable interference with Maguire ***Oil***’s leasehold estate.

In *Seagull Energy E & P, Inc. v. Railroad Commission*,[[134]](#footnote-135)121 the Texas Supreme Court was faced with a modern regulatory takings challenge that under the older well spacing and proration rules would have fallen under the rubric of “confiscatory” orders. Seagull operates a lease where there are three vertically separate sands or reservoirs. It receives a well permit from the Commission to drill a new well that can be completed into all three reservoirs. The field rules, however, do not allow concurrent production from both wells so Seagull completes the second well only in the two sands not completed by the first well and then shuts in the first well.[[135]](#footnote-136)122 It then seeks an exception permit to re-start production from the first well.[[136]](#footnote-137)123 The Commission denies the permit because it concludes that Seagull has not shown that the hydrocarbons from the sand not being produces has been confiscated.

Seagull asserts that it has a vested property right in the gas in the sand where it is not being allowed to produce from that first well. The issue is the nature of the property interest where there is downhole commingling of separate reservoirs. The Commission notes that Seagull is free to shut-in the second well and produce from the first if it feels there would be drainage from the sand where the first well is completed. Since the Commission has the authority to prorate, allocate, or apportion the production from commingled sands, the court finds that Seagull’s property interest is measured by the commingled sands and not by the individual sands that may have existed separately prior to production occurring.[[137]](#footnote-138)124 In fact, an early Rule 37 case supports the general view that an owner is entitled to a first well in each separate sand on its property whether it is commingled or not.[[138]](#footnote-139)125

The nature of a mineral lessee’s property interest in the ***oil*** and gas is defined to include only a fair chance or opportunity to produce the ***oil*** and gas. Even though Texas is an ownership-in-place state, the court finds that the property interest is not in the hydrocarbons in place but merely in the opportunity to produce them from a well located on one’s land.[[139]](#footnote-140)126 Furthermore, all property interests are held subject to the reasonable exercise of the police power and the Commission’s rules regarding commingled production and the proximity of wells clearly fall within that category. Without ever getting into either a *Lucas* or *Penn Central* analysis, the court is essentially saying that the Commission rules do not confiscate Seagull’s interest in the sand where it is not now producing because one needs to look at all of the sands and not just at the non-producing sand to determine a taking. The court is essentially adopting an “aggregate” view of the property interest subject to regulation, stating that it is all of the commingled sands and not just the one sand that is not being produced.

In *Murphy v. Amoco Production Co.*,[[140]](#footnote-141)126.1 the court summarily dismissed a regulatory takings claim challenging the then-recently enacted North Dakota ***Oil*** and Gas Production Surface Compensation Act which had the effect of requiring ***oil*** and gas lessees to compensate surface owners for any potential damage that might be done through their drilling and other operations. The Eighth Circuit, in less than a page of analysis, found no regulatory taking even though prior to the Act the mineral lessee had an implied and/or express easement of surface access and use that allowed it to use as much as the surface as was reasonably necessary for its operations without compensation. The court said: “The damage compensation statute does not ‘take’ anything from Amoco. … The requirement that Amoco pay the surface owner for any damage that Amoco itself actually causes to the surface estate does not amount to a governmental taking of private property for public use at all.”[[141]](#footnote-142)126.2 The Eighth Circuit suggested, however, that the regulatory takings claim had to fail because it was adopting an expansive view of the denominator problem by treating the impacted property interest as the entire mineral estate and not just the implied and/or express easement of surface access and use. The easement was treated as “only a minor strand in the full bundle of rights which constitutes Amoco’s mineral estate.”[[142]](#footnote-143)126.3

The North Dakota ***Oil*** and Gas Production Damage Compensation Act was also implicated in another regulatory takings case where the North Dakota Supreme Court found the statute to be unconstitutional. In *Northwest Landowners Association v. State*,[[143]](#footnote-144)126.4 plaintiffs challenged the constitutionality of a statutory scheme that allowed ***oil*** and gas lessees to utilize the pore space for the injection and/or migration of either gas or liquid substances without compensation.[[144]](#footnote-145)126.5

In order to make a regulatory takings claim, an owner must show that it has a property interest as defined under state law. In defining the surface owner’s property interest in the pore space, the North Dakota Supreme Court looks at the various statutory provisions that (1) allocate to the surface owner the ownership of the pore space and (2) further give the surface owner the right to receive damages for surface use notwithstanding the implied easement of surface use and accesss.[[145]](#footnote-146)126.6 Both at common law and by statute, North Dakota recognizes that the surface owner is the owner of the pore space, subject only to the implied easement of surface use and access which can include both the leasehold estate as well as areas covered by pooling or unitization agreements or orders.[[146]](#footnote-147)126.7 Thus, in this case, the court had no difficulty finding that the surface owners had a property interest in the pore space that had been directly impacted by the enactment of SB 2344 in 2019.

Having declared the surface owners’ property interest in the pore space, North Dakota then essentially follows the regulatory takings jurisprudence of the U.S. Supreme Court by recognizing two types of per se takings, physical invasion and total takings and ad hoc *Penn Central* takings.[[147]](#footnote-148)126.8 The *Northwest Landowners* court summarized its reasons for finding a physical invasion by stating:

Senate Bill 2344 constitutes a per se taking. It allows third-party ***oil*** and gas operators to physically invade a landowner’s property by injecting substances into the landowner’s pore space. … [P]hysical invasion by water, even for a limited duration, results in a per se taking. Furthermore, because S.B. 2344 permits ***oil*** and gas operators to use pore space to temporarily or permanently store or dispose of gases and wastes, the bill authorizes an occupation of the landowners’ property.[[148]](#footnote-149)126.9

The court rejected the state’s claim that the existence of the implied easement of surface access and use, which it labeled the “dominant mineral estate principle,” saved the statutes from invalidation.[[149]](#footnote-150)126.10 Since the implied easement included pooled and/or unitized areas, the state asserted that its statutes merely recognize the right to use the pore space for pooled or unitized purposes. The court, however, rejected the narrow reading of the statute to restrict its use to only leasehold, pooled or unitized areas by finding that it gave the injection right for any operation that would include third-parties who otherwise would not have the right to inject fluids or gasses. Thus, the statutes potentially authorized disposal or injection by parties who did not have a right to do so and whose injections would otherwise constitute a trespass.

In dealing with one section of SB 2344 that redefines the term “land” as used in the ***Oil*** and Gas Production Surface Compensation Act so as not to include pore space,[[150]](#footnote-151)126.11 the court gave no reason why the legislature did not have the authority to enact statutes that define or redefine what is a property interest under state law. On a prospective basis, legislatures typically retain their power to change statutes, impact property and/or contract rights without running afoul of either the Fifth Amendment or the Contracts Clause. For example, one would think that the North Dakota Legislature could repeal and/or amend the ***Oil*** and Gas Production Surface Compensation Act on a prospective basis without running into constitutional problems under their inherent right to exercise the police power.[[151]](#footnote-152)126.12

A regulatory takings claim may also be made in the situation where a conservation agency attempts to change, modify or revoke a permit that had been issued under an earlier, and typically, less stringent regulatory program. This general problem is often referred to in terms of the permit holder having a “vested right” to continue to operate under the terms specified in the permit. One way for agencies to avoid vested rights claims is to include in the permit or in the rules relating to the issuance of permits a general provision that the permit may be modified during its term by a change in statutory or regulatory standards. It is a general rule that a permit that is mistakenly or invalidly issued cannot give rise to a vested right even though the permit holder may make expenditures relying on the validity of the permit.[[152]](#footnote-153)127

Where a state conservation agency authorizes an ***oil*** and gas operator to use an abandoned wellbore that had become part of the surface estate, does that order constitute a regulatory taking of the surface owner’s property interest? In *O’Brien* ***Oil****, L.L.C. v. Norman*,[[153]](#footnote-154)128 the operator received permission from the Oklahoma Corporation Commission to use the surface casing of a well that had been plugged and abandoned many years earlier. Under Oklahoma law, it was clear that the surface owner was the owner of the abandoned wellbore and casing.[[154]](#footnote-155)129 The court nonetheless found no regulatory taking, weaving together the implied easement of surface use that gives the operator the right to use so much of the surface estate as is reasonably necessary for the exploitation of the mineral estate and the doctrine that a severed surface owner has no standing to object to the unitized development of the underlying mineral resource.[[155]](#footnote-156)130 Just as a surface owner cannot claim injury from an order of the Commission specifying a well location, it cannot claim a regulatory taking where the Commission issues an order authorizing the operator to re-enter a previously plugged and abandoned wellbore.[[156]](#footnote-157)131

In *Indiana Department of Natural Resources v. United Minerals, Inc.*,[[157]](#footnote-158)132 a permit holder challenged the ability of the state to impose new performance standards that had been promulgated after the issuance of the permit. Here the statute clearly gave the agency the power to require a permittee to comply with later promulgated regulatory standards. The fact that the new standards would be costly and more onerous to comply with would not invalidate the permit modification even though the court did recognize that a valid permit might create a property interest in the permit holder.[[158]](#footnote-159)133

While the vested rights doctrine may have a constitutional component, the doctrine also may be founded on statutory or common-law grounds. For example, in *Shelby Operating Co. v. City of Waskom,*[[159]](#footnote-160)134 the court was reviewing a Texas vested rights statute that required governmental entities to make permit decisions based on the regulations, ordinances or rules in effect at the time the application is filed.[[160]](#footnote-161)135 In jurisdictions that have similar statutes, while the legislative body is free to amend the regulation in question, the permit applicant has a statutory right not to have its application judged by the amended regulation. The vested rights statute was found to be non-applicable because the permit had been denied under its terms and a second permit application was found to be properly judged under the terms of the later adopted ordinance. *Shelby* also illustrates the point that as to the common-law doctrine of vested rights to permits, the permit applicant must show that it has met all of the conditions or requirements for the permit so that the permit issuance is merely a ministerial duty. There is typically no vested right to a discretionary permit.

In *Pantera Energy Co. v. Railroad Commission*,[[161]](#footnote-162)136 an applicant to dissolve 48 existing pooled units argued that it had a vested right to have the notice rules in existence at the time of the filing of the petitions applied rather than the amended rules which were more onerous. The key issue was whether the notice rules are procedural or substantive in nature. If procedural, there can be no vested rights in the rule, but if substantive there can be.[[162]](#footnote-163)137 The court concluded that Pantera only had, at best, an expectation, not a right, to dissolve the units. Because the production of ***oil*** and gas is heavily regulated by the Commission pursuant to statutory authority, Pantera did not have the unfettered right to create and/or dissolve units. The notice requirements imposed on those parties seeking Commission approval were within the Commission’s authority to regulate ***oil*** and gas production.[[163]](#footnote-164)138

In *Coastal Petroleum v. Chiles*,[[164]](#footnote-165)139 Coastal challenged a Florida statute which prohibited the exploration and drilling for ***oil*** and gas from certain areas off the Florida coast. Coastal is the successor in interest to a 50-year-old exploration contract and option to lease that the state had executed. Several exploratory wells were drilled over the years but no production was ever achieved. In 1976 a settlement agreement was reached which transformed some of Coastal’s interests into the equivalent of an overriding royalty should the state ever lease the described geographic areas. The agreement did not delineate the state’s duty, if any, as owner of the executive rights, to lease the areas covered by Coastal’s royalty interest. After enactment of the statutory ban on drilling in this area, Coastal claimed that its royalty interest had been taken and filed this inverse condemnation action.

The court applied a four-part analysis to determine if there had been a regulatory taking. The court must determine:

(1) the nature and extent of the property interest held by the plaintiff; (2) whether the property interest is one which will entitle the landowner to protection pursuant to the laws of inverse condemnation; (3) the extent that the government’s regulation interferes with the plaintiff’s enjoyment of the protected property right; and (4) whether the governmental regulation effects a taking of property … .[[165]](#footnote-166)140

Most inverse condemnation cases focus on the third and fourth issues, but this case involves the nature and extent of the property interest that Coastal had owned pursuant to the settlement agreement. Because there was no express duty on behalf of the state to lease the offshore lands under either the settlement agreement or applicable statutes, Coastal did not own a valid property right. Here the reservation of an overriding royalty interest, dependent on the state’s possible execution of a lease was not a regulatory taking. The court seems to be concluding that the royalty interest is “too speculative” a property interest to be protected.[[166]](#footnote-167)141 But that issue goes to the value that is given to the royalty interest and not whether it is a property interest. Clearly a freestanding royalty interest is a property interest. Whether it has any value will depend on whether any ***oil*** or gas exists in the area covered by the royalty and whether, under state law, the owner of the executive power is under a duty to lease the premises in question. Because the state may have public trust responsibilities which limit its power to lease, the state is in a different situation than the owner of the executive power over privately owned minerals where most states impose some type of duty to lease if a reasonable and prudent owner would lease the minerals as if there were no outstanding royalty interest burdening the mineral estate.[[167]](#footnote-168)142 The holding, however, goes beyond the conclusion that the royalty interest is essentially valueless; rather, it concludes that it was not a property interest worthy of protection through an inverse condemnation claim.

As the *Coastal Petroleum* court noted, in order to claim a regulatory taking, one must prove that one owns a compensable property interest within the ambit of the Fifth Amendment.[[168]](#footnote-169)143 Property interests are determined typically by state law principles.[[169]](#footnote-170)144 Thus, how a state classifies royalty interests, delay rental, or other payments such as bonus may determine whether a taking has occurred.[[170]](#footnote-171)145 In addition, once the mineral estate has been severed from the surface estate, state law must be looked at to determine the scope and extent of the rights of the mineral owner before one can claim a regulatory taking.[[171]](#footnote-172)146

In *Devon Energy Corp. v. United States,*[[172]](#footnote-173)147 a classic regulatory takings case was decided after several federal ***oil*** and gas lessees were denied permits to drill. The leases were issued in 1963. At that time the leases were outside of lands covered by Interior Department regulations limiting drilling because of the existence of valuable potash deposits. In 1975, however, the Interior Department modified its potash regulations to expand the covered area and included most of the plaintiff’s leasehold acreage. Under the federal regulations permits to drill ***oil*** wells within the potash area would be denied unless they fell within two exceptions. In addition, federal ***oil*** and gas leases were amended to include several stipulations whereby the lessees would not interfere with the mining of potash or cause undue waste of potash reserves.[[173]](#footnote-174)148 In a four-year span, the plaintiff submitted 15 applications for permits to drill (APDs), all of which were denied. An appeal was taken to the IBLA which remanded the denial decisions to reconsider whether the leases were subject to either the post-lease potash order or to the potash stipulations allegedly incorporated into the leases. On remand, BLM acknowledged that the subject leases were not subject to the potash stipulations but nonetheless denied the APDs under its general statutory authority to resolve multiple mineral conflicts.

The major issue raised by the Interior Department in its motion to dismiss the regulatory takings claims was ripeness.[[174]](#footnote-175)149 The plaintiffs did not file any additional APDs for vertical or directional wells from areas barren of potash resources or for APDs for directional wells adjacent to existing wells or drilling islands located within potash producing areas. Based on *Hamilton Bank*,[[175]](#footnote-176)150 the Interior Department argued that additional APDs were the functional equivalent of variances, which the Supreme Court in *Hamilton Bank* required in order to meet the ripeness requirement. The court, however, found no “variance” mechanism available for a federal ***oil*** and gas lessee seeking an APD. While a typical zoning variance exempts a party from the application of the ordinance, the Department’s suggestion required the applicant to submit to the potash regulatory scheme. The court also noted that there was a well-accepted exception to the ripeness requirement of seeking additional administrative or legislative relief where such efforts would be futile.[[176]](#footnote-177)151 Here, any efforts by the plaintiffs to seek alternative well locations within the potash area would clearly be futile. Existing regulations discourage drilling in potash areas and thus the likelihood of getting approvals would be de minimis. Finally, the court found that requiring the applicant to seek a permit for activities that were economically infeasible was not required under *Hamilton Bank*.

While *Hamilton Bank* requires that the claim be ripe, there is no requirement that a party need exhaust its administrative remedies prior to bringing a regulatory takings claim.[[177]](#footnote-178)152 While the IBLA has the authority to rule on the lawfulness of BLM’s actions in applying the potash regulations to the APDs, the regulatory takings claim is an independent cause of action. If the Interior Department has taken the lessee’s property rights through the denial of the APDs, the applicant can appeal that decision or claim a taking of property as separate and independent causes of action. Thus, the *Hamilton Bank* ripeness doctrine does not require the plaintiffs to exhaust their administrative remedies.[[178]](#footnote-179)153

The Interior Department also raised a standing issue since a number of the plaintiffs had not received approval of their assignments from the Department. Interior Department regulations clearly do not recognize the validity of a transfer until such time as it is approved.[[179]](#footnote-180)154 But as between the assignor and assignee, the assignment is valid when executed. Thus, while the Interior Department may treat the assignor as liable under the various express provisions of the lease until approval is received, as between the private parties an effective conveyance of a property interest takes place when the instrument is properly executed.[[180]](#footnote-181)155 The plaintiffs were the owners of the real property interests in the ***oil*** and gas leases allowing them to assert a regulatory takings claim.

The denial of APDs was also the heart of the regulatory takings claim in *Bass Enterprises Production Co. v. United States.*[[181]](#footnote-182)156 Bass had argued that denial of an APD pending a determination of the transportation modes for the Waste Isolation Pilot Project (WIPP) in southeastern New Mexico was a permanent taking. An earlier decision had found that no permanent taking had occurred, but remanded to the trial court to determine if a temporary taking had occurred.[[182]](#footnote-183)157 In order for there to be a temporary taking, the operator must show in the APD context that it was ready to undertake the drilling activities had BLM not denied or delayed the issuance of the well permit. The court found that Bass was ready to drill the wells at the time it filed the APD. With an effective federal ***oil*** and gas lease giving Bass the right to drill a well, the court found that the APD denial constituted a *Lucas* total taking. The Bass leases were not subject to the WIPP land withdrawal scheme, and thus the denial of the APD amounted to a total deprivation of the beneficial use of the leasehold interest.

In an unusual legal event, the government’s motion for reconsideration was granted and the Court of Federal Claims reversed its initial finding that there was a temporary taking by the denial of permits to drill.[[183]](#footnote-184)158 The reason for the court’s reconsideration was the Supreme Court decision in *Tahoe-Sierra Preservation Council*[[184]](#footnote-185)159 that treated a moratorium on building permits not as a per se *Lucas* taking but as a regulation that requires the application of the *Penn Central* balancing test. Applying Tahoe-Sierra to the four-year delay in getting permits to drill, the court found that it should have applied *Penn Central*. Applying the *Penn Central* balancing test, the court concluded that there was no regulatory taking because the diminution in value due to the permit delay amounted to less than 5% of the total value of the property interest.[[185]](#footnote-186)160

In *Riviera Drilling & Exploration, Inc. v. United States*,[[186]](#footnote-187)161 the Court of Federal Claims dismisses a regulatory taking claim made by a federal ***oil*** and gas lessee. Riviera was apparently the owner of several federal ***oil*** and gas leases and the unit operator of an approved unit, although BLM had never approved the assignment of any leases to it, nor its status as unit operator.[[187]](#footnote-188)162 Riviera’s taking claim is based on two separate actions taken by the United States, the first being a refusal to re-issue a road use permit that had expired without the posting of a substantial road repair bond and an order to shut-in the wells that follows the expiration of the road use permit. Since Riviera never filed a request for a new road use permit, the takings claim is not ripe. The court rejects Riviera’s attempt to avoid the ripeness defense through its claim that it is the shut-in order and not the permit expiration decision that it is challenging. But the shut-in order is dependent on Riviera’s lack of access to the site which is solely dependent on its failure to properly re-new its road use permit. Thus since there is no final agency action, such as a denial of a road use permit application, the regulatory takings claim must be dismissed on ripeness grounds.

One issue in temporary takings doctrine is the appropriate measure of damages. It should not be the value of the property interest since that would constitute a permanent taking. In fact, after *First English* the governmental agency can always transform a permanent taking into a temporary taking by repealing the offending regulation or reversing the adjudicatory order. The typical measure of damages for a temporary taking is the rental value of the property for the period of the taking.[[188]](#footnote-189)163 Since Bass did not lose any ***oil*** and gas, nor did the U.S. use any part of the mineral estate, the court found that the damages were to be measured by the interest Bass would have earned on the profits, if any, from the production it was denied achieving, for the period of the temporary taking.[[189]](#footnote-190)164

In *Laguna Gatuna, Inc. v. United States*,[[190]](#footnote-191)165 the United States Environmental Protection Agency issued a cease and desist order against a lessee of private and federal lands to stop further surface disposal of produced water onto a dry lake bed. The lessee had also received a right-of-way from BLM to access the lake bed with trucks containing the ***oil*** field brine that had been processed to remove most of any ***oil*** residue. After unsuccessfully challenging the EPA decision that the dry lake bed came within the Clean Water Act’s definition of waters of the United States, the lessee—who was operating the disposal facility—brought this inverse condemnation action.[[191]](#footnote-192)166

As a threshold matter, the Court had to decide whether the EPA’s action in revoking the permit was “authorized government action” that is needed to form the basis of a regulatory takings claim.[[192]](#footnote-193)167 The EPA had revoked the cease and desist order because the Supreme Court had held in an analogous situation that the term “waters of the United States” did not include habitat of migratory birds that may at some time during the year have water in it.[[193]](#footnote-194)168 Relying on *Del-Rio Drilling*, the court concluded that at the time the order was issued, the EPA had ostensible authority under the Clean Water Act to issue the order.[[194]](#footnote-195)169 Merely because the agency action is found to be erroneous at a later date does not make the action unauthorized at the time for regulatory takings purposes.

As a first step in regulatory takings analysis, be it the *Penn Central* balancing test, or the *Lucas* per se test, the court must determine the allegedly taken property interest.[[195]](#footnote-196)170 In this case, the plaintiffs asserted four separate interests. The first interest was a right-of-way over BLM land that was used to truck in the brine. The court had no difficulty finding that the easement was a property interest susceptible of being taken under either *Penn Central* or *Lucas*. The second interest related to the lease between the plaintiff and another corporation controlled by the same owner. The lease provided for a 10-year term and a $1.00/year rent paid in advance. There was also an option to purchase provision contained in the lease that allowed the plaintiff/lessee to purchase the interest at any time for $200,000. Plaintiff argued that the option to purchase constituted an executory contract for the purchase of the fee interest and thus plaintiff should be compensated as the fee owner. The court rejected that claim, finding that under New Mexico law the purchaser under an option to purchase does not have fee title until the option is exercised. Thus, only the plaintiff’s leasehold interest was potentially subject to a regulatory takings claim.

The third interest related to a 40-acre tract of land that was the subject of an auction by the state. There was a two-year period between the plaintiff being named the high bidder on the tract and the actual execution of a patent transferring title. Since the order was issued prior to the patent being issued, the plaintiff did not own a cognizable property interest in the 40-acre tract. The fourth interest related to a state permit to dispose of 30,000 barrels/day of produced water into the dry playa lake. Owning a governmental permit is not the equivalent of owning a property interest. Yet the value that attaches to a property interest by virtue of the existence of such a permit may be relevant evidence in determining the value of the taken interest. Thus, the value the permits add to the leasehold and easement interests may be considered.

The court then applied the *Penn Central* balancing test to the identified property interests. It looked at the interference with distinct, investment-backed expectations, the degree of economic impact, and the character of the governmental action. The United States conceded that plaintiff had investment-backed expectations to use the leasehold and easement to dispose of produced water. Substantial investments were made in processing facilities and other infrastructure based on such a use. On the issue of economic impact or diminution in value, the plaintiff proffered an expert appraiser who testified that the value of the interests without the right to dispose of produced water was zero. The character of the governmental action was consistent with the view that a regulatory taking had occurred. Thus, the court found that the cease and desist order constituted a taking for which plaintiff was entitled to damages.

In *Stearns Co., Ltd. v. United States*,[[196]](#footnote-197)171 the court not only discussed what constitutes a regulatory taking, but then went on to analyze the proper methodologies the parties may use to value a “taken” mineral estate. Stearns was the owner of the mineral estate which had been reserved when the surface was sold to the United States for inclusion in a national forest. Plaintiff and various of its lessees engaged in underground coal mining operations until the Surface Mining Control and Reclamation Act (SMCRA) was passed in 1977.[[197]](#footnote-198)172 SMCRA essentially says that no surface mining operations can take place on public lands unless the operations were instituted prior to the SMCRA’s effective date and thus constituted a valid existing right or were allowed at the discretion of the appropriate federal land manager. The court concluded that the federal agency decision finding that Stearns did not have valid existing rights was erroneous and thus the decision not to allow further activities constituted a regulatory taking.

The issue then turned to how to determine the amount of just compensation due. The lodestar is “fair market value,” which is often defined as the “amount determined in a negotiated transaction between a willing buyer and seller absent any compulsion taking into account the factors that well-informed persons would consider under similar circumstances and custom in the industry.”[[198]](#footnote-199)173 The court used several different approaches to determine fair market value. It first had to determine the amount of mineable coal. It accepted evidence of comparable sales as well as a royalty income analysis based on Stearns’ right to receive royalty from production. As initially determined using what the court later called this “gestalt” approach, compensation was set at $5,000,000, but was on further reconsideration raised to a little over $10,000,000 when the court excluded some comparable sales figures that it determined were not really comparable.[[199]](#footnote-200)174

The Court of Federal Claims decision in *Stearns* that found and then placed a value on the amount of minerals that were taken was reversed by the Court of Appeals for the Federal Circuit in *Stearns Co., Ltd. v. United States*.[[200]](#footnote-201)175 The Federal Circuit clearly rejects the view that the application of SMCRA’s regulatory regime to the owner’s mineral rights and implied easement of surface use constitutes a physical invasion. There can be a physical invasion only when the governmental body occupies the parcel or requires the owner to submit to physical occupation of its land.[[201]](#footnote-202)176 The United States neither occupied the mineral estate nor the implied easement of surface nor did it require the owner to accept its or a third party’s occupation. The application of the final permit rule to determining whether the owner has a valid existing right does not constitute a physical invasion. Since the per se physical invasion test is inapposite the court goes on to find that the remaining regulatory takings case is not ripe. In order to be ripe the owner has to seek a valid existing rights determination or permission to mine upon a finding that the lands are compatible for surface mining operations. The owner’s request for a VER determination was denied, but no application has been filed for a compatibility determination. Thus, the regulatory takings claim is not ripe.[[202]](#footnote-203)177

The takings clause clearly provides a constraint on the extent to which the state may exercise the police power in ***oil*** and gas conservation matters. While constitutional takings claims in conservation regulation have been nearly non-existent from 1950–1995, these cases indicate that such claims may become much more prevalent in the years ahead, challenging the conventional wisdom that most ***oil*** and gas conservation matters occur within the broad boundaries of the takings clause jurisprudence.[[203]](#footnote-204)178

The inverse condemnation remedy may also be available against private entities who have been delegated the eminent domain power. In *ANR Pipeline Co. v. 60 Acres of Land*,[[204]](#footnote-205)179 the owners of the mineral estate adjacent to a natural gas storage facility asserted various theories supporting an inverse condemnation claim against the facility operator. The first theory was that there was a *Loretto* physical invasion caused by the migration of native gas from the storage facility to the defendants’ land. While not denying the migration of native gas, the court found that the different rules relating to the ownership of native gas, namely the rule of capture, and the ownership of injected gas, namely that title to the gas is not lost upon re-injection, did not allow the court to conclude that a trespass had occurred. The mere migration of hydrocarbons from one property to another, even when caused by artificial means, was not a physical invasion for which there would be *per se* liability.

A second theory posited by the defendants was that their lands had been “impressed” into public service without their consent and without compensation. The factual predicate for that theory was that the defendants’ native gas was being used by ANR as cushion gas for its storage operations, thus saving ANR substantial sums of money. While there was some factual dispute as to whether the defendants’ native gas is really providing a benefit to ANR, the court applied a *Penn Central-*type analysis to reject the defendants’ claim. Only if the actions of ANR diminished the value of the property interest, caused serious injury to the property or interfered with the use of the property could an inverse condemnation claim be made. Here, the defendants failed to prove that any of those three events occurred and therefore the court dismissed their counterclaim.

A third theory, which the court labeled *de facto* taking, is sometimes called in the land use arena planning or condemnation blight. A governmental entity may not take affirmative steps to lower the value of a property interest they intend to condemn at a later date. The defendants alleged that ANR, while not seeking to condemn its mineral estate at this time, was engaging in actions that would lower the value of that estate when it did condemn it in the future. The court rejected the factual underpinnings of that theory, stating that the mere possibility that condemnation may occur in the future is not a basis for proving a *de facto* taking.

There is a close analytical relationship between the constitutional protections afforded under the takings clause and the impairment of obligation of contracts clause. A contracts clause claim typically involves a multi-layered analysis since it is clear that not every legislative action that impacts a contractual relationship will violate the Contracts Clause.[[205]](#footnote-206)179.1 The court must initially determine whether the statute substantially impairs a contractually relationship by exploring such factors as “the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights.”[[206]](#footnote-207)179.2 If a substantial impairment is found, the court “then ‘turns to the means and ends of the legislation’ and evaluates whether the legislation (1) has ‘a significant and legitimate public purpose,’ and (2) ‘is drawn in an appropriate and reasonable way to advance’ that public purpose.”[[207]](#footnote-208)179.3 Finally, where the governmental entity is not a party to the contract being substantially impaired, the entity is ordinarily entitled to deference. In *Warner Valley Farm, LLC v. SWN Production Co., LLC*,[[208]](#footnote-209)179.4 the court applied that approach to find that a Pennsylvania statute that allowed an ***oil*** and gas lessee to drill a horizontal well across two separate tracts did not impart the lessor’s contractual rights since the lease contained several provisions authorizing the pooling of the leasehold estate.[[209]](#footnote-210)179.5

In *Hermosa Beach Stop* ***Oil*** *Coalition v. City of Hermosa Beach*,[[210]](#footnote-211)180 the court explored those issues in depth. In 1984, the city amended its zoning ordinance to allow, under certain conditions, the location of ***oil*** production facilities. Two years later the city executed two leases covering both onshore and submerged lands. The lease provided that the lessee would have to comply with all city, regional, state and federal regulations. It also required the lessee to receive all permits before applying for a discretionary conditional use permit from the city. By 1990, the lessee had obtained some, but not all, of the required permits. The city nonetheless issued a conditional use permit, containing 140 conditions that would have to be met before the permit would be effective. While the lessee was seeking the other required permits, a citizen initiative was placed on the ballot to amend the zoning ordinance by removing the provisions authorizing ***oil*** production activities. That initiative was passed by 56% of the voters. The city continued to process the lessee’s application because of fears that stopping the process would constitute either a regulatory taking or an impairment of a contractual obligation. The citizen group that sponsored the initiative election filed this action seeking to enjoin the city from going forward with the lessee’s application.

The court first concluded that the initiative ordinance was clearly intended to apply to the pre-existing lease. Then it found that the lessee did not have a vested right to continue to operate under the now-repealed ordinance. In order to attain a vested right in California, a property owner is required to receive the last discretionary permit needed to build. In addition, the owner is required to have incurred substantial liabilities in good faith reliance on that permit. Here, the lessee had not received the final permit, and all of its expenditures were considered “soft,” meaning that they went into labor and other costs as opposed to buildings, roads or the like. The court also rejected the lessee’s analogous claim that the city should be equitably estopped from applying the new ordinance. Again, the court found that there was no promise made by the city that could be reasonably relied upon by the lessee that a permit would be issued.

On the impairment of obligation of contracts issue, the court concluded that not every governmental action that impairs or affects a contractual obligation is unconstitutional.[[211]](#footnote-212)181 Even a total prohibition of previously authorized conduct, such as would impact the lease should the initiative ordinance apply, is not necessarily unconstitutional. The court must balance the importance of the governmental interest with the impact on the contracting party. The court must also be concerned that the governmental entity is impairing its own contractual obligations. Nonetheless, the court found that the balance was in favor of validating the initiative ordinance. The importance of direct citizen involvement in issues of great import outweighed the lessee’s reasonable expectations that the drilling operations would eventually be approved. The court noted that the lease itself contemplated further regulatory changes and was contingent upon the satisfaction of numerous conditions imposed by various levels of governmental organizations. The court further noted that the ordinance was designed to achieve a public health and safety objective in the only way that the citizens felt appropriate, namely an outright ban on ***oil*** and gas drilling. The court specifically eschewed answering any questions relating to whether the city had not breached its contractual obligations with the lessee, leaving that for the trial court on remand.

Where it is the local governmental unit that issues an ***oil*** and gas lease and then engages in subsequent actions that impair the ability of the lessee to drill for and produce hydrocarbons, there is a viable claim of impairment of the obligation of contracts. In *Bass Energy Inc. v. City of Highland Heights*,[[212]](#footnote-213)182 Bass entered into a lease with the City regarding the drilling of three natural gas wells.[[213]](#footnote-214)183 There were a number of conditions precedent that Bass had to meet in order to drill. A year after the lease was executed, the City Council reversed its position and passed a second resolution rescinding the first resolution. At that time the City had not approved the three sites proffered by Bass. After waiving an arbitration provision in the lease, Bass seeks judicial relief based on either a breach of contract or a constitutional violation based on the United States’s and Ohio’s prohibition against governmental actions that impair the obligation of contracts.[[214]](#footnote-215)184 While not every legislative act that impairs the value of a contract is unconstitutional, in this case the City’s second resolution had the legal effect of rescinding both the first resolution and the ***oil*** and gas leases that had been entered pursuant thereto. Such an action involves either a total or substantial impairment of the leasehold obligations. Bass was unable to drill wells within the lease’s three-year primary term, which would have allowed it to keep the lease alive indefinitely so long as there was production in paying quantities. Furthermore, Bass had expended more than $27,000 in permit and site preparation work and the City had accepted two delay rental payments under the terms of the lease. While contractual rights are often subject to regulation or impairment by the exercise of the police power, that accommodation is not absolute where there is either a total or substantial impairment of the rights created by the contract.[[215]](#footnote-216)185

While conservation regulation in general, and pooling and unitization regulation specifically, do not constitute a regulatory taking under the Oklahoma Constitution,[[216]](#footnote-217)186 Corporation Commission order authorizing a lessee to re-enter a plugged and abandoned well must consider the fact that the ownership of the casing of such a well reverted to the surface owner upon the termination of a prior lease. Under the Oklahoma Surface Damages Act,[[217]](#footnote-218)187 the surface owner is entitled to damages as measured by the rental value of its casing as compensation for the use of its property pursuant to the Commission’s wellbore re-entry order.[[218]](#footnote-219)188

A recent plurality opinion of the Supreme Court would extend the protections against the uncompensated taking of private property without just compensation to judicial orders and opinions.[[219]](#footnote-220)189 At least one state supreme court has, in dicta, refused to follow the plurality opinion as governing a regulatory takings claim asserted against a state trial court injunction.[[220]](#footnote-221)190

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1. 1The Fifth Amendment’s prohibition against the taking of property without the payment of just compensation was incorporated into the Fourteenth Amendment’s due process provisions and thus was made applicable to state action in Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897). [↑](#footnote-ref-2)
2. 2*See* 2 R. Rotunda, J. Nowak, J. Young, Treatise on Constitutional Law 26–155 (1985). [↑](#footnote-ref-3)
3. 3Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) stands as the paradigm for judicial review of the soundness of a legislative enactment, allowing the justices to substitute their views on the reasonableness of the legislation for that of the legislature under the guise of preventing the deprivation of liberty and property without due process of law.

   In both due process and regulatory takings challenges, the plaintiff must show that it has a property interest. In Dos Republicas Coal Partnership v. Saucedo, 477 S.W.3d 828 (Tex. App.—Corpus Christi 2015), the court found that a mineral owner did not have a vested property right to develop its minerals without compliance with properly enacted police power regulations, in this case a flood plain protection ordinance. [↑](#footnote-ref-4)
4. 42 R. Rotunda, J. Nowak, J. Young, *Treatise on Constitutional Law* 200–312 (1985), describes in detail the nature and extent of procedural due process considerations.

   In Citizens Allied for Integrity and Accountability, Inc. v. Schultz, 335 F. Supp. 3d 1216 (D. Idaho 2018), *motion for reconsideration denied*, 2019 U.S. Dist. LEXIS 16777 (D. Idaho Feb. 1, 2019), the court invalidated on procedural due process grounds a compulsory pooling/integration order that had been issued by the Idaho ***Oil*** & Gas Conservation Commission. The court initially concluded that the unleased mineral interest constituted a protected property interest under Idaho law. While the unleased mineral owner was afforded notice and an opportunity to be heard, the opportunity was inadequate because there was no guidance provided on what consitutes “just and reasonable” terms which must be included in the order.

   In Miller v. Utah, 638 Fed. Appx. 707 (10th Cir. 2016), the court rejected a mine owner’s claim that he was denied his procedural due process rights due to a failure to actually notify him of his obligations to reclaim an abandoned mine.

   In Martin v. Hamblet, 230 W. Va. 183, 737 S.E.2d 80 (2012), the court rejected a procedural due process attack on several West Virginia statutes (W. Va. Code §§ 22-6-17, 22-6-41) which do not provide the surface owner with a right to appeal a decision to issue an application for permit to drill a well. The court distinguished Snyder v. Callaghan, 168 W. Va. 265, 284 S.E.2d 241 (1981) relating to riparian rights because the surface owner’s property interest is burdened by the mineral owner’s implied easement of surface use. The surface owner does not have a vested property interest in preventing the severed mineral estate owner from drilling a well.

   Procedural due process claims have been made, but rejected, in cases dealing with dormant minerals acts and marketable title acts where the alleged title owner is deprived of title through the operative effects of the legislation. *See* Texaco, Inc. v. Short, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738, 72 O.&G.R. 217 (1982) (due process does not require personal notice to severed mineral estate owners before its ownership may be involuntarily conveyed to the surface owner upon failure to develop or record a statement of ownership); Rocket ***Oil*** & Gas Co. v. Donabar, 2005 OK CIV APP 111, 127 P.3d 625 (due process does not require notice to title owner before their ownership may be involuntarily conveyed to a third party through the application of a marketable record title act). [↑](#footnote-ref-5)
5. 5*See* §§ 24.05–24.06 *below*. [↑](#footnote-ref-6)
6. 6Townsend v. State, 147 Ind. 624, 47 N.E. 19 (1897).

   In a mixture of procedural and substantive due process and equal protection principles, the Kentucky Supreme Court in a 4-3 opinion invalidated an administrative policy of the Natural Resources and Environmental Protection Cabinet requiring parties to prepay assessments for violations of surface mining regulations in order to be granted a formal hearing. Commonwealth Natural Resources & Environmental Protection Cabinet v. Kentec Coal Co., 177 S.W.3d 718 (Ky. 2005).

   *See also* Commonwealth, Energy & Environment Cabinet v. Spurlock, 308 S.W.3d 221 (Ky. App. 2010) (where Cabinet regulations require giving party served with a notice of assessment the option to seek a waiver from the prepayment penalty, failure to do so will require that a proper notice be sent out). [↑](#footnote-ref-7)
7. 7*Townsend*, 47 N.E. at 23. By 1897 the U.S. Supreme Court had already rendered several opinions suggesting that there were substantive due process limitations on the exercise of state legislative authority.

   In Railroad Commission Cases, 116 U.S. 307, 6 S. Ct. 334, 29 L. Ed. 636 (1886), the Court, while upholding the delegation of regulatory power to the commission over railroad rates, suggested that there were substantive due process limits on how far that rate regulation could go. In Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887), the Court again upheld a state law that prohibited the manufacture of alcoholic beverages, but found that the corporation that was forced to shut down its business could allege a substantive due process violation even though the challenge was unsuccessful in that case. In 1897, the year that *Townsend* was decided, the U.S. Supreme Court struck down a Louisiana statute on substantive due process grounds, laying the groundwork for *Lochner* and its progeny. Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897). [↑](#footnote-ref-8)
8. 8Ohio ***Oil*** Co. v. Indiana, 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900). For other cases that followed *Ohio* ***Oil*** and upheld state regulation of the ***oil*** and gas industry, see, e.g., Walls v. Midland Carbon Co., 254 U.S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911).

   The Texas Supreme Court on two separate occasions has found that the State has the authority to regulate groundwater under its police power because of the important safety and public welfare considerations involved. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012); Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996). *In accord* Edwards Aquifer Authority v. Bragg, 421 S.W.3d 118 (Tex. 2013) (limits on groundwater withdrawals constitute an inverse condemnation of the surface owner’s property rights in the groundwater). [↑](#footnote-ref-9)
9. 9The statute provided in part:

   Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and ***oil*** wells, prescribing penalties therefore, …

   Section 1. Be it enacted … That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or ***oil*** well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or ***oil*** from any such well to escape into the open air, without being confined within such well or proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or ***oil*** shall have been struck in such well. And thereafter all such gas or ***oil*** shall be safely and securely confined in such well, pipes or other safe and proper receptacles.

   177 U.S. at 190–191. [↑](#footnote-ref-10)
10. 10177 U.S. at 210–211. [↑](#footnote-ref-11)
11. 11Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). [↑](#footnote-ref-12)
12. 12*See generally* Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 Va. L. Rev. 187 (1984). [↑](#footnote-ref-13)
13. 13For decisions upholding state conservation legislation, see, e.g., Walls v. Midland Carbon Co., 254 U.S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920); Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510 (1937); Bandini Petroleum Co. v. Superior Court, 110 Cal. App. 123, 293 P. 899 (Cal. App. 1931), *aff’d,* 284 U.S. 8, 52 S. Ct. 103, 76 L. Ed. 136 (1931); People v. Associated ***Oil*** Co., 211 Cal. 93, 294 P. 717 (1930), *on later appeal,* 212 Cal. 76, 297 P. 536 (1931); Bennett v. Corporation Commission, 157 Kan. 589, 142 P.2d 810 (1943); Marrs v. City of Oxford, 24 F.2d 541 (10th Cir. 1931)*, aff’d,* 32 F.2d 134 (D. Kan. 1928)*, cert. denied,* 280 U.S. 573, 50 S. Ct. 29, 74 L. Ed. 625 (1929); C.C. Julian ***Oil*** & Royalties Co. v. Capshaw, 1930 OK 452, 145 Okla. 237, 292 P. 841 (1930); Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941 (1944).

    The early cases finding state ***oil*** and gas conservation legislation constitutional under the Due Process Clause are reviewed in length in Hale v. CNX Gas Co., LLC, 2011 U.S. Dist. LEXIS 52935 (W.D. Va. Jan. 21, 2011), *report and recommendation accepted*, 2011 U.S. Dist. LEXIS 110645 (W.D. Va. Sept. 28, 2011); Adair v. EQT Prod. Co., 2011 U.S. Dist. LEXIS 52932 (W.D. Va. Jan. 21, 2011), *report and recommendation accepted*, 2011 U.S. Dist. LEXIS 110512 (W.D. Va. Sept. 28, 2011). In both *Hale* and *Adair,* the court found the Virginia statutory pooling statute valid. [↑](#footnote-ref-14)
14. 14The story of the East Texas Field insofar as it relates to conservation legislation and judicial intervention is recounted at A.B.A., *Legal History of Conservation of* ***Oil*** *and Gas* (1938). [↑](#footnote-ref-15)
15. 15Macmillan v. Railroad Commission, 51 F.2d 400 (W.D. Tex. 1931). Another case reaching a similar result was Constantin v. Smith, 57 F.2d 227 (E.D. Tex. 1932), *aff’d,* 287 U.S. 378, 53 S. Ct. 190, 77 L. Ed. 375 (1932). [↑](#footnote-ref-16)
16. 16Champlin Refining Co. v. Oklahoma Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932). [↑](#footnote-ref-17)
17. 17286 U.S. 233–234. The Court added:

    And that power [the police power] extends to the taker’s unreasonable and wasteful use of natural gas pressure available for lifting the ***oil*** to the surface and the unreasonable and wasteful depletion of a common supply of gas and ***oil*** to the injury of others entitled to resort to and take from the same pool.

    *Id.*

    The Court did not explain why its prior substantive due process cases, such as *Lochner,* did not apply. Why should a state regulation setting minimum hours or wages, or regulating the use of child labor, violate the employer’s substantive due process rights, whereas an absolute limitation on the right to take gas that admittedly is owned by the plaintiff is not a deprivation of a property or liberty interest without due process of law? The difference may have been the Court’s willingness to re-define what is a property interest in a common source of supply, so that Champlin never owned the right to take as much gas as physically possible where it might injure the common source or deflate prices to an unacceptable level. This would in essence eliminate the rule of capture as the basic ownership scheme and replace it with a correlative ownership scheme not unlike the riparian rights scheme for surface water. *See* Ch. 2 *above*. [↑](#footnote-ref-18)
18. 18Patterson v. Stanolind ***Oil*** & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83 (Okla. 1938), *appeal dismissed*, 305 U.S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939). For other state court decisions upholding compulsory pooling statutes and agency orders, see, e.g., Gawenis v. Arkansas ***Oil*** & Gas Comm’n, 2015 Ark. 238, 464 S.W.3d 453; Hunter v. Justice’s Court, 36 Cal.2d 315, 223 P.2d 465 (1950); Helmerich & Payne v. Roxana Petroleum Corp., 136 Kan. 254, 14 P.2d 663 (1932) (municipal ordinance); Hunter Co. v. McHugh, 11 So. 2d 495, 202 La. 97 (1943), *appeal dismissed,* 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 5 (1943); Railroad Commission v. Shell ***Oil*** Co., 139 Tex. 66, 161 S.W.2d 1022 (1942). [↑](#footnote-ref-19)
19. 19Palmer ***Oil*** Corp. v. Phillips Petroleum Co., 1951 OK 78, 204 Okla. 543, 231 P.2d 997 (Okla. 1951), *appeal dismissed*, 343 U.S. 390, 72 S. Ct. 842, 96 L. Ed. 1022, 1 O.&G.R. 876 (1952). *See also* Crichton v. Lee, 25 So. 2d 229, 209 La. 561 (1946); Hunter Co. v. McHugh, 11 So. 2d 495, 202 La. 97 (1943), *appeal dismissed,* 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 5 (1943).

    In Samson Resources Co. v. Corporation Commission, 1992 OK CIV APP 62, 831 P.2d 663, 119 O.&G.R. 520, the court relied on *Palmer* ***Oil*** to sustain the validity of the Commission’s newly promulgated horizontal well unit regulations.

    In a broad affirmation of *Palmer* ***Oil***, the Oklahoma Supreme Court has said: “Ultimately, the regulation of the unitized management and development of ***oil*** and gas properties within this state constitutes a valid exercise of the state’s police powers, and orders of the Corporation Commission dictating the unitized management and development of ***oil*** and gas properties within this state, commensurate with state law, do not violate the Oklahoma constitutional provisions relating to due process or the taking of private property.” O’Brien ***Oil***, L.L.C. v. Norman, 2010 OK CIV APP 23, 233 P.3d 413. *See also* Jones ***Oil*** Co. v. Corporation Comm’n, 1963 OK 116, 382 P.2d 751, 18 O.&G.R. 1041; Woody v. State Corporation Comm’n, 1954 OK 14, 265 P.2d 1102, 3 O.&G.R. 465. [↑](#footnote-ref-20)
20. 20231 P.2d at 1002, quoting from Chicago, B. & Q. R.R. Co. v. McGuire, 219 U.S. 549, 31 S. Ct. 259, 55 L. Ed. 328 (1911). [↑](#footnote-ref-21)
21. 21Energy Management Corp. v. City of Shreveport, 467 F.3d 471, 163 O.&G.R. 716 (5th Cir. 2006), *on remand*, 2006 U.S. Dist. LEXIS 80925 (W.D.La. 2006). [↑](#footnote-ref-22)
22. 22*See* 4.05[2][b] *supra*. [↑](#footnote-ref-23)
23. 23467 F.3d at 481–82. *See also* Simi Investment Co. v. Harris County, Texas, 236 F.3d 240 (5th Cir. 2000). [↑](#footnote-ref-24)
24. 24*Id.*, 467 F.3d at 481. [↑](#footnote-ref-25)
25. 25The dividing line between the *Lochner* era and the modern era of substantive due process review is generally conceded to be 1937, the year the United States Supreme Court decided West Coast Hotel v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 8 Ohio Op. 89, 1 L.R.R.M. (BNA) 754, 7 L.R.R.M. (BNA) 754 (1937), which was followed by United States v. Carolene Prods., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), with its famous footnote four, where substantive due process review was essentially replaced by equal protection analysis of economic regulation. There were some pre-1937 decisions, such as Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934), which suggested that the *Lochner* view of the role of the judiciary in reviewing state economic regulation was no longer in favor.

    In Seneca Resources Corp. v. Highland Township, 2017 U.S. Dist. LEXIS 162629 (W.D. Pa. Sept. 29, 2017), the court invalidated initiative-created charter provisions that sought to deny corporations any rights, as being violative of the plaintiff’s substantive due process rights since the charter provisions were irrational and arbitrary.

    In Maytown Sand & Gravel, Inc. v. Thurston County, 198 Wn. App. 560, 395 P.3d 149 (2016), the court upheld a jury verdict finding that the county violated the mining company’s substantive due process rights to carry on mining operations pursuant to a valid land use permit. The permit created the property right which was interfered with by the county in a way that “shocked one’s conscience.”

    In Miller v. Utah, 638 Fed. Appx. 707 (10th Cir. 2016), the court limited substantive due process challenges to regulatory actions to matters that “shock the conscience” to are clearly arbitrary and unconstrained exercises of the police power.

    In Nat’l Fuel Gas Supply Corp. v. Town of Wales, 904 F. Supp. 2d 324 (W.D.N.Y. 2012), 2013 U.S. Dist. LEXIS 151916 (W.D.N.Y. Oct. 21, 2013), the court dismissed an ***oil*** and gas operator’s substantive and procedural due process claims based on the Town’s delay in allowing a compressor station to be built that had been authorized by the FERC.

    In Noram Energy Corp. v. Oklahoma Tax Comm’n, 1995 OK CIV APP 149, 935 P.2d 389, 134 O.&G.R. 390, *cert. dism’d* (released for publication by order of the Court of Appeals), the court dismissed a due process and equal protection challenge to the commission’s decision to impose a gross production tax assessment on prepayments made to a gas purchaser in settlement of a take or pay dispute. The purchaser had argued that the payments did not reflect the value of the gas but were merely a payment to reform the existing gas purchase contract. The court found that the commission’s treatment of the settlement monies as part of the value of the gas did not create an illusory or invalid classification. It likewise dismissed the due process claim applying a very deferential view on when a court will invalidate a taxation plan developed by the legislature. *Id.* at 396.

    In Trail Enters., Inc. v. City of Houston, 957 S.W.2d 625, 138 O.&G.R. 454 (Tex. App.—Houston [14th Dist.] 1997, writ denied), *cert. denied,* 525 U.S. 1070, 119 S. Ct. 802, 142 L. Ed. 2d 663, *reh’g denied,* 525 U.S. 1172, 119 S. Ct. 1099, 143 L. Ed. 2d 98 (1999), the court summarily dismissed a substantive due process attack on a municipal ordinance which totally prohibits the drilling of ***oil*** wells within the watershed of a city-owned lake. The court observed: “The standard of review for a substantive due process challenge is whether the statute has a reasonable relation to a proper legislative purpose, and whether it is arbitrary or discriminatory … . When a city government passes an ordinance … , it cannot be revised by the courts unless the passing of the ordinance was arbitrary, unreasonable, and a clear abuse of power … . There is a presumption in favor of the validity of the ordinance and appellant faces an ‘extraordinary burden’ when asserting an ordinance is unconstitutional.” *Id*. at 634–635.

    In Trail Enterprises, Inc. v. City of Houston, 2002 Tex. App. LEXIS 1872 (Tex. App.—Houston [14th Dist.] Mar. 14, 2002) (not designated for publication), the court found that the substantive due process/regulatory taking claim made in a lawsuit filed about a different lease and not barred by the statute of limitations, as was the first claim, could not be made because Trail Enterprises was collaterally estopped by virtue of the result in the first litigation.

    The inverse condemnation claims in *Trail Enterprises* are discussed *infra* at § 24.01[2].

    In Shelby Operating Co. v. City of Waskom, 964 S.W.2d 75, 139 O.&G.R. 388 (Tex App.—Texarkana 1997) *on later appeal*, 1999 Tex. App. LEXIS 4250 (Tex. App.—Texarkana 1999, not for publication), one argument made by the ***oil*** and gas operator challenging the validity of a municipal drilling ordinance was that the 500-foot buffer zone requirement was unreasonable and arbitrary and not necessary for health or safety purposes. The court summarily dismissed the claim, supported in part by the heavy presumption of validity that attaches to police power regulations. Clearly ***oil*** and gas drilling operations conducted within city limits are subject to regulation and control by the city government in the absence of a clear showing that such regulation is arbitrary. *See also* Helton v. City of Burkburnett, 619 S.W.2d 23, 71 O.&G.R. 602 (Tex. Civ. App.—Fort Worth 1981, writ ref’d n.r.e.)*, appeal dismissed,* 456 U.S. 940, 102 S. Ct. 2002, 72 L. Ed. 2d 462 (1982).

    Federal substantive due process claims are, for the most part, equally hard to allege. While a state or local regulatory program, if arbitrary or capricious, may entail a substantive due process cause of action, merely alleging arbitrary or capricious regulation is typically insufficient to withstand a summary judgment motion. *See, e.g.,* Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382 (5th Cir. 2001) (no substantive due process claim for ordinance totally prohibiting mining operations); *but cf.* Suarez Cestero v. Pagan Rosa, 198 F. Supp. 2d 73 (D.P.R. 2002) (denial of excavation permit for sand removal may constitute violation of due process clause since applicant had a protectable property interest in the permit).

    In an interesting attempt to avoid the difficult pleading and proof requirements of a substantive due process attack on a regulatory program, the plaintiffs in Kepler v. Mirza, 102 F. Supp. 2d 617 (W.D. Pa. 1999), *aff’d sub nom.* McCleary v. Mirza, 205 F.3d 1329 (3d Cir. Pa. 1999), *cert. denied*, 529 U.S. 1110, 120 S. Ct. 1965, 146 L. Ed. 2d 796 (2000), asserted that the actions of a particular state official and the state department of environmental protection, in denying three reclamation plan requests, amounted to a deprivation of a liberty interest to follow a chosen profession. The court found that there was no severe limitations on the plaintiffs’ ability to engage in the reclamation business, and thus no due process violation. The holding is undoubtedly correct since it was apparent that the reclamation plans did not meet state regulatory requirements. There was some evidence, however, of the defendant employee’s “antipathy” towards the plaintiffs, but not enough to warrant a finding of a deprivation of a liberty interest.

    In Kentec Coal Co. v. Commonwealth, 177 S.W.3d 718 (Ky. 2005), the court invalidated an agency rule that required a party challenging an assessment for violating a statutory, regulatory or permit standard to submit prepayment of the penalty. The hearing process was bifurcated into a violation phase and a penalty phase. Imposing the prepayment requirement prior to the penalty phase violated the due process and equal protection rights of those charged with violating state surface mining permits. *See also* Franklin v. Natural Resources & Environmental Protection Cabinet, 799 S.W.2d 1 (Ky. 1990) (invalidating earlier procedures that similarly imposed pre-payment requirements in order to have access to administrative appeals process).

    Commonwealth, Energy and Environment Cabinet v. Spurlock, 308 S.W.3d 221 (Ky. App. 2010) (failure of Cabinet to include in its notice of assessment the right to seek a waiver of the prepayment regulatory requirement necessitates remand of order so that the individual be affirmatively notified of its right to week such a waiver). [↑](#footnote-ref-26)
26. 26The most analogous area to the drilling permit situation involves land use permits. Where a drilling permit is denied because the permittee cannot meet locational or other restrictions regarding the drilling in a state park, it will be very hard to make an equal protection claim. In Schmude ***Oil***, Inc. v. Dep’t of Envtl. Quality, 306 Mich. App. 35, 856 N.W.2d 84 (2014), the court easily dismissed an equal protection claim made by an operator who owned land that was largely in the no-drilling zone. As with zoning districts it is very hard to argue that because a lot across the street is in a zoning district that allows more intensive uses you have a viable Equal Protection claim.

    In order to state an equal protection claim the plaintiff must prove that the agency is treating similarly situated persons differently without providing sufficient justification. Freeman v. United States Department of the Interior, 37 F. Supp. 3d 313 (D.D.C. 2014), 83 F. Supp. 3d. 173 (D.D.C. 2015), *aff’d*, 650 Fed. Appx. 6 (D.C. Cir. 2016).

    In Portland Pipe Line Corp. v. City of S. Portland, 288 F. Supp. 3d 322 (D. Me. 2017), the court rejected a pipe line company’s equal protection claim after the city engaged in various legislative and administrative actions designed to prohibit the company’s plan to expand its existing facilities.

    In Vaquero Energy, Inc. v. County of ***Kern***, 42 Cal. App. 5th 312, 255 Cal. Rptr. 3d 221 (2019), a county ordinance set up two tracks for the issuance of an ***oil*** and gas permit. Where the operator obtained the consent of the effected surface owner a seven-day process ensued. Where consent was not obtained a one hundred and twenty-day process ensued. The court found that as to mineral owners there were two classes but that the ordinance was substantially related to achieving a number of valid police power objectives and thus affirmed the validity of the ordinance. [↑](#footnote-ref-27)
27. 27Maguire ***Oil*** Co. v. City of Houston, 69 S.W.3d 350, 154 O.&G.R. 428 (Tex. App.—Texarkana 2002, rev. denied). [↑](#footnote-ref-28)
28. 28Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). [↑](#footnote-ref-29)
29. 29The issue of what constitutes an equal protection violation for a class of one is not clear. The Seventh Circuit decision in Olech v. Village of Willowbrook, 160 F.3d 386 (7th Cir. 1998), heavily relied on an improper motive or intent theory. The Supreme Court decision, however, specifically eschews relying on a motive theory, but does not state what the test is to be. *See* Hilton v. City of Wheeling, 209 F.3d 1005 (7th Cir. 2000). The Ninth Circuit requires three elements for such an equal protection claim, namely, that the defendants intentionally treated the plaintiffs different from others who are similarly situated without a rational basis. Gerhart v. Lake County Mont., 637 F.3d 1013 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 249, 181 L. Ed. 2d 143 (2011); Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist., 935 F. Supp. 2d 968 (E.D. Cal. 2013). The Third Circuit requires the plaintiff to allege that the defendant treated him differently from others similarly situated, it was done intentionally and there is no rational basis for the difference in treatment. Gerhart v. Energy Transfer Partners, LP, 2020 U.S. Dist. LEXIS 55107 (M.D. Pa. Mar. 30, 2020), relying on Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008).

    In Martin v. Hamblet, 230 W. Va. 183, 737 S.E.2d 80 (2012), the court easily dismissed an equal protection claim made by a surface owner who under the relevant West Virginia statutes was not entitled to appeal a decision to grant an application for permit to drill a well into the Marcellus Formation. The surface owner alleged that there is no reasoned justification for providing an appeal procedure for coal seam owners but not surface owners. *See* W. Va. Code §§ 22-6-15, 22-6-16, 22-6-17.

    In making an equal protection or due process claim, if the agency being sued is treated as an arm of the state, it is entitled to Eleventh Amendment immunity from suit in the federal courts. *See* Dunhill Resources I, L.L.C. v. State of Louisiana *ex rel.* Louisiana State Mineral Board, 298 F. Supp. 2d 404, 160 O.&G.R. 190 (M.D. La. 2003) (suit by unsuccessful bidder for state lease barred by Eleventh Amendment since the Board is an arm of the state).

    The Eleventh Amendment also prohibits a FERC certificate holder from condemning state-owned lands pursuant to the Natural Gas Act. *In re* PennEast Pipeline Co., LLC, 938 F.3d 96 (3d Cir. 2019). The same restriction would not prevent the federal government from condemning state land. United States v. Carmack, 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209 (1946). Upon appeal, PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021), the Supreme Court reversed in a 5-4 opinion and found that the Eleventh Amendment did not prevent New Jersey from being sued in a condemnation action brought by the holder of a FERC-issued certificate of public convenience and necessity.

    There is a longstanding exception to Eleventh Amendment immunity if the plaintiff is seeking only prospective injunctive relief. *Ex parte* Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). In Seneca Nation v. Hochul, 58 F.4th 664 (2d Cir. 2023), *aff’g* Seneca Nation v. Cuomo, 484 F. Supp. 3d 65 (W.D.N.Y. 2020), the Second Circuit applied *Ex Parte Young* to allow a suit by a Native American Tribe to continue seeking prospective relief regarding an ongoing trespass by the State of New York.

    In Grynberg v. Colorado ***Oil*** & Gas Conservation Comm’n, 7 P.3d 1060, 145 O.&G.R. 249 (Colo. Ct. App. 1999), the court applied the very deferential “rational basis” test for an alleged equal protection violation under a Colorado statute that gave the Commission “exclusive jurisdiction” to resolve certain types of disputes between payees and payors. *See also* Grant Bros. Ranch, LLC v. Antero Resources Piceance Corp., 2016 Colo. App. LEXIS 1675 (Colo. App. Dec. 1, 2016) (discusses same statutory provision relating to the Commission’s exclusive jurisdiction, in the absence of a contract dispute, to resolve payment issues).

    The burden of proof on the party asserting an equal protection claim is substantial. The party must show that the alleged disparate treatment by a governmental agency “clearly, palpably and plainly” violates its equal protection rights. UMCO Energy, Inc. v. Dep’t of Envtl. Prot., 938 A.2d 530 (Pa. Commw. Ct. 2007) (Department’s revision of mining operator’s permit pursuant to Clean Streams Law to prohibit longwall mining not a denial of equal protection rights).

    Administrative agencies are generally prohibited “from treating similarly situated petitioners differently without providing a sufficiently reasoned explanation for the disparate treatment.” Muwekema Ohlone Tribe v. Kempthorne, 452 F. Supp. 2d 105, 115 (D.D.C. 2006). As in *Olech*, however, it is difficult to show that parties are similarly situated. General Chemical (Soda Ash) Partners, 176 IBLA 1, 11–12 (2008). *See also* Westar Energy, Inc. v. Federal Energy Regulatory Commission, 473 F.3d 1239 (D.C. Cir. 2007); Colorado Interstate Gas Co. v. Federal Energy Regulatory Commission, 850 F.2d 769 (D.C. Cir. 1988); Exaro Energy III, LLC v. Wyoming ***Oil*** and Gas Conservation Commission, 2020 WY 8, 455 P.3d 1243 (approval of one request for a drilling and spacing unit and disapproval of a second request both supported by identical evidence in the record constitutes an arbitrary and capricious decision). [↑](#footnote-ref-30)
30. 29.1City of Port Arthur v. Thomas, 659 S.W.3d 96 (Tex. App.—Beaumont 2022), citing to Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998). [↑](#footnote-ref-31)
31. 30The issue of the timing of pooling orders, including an analysis of retroactive orders is contained in § 13.03[4] *above.* [↑](#footnote-ref-32)
32. 31Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988). [↑](#footnote-ref-33)
33. 32Indiana Dep’t of Natural Resources v. United Minerals, 686 N.E.2d 851 (Ind. Ct. App. 1997)*, trans. denied,* 698 N.E.2d 1185 (Ind. 1998) (surface mining permit could be modified to reflect change in both the statute and the rule relating to surface reclamation requirements). [↑](#footnote-ref-34)
34. 33Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), is generally considered the beginning of modern takings jurisprudence. This section is not intended to be anything but an introduction to the problem of applying the takings clause. There have been exhaustive writings on the subject. *See, e.g.*, Richard A. Epstein, *Valuation Blunders in the Law of Eminent Domain,* 96 Notre Dame L. Rev. 1441 (2021); Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 Notre Dame L. Rev. 1421 (2021); Dave Owen, *The Realities of Takings Litigation*, 2021 B.Y.U. L. Rev. 577; John D. Echevarria, *What Is a Physical Taking*?, 54 U.C. Davis L. Rev. 731 (2020); Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J. L & Liberty 151 (2017); Joseph Belza, *Inverse Condemnation and Fracking Disasters: Government Liability for the Environmental Consequences of Hydraulic Fracturing Under a Constitutional Takings Theory*, 44 B.C. Envtl. Aff. L. Rev. 55 (2017); James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35 (2016); Kevin J. Lynch, *Regulation of Fracking is Not a Taking of Private Property*, 84 U. Cin. L. Rev. 39 (2016); Maureen E. Brady, *Property’s Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 Va. L. Rev. 1167 (2016); Joseph William Singer, *Justifying Regulatory Takings*, 47 Ohio N.U. L. Rev. 601 (2015); Eduardo Moises Penalver, *Regulatory Taxings*, 104 Colum. L.Rev. 2182 (2004); Eduardo Moises Penalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 Ecol. L.Q. 227 (2004); David Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165 (1967); Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law,* 1962 Sup. Ct. Rev. 63; Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393 (1991).

    One of the memorable quotes from *Penn Coal* is that the “right to coal consists of the right to mine it.” 260 U.S. 393, 414, 43 S. Ct. 158, 67 L. Ed. 322. That quote was used in the court’s standing analysis in SWEPI, L.P. v. Mora County, 81 F. Supp. 3d 1075 (D.N.M. 2015). While finding SWEPI, L.P. has standing, the case was not ripe for review under *Hamilton Bank* since New Mexico has a statutory procedure for bringing inverse condemnation claims. The *Hamilton Bank* ripeness requirement that a claimant file its inverse condemnation action in state court prior to filing its federal court action was overruled in Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

    In order to make a regulatory takings or due process claim, one must have a vested property right. Dos Republicas Coal Partnership v. Saucedo, 477 S.W.3d 828 (Tex. App.—Corpus Christi 2015). [↑](#footnote-ref-35)
35. 34*See, e.g.*, Walls v. Midland Carbon Co., 254 U.S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920); Ohio ***Oil*** Co. v. Indiana, 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900). [↑](#footnote-ref-36)
36. 35*See, e.g.*, Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510 (1937); Champlin Refining Co. v. Oklahoma Corp. Comm’n, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932); Bandini Petroleum Co. v. Superior Court, 110 Cal. App. 123, 293 P. 899 (1930), *aff’d*, 284 U.S. 8, 52 S. Ct. 103, 76 L. Ed. 136 (1931); Patterson v. Stanolind ***Oil*** & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83 (1938), *appeal dismissed*, 305 U.S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939). [↑](#footnote-ref-37)
37. 36Patterson v. Stanolind ***Oil*** & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83, 89–90, *appeal dismissed*, 305 U.S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939). *Patterson* was cited with approval in ***Kerns*** v. Chesapeake Exploration, LLC, 762 Fed. Appx. 289, 2019 U.S. App. LEXIS 3450 (6th Cir. 2019), *aff’g* 2018 U.S. Dist. LEXIS 99180 (N.D. Ohio June 13, 2018), a case upholding the Ohio compulsory pooling statute. [↑](#footnote-ref-38)
38. 37Gawenis v. Arkansas ***Oil*** & Gas Commission, 2015 Ark. 238, 464 S.W.3d 453 (2015).

    In Northwest Landowners Association v. State, 2022 ND 150, 978 N.W.2d 679, a facial attack on several statutes that purported to allow ***oil*** and gas operators to use the pore space to inject substances, including CO2, was allowed. The North Dakota Supreme Court concluded that because the surface owners had property interests in the pore space, such interests were taken without compensation by the statutory provisions. [↑](#footnote-ref-39)
39. 38The Arkansas Supreme Court relied on Anderson v. Corporation Commission, 1957 OK 39, 327 P.2d 699, 7 O.&G.R. 72, 9 O.&G.R. 196, *appeal dismissed*, 358 U.S. 642, 79 S. Ct. 536, 3 L. Ed. 2d 567, 9 O.&G.R. 196, 10 O.&G.R. 292 (1959) and Amis v. Bryan Petroleum Corp., 1939 OK 192, 185 Okla. 206, 90 P.2d 936, 939. [↑](#footnote-ref-40)
40. 39Paczewski v. Antero Res. Corp., 2019-Ohio-2641 (Ohio App.), *discretionary appeal denied*, 157 Ohio St. 3d 1441, 2019-Ohio-4421. [↑](#footnote-ref-41)
41. 402019-Ohio-2641, at Paras. 37–41. The court cites to Cities Service Gas Co. v. Peerless ***Oil*** & Gas Co., 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190 (1950); Hunter Co. v. McHugh, 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 5 (1943); and Ohio ***Oil*** Co. v. Indiana, 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900). [↑](#footnote-ref-42)
42. 41First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). One of the issues raised by *First English* was whether there would be a “temporary” taking in the inevitable delay between applying for a land use permit and the eventual decision. The Supreme Court specifically eschewed holding that normal delays in obtaining building permits, changes in zoning ordinances, and the like would constitute a taking. 482 U.S. at 321. *See, e.g.*, Wyatt v. United States, 271 F.3d 1090, 156 O.&G.R. 237 (Fed. Cir. 2001) (normal delays in processing surface mining permit were not sufficiently extraordinary to constitute a regulatory taking under *First English*).

    The Supreme Court has held that temporary moratoria on development do not constitute a “temporary” regulatory taking even though the delay in development may be quite long. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002). Implicit in that holding is that ordinary regulatory delays in issuing permits would not constitute a regulatory taking even if all uses were prohibited during the moratoria period.

    Even though a moratoria may not constitute a “temporary” taking, it may be invalid if the ordinance does not comply with state statutory or common law requirements for such ordinances. *See* Jeffrey v. Ryan, 37 Misc. 3d 1204(A) (Sup. Ct. 2012), the court invalidates a municipal ordinance that sought to place a two-year moratorium on ***oil*** and gas exploration, production and storage operations because the City did not show that the ordinance was: “1. in response to a dire necessity; 2. reasonably calculated to alleviate or prevent a crisis condition; and 3. that the municipality is presently taking steps to rectify the problem,” relying on Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 364 N.Y.S.2d 160, 323 N.E.2d 697 (1974).

    An argument similar to that in *First English* was made by an unleased mineral owner who asserted that a delay in a compulsory pooling hearing, followed by a dismissal of the application, constituted a taking of his property interest. White v. Amoco Prod. Co., 1985 OK 55, 704 P.2d 470, 85 O.&G.R. 616. The court concluded that the property owner’s interests were not taken during the pendency of the compulsory pooling hearing process. The mineral estate could have been leased at any time, subject to the commission’s exercise of its power to pool. The mere fact that potential lessees might be scared off by the pendency of the pooling order does not constitute a taking of property interests. 704 P.2d at 473.

    While the defendant in an inverse condemnation claim is usually a governmental entity with the power of eminent domain, private entities that have that power by legislative grant are also subject to such a claim. In Miller v. Southeast Supply Header, LLC, 2009 U.S. Dist. LEXIS 121795 (S.D. Ala. Dec. 31, 2009), the court denied the pipeline operator’s motion for summary judgment on the surface owner’s inverse condemnation claim after the operator engaged in activities that allegedly led to the flooding of the surface. [↑](#footnote-ref-43)
43. 42Section 3.02[4][a] *above* discusses the vexing problem of how to measure just compensation in regulatory takings cases. The government may choose, by repealing the offending regulatory program or decision, to convert a permanent taking into a regulatory taking. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

    It is axiomatic that a regulatory takings or inverse condemnation claim can only be made against a governmental entity possessing the power of eminent domain or a private entity delegated that power or a party operating pursuant to a state permit. Mongrue v. Monsanto Co., 1999 U.S. Dist. LEXIS 5543 (E.D. La. Apr. 9, 1999) (unpublished opinion). But in a later order dealing with a state regulatory takings claim under the Louisiana Constitution, the court found that only private entities with the right to expropriate private property for a public and necessary purpose can have a regulatory takings claim brought against them. Mongrue v. Monsanto Co., 1999 U.S. Dist. LEXIS 16663 (E.D. La. Oct. 21, 1999) (unpublished opinion). Thus, a regulatory takings claim based on the migration of injected fluids will not lie against Monsanto whose injection was permitted by the state, but which did not have the power to expropriate private lands. The court in a third opinion refused to allow the plaintiff a new trial to raise issues under the U.S. Constitution, rather than the Louisiana Constitution. Mongrue v. Monsanto Co., 1999 U.S. Dist. LEXIS 19573 (E.D. La. Dec. 16, 1999) (unpublished opinion). The Fifth Circuit affirmed the decision of the district court that only a private entity authorized by Louisiana law to condemn property interests could be sued on an inverse condemnation claim. Mongrue v. Monsanto Co., 249 F.3d 422, 150 O.&G.R. 219 (5th Cir. 2001). The court also found that the plaintiffs’ attempt to assert a state inverse condemnation claim was an impermissible attempt to relitigate the federal regulatory takings claim. *Id.* A second action filed by the same parties again for damages based on underground pollution was dismissed on res judicata grounds in Mongrue v. Monsanto Co., 2001 U.S. Dist. LEXIS 15586 (E.D. La. Sept. 27, 2001).

    In Hughes v. UGI Storage Co., 243 A.3d 278 (Pa. Commw. Ct. 2020), the court determined that since UGI’s power to condemn was limited to the area described in its FERC-issued certificate of public convenience and necessity, a de facto takings claim could not be asserted against it by the owner of a surface estate that was outside the boundaries of the described underground storage facility. On appeal, however, Hughes v. UGI Storage Co., 263 A.3d 1144 (Pa. 2021), the Pennsylvania Supreme Court concluded that imposing such a requirement based on the statutory Eminent Domain code would violate the constitutional provision relating to takings. It thus remanded the case back to the Commonwealth Court to ascertain whether the property owner had waived its right to a hearing on the de facto condemnation claim.

    In a case dealing with a temporary taking in order to construct a pipeline, the court concluded: “Compensation for a temporary taking is generally determined by (1) ascertaining the value of the property for the period it is held by the condemnor; (2) ascertaining the difference in the value of the property before and after the taking; or (3) looking at the fair market rental value of the property during the time it was taken.” Portland Natural Gas Transmission System v. 19. 2 Acres of Land, 318 F.3d 279, 285, 158 O.&G.R. 393 (1st Cir. 2003).

    The general rule is that regulatory actions that require the payment of money do not constitute a taking of property without just compensation. Eastern Enters. v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998); Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339 (Fed. Cir. 2001); Red River Coal Co. v. United States, 105 Fed. Cl. 602 (2012). The one exception to the rule is where there is a common fund of money owned by individuals. Phillips v. Washington Legal Found., 524 U.S. 156, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998). Personal property, however, is covered by the Fifth Amendment as well as real property. In Horne v. Dep’t of Agric., 135 S. Ct. 2419, 192 L. Ed. 2d 398 (2015), the Supreme Court invalidated a raisin set-aside program whereby the Department took a certain percentage of Horne’s raisin crop and used it for its own purposes. Just as in Loretto v. Teleprompter Manhattaan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), a physical taking is a per se taking. [↑](#footnote-ref-44)
44. 43Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

    *See also* Northwest Landowners Association v. State, 2022 ND 150, 978 N.W.2d 679 (North Dakota statute authorizing ***oil*** and gas lessee to utilize pore space owned by the surface owner is a *Loretto* per se taking); McKay v. United States, 199 F.3d 1376, 147 O.&G.R. 461 (Fed. Cir. 1999) (placement of monitoring wells to determine groundwater contamination that intrude into the mineral estate is a physical invasion requiring the payment of just compensation); Mongrue v. Monsanto Co., 1999 U.S. Dist. LEXIS 16663, 5543 (E.D. La. 1999) (unpublished opinions) (migration of injected fluids authorized by state permit, if proven, constitutes a physical occupation), *aff’d on other grounds,* 249 F.3d 422, 150 O.&G.R. 219 (5th Cir. 2001) (the plaintiffs in *Mongrue* sought and received a motion to dismiss with prejudice their trespass claim, in order to appeal the dismissal of their state and federal regulatory takings claims, 249 F.3d at 426); *but cf.* City of Northglenn v. Grynberg, 846 P.2d 175, 122 O.&G.R. 437 (Colo.), *cert. denied,* 510 U.S. 815, 114 S. Ct. 63, 126 L. Ed. 2d 33 (1993); Hendler v. United States, 175 F.3d 1374 (Fed. Cir. 1999) (use of wellsite to monitor for groundwater pollution not a regulatory taking).

    In ***Kerns*** v. Chesapeake Exploration, LLC, 762 Fed. Appx. 289, 2019 U.S. App. LEXIS 3450 (6th Cir. 2019), *cert. denied*, 2019 U.S. LEXIS 3450 (Feb. 4, 2019), *aff’g* 2018 U.S. Dist. LEXIS 99180 (N.D. Ohio June 13, 2018), the court found that the occupation of the subsurface by a horizontal lateral authorized by a compulsory unitization order did not involve a taking because under Ohio law, the surface owner’s property interest in the subsurface estate was not “absolute” but was instead restricted to preventing only interferences with the owner’s reasonable and foreseeable uses of the surface. *See also* Chance v. BP Chemicals, 77 Ohio St. 3d 17, 670 N.E.2d 985 (Ohio 1996).

    In Nat’l Food & Bev. Co. v. United States, 105 Fed. Cl. 679 (2012), plaintiffs showed a *Loretto* taking when the United States mined some 380,000 cubic yards of clay without paying the true owner any compensation. There was a dispute between the seller and purchaser as to whether the seller retained the right to the clay but the court determined that the reservation did not include clay. The measure of damages was the amount of tonnage of clay removed multiplied by the market price for clay at the time of the removal since clay mining was the highest and best use of the land.

    In Vogt v. Bd. of Comm’rs, 294 F.3d 684, 157 O.&G.R. 741*, reh’g and reh’g en banc denied,* 45 Fed. Appx. 327 (5th Cir.)*, cert. denied,* 537 U.S. 1088, 123 S. Ct. 700, 154 L. Ed. 2d 632 (2002), the court faced a unique circumstance that is directly analogous to the physical invasion theory of regulatory takings.

    In 1984, the Louisiana legislature passed a statute requiring the district to re-convey title to certain land originally expropriated by the district to the owners or to their successors in interest. At that time the district was receiving about $3,000,000/year in royalties from production from those lands. After litigating the right of the state to order the re-conveyance and losing, the district sold back the lands but continued to keep the royalties. Board of Commissioners of the Orleans Levee District v. Huls, 852 F.2d 140 (5th Cir. 1988); Board of Commissioners of the Orleans Levee District v. Department of Natural Resources, 496 So. 2d 281 (La. 1986). The new owners then sued to recover the royalties that had been retained. They received a money judgment, but the district refused to make payment. In this case, the court found that the failure to pay the royalties to the proper owners constituted a taking of property without just compensation. Where the government forcibly appropriates private property without a claim of right or public or regulatory purpose, a regulatory taking claim has been made.

    In ANR Pipeline Co. v. 60 Acres of Land, 418 F. Supp. 2d 933 (W.D. Mich. 2006), the mineral estate owner claimed that activities by ANR Pipeline in operating its natural gas storage facility led to a physical invasion. The evidence, however, only showed that native gas was pushed across the property line. The court admitted that had injected gas migrated across the property line, a trespass may have occurred. But with only native gas migrating, the court found that the rule of capture applied to migratory native gas so there was no physical invasion and therefore no inverse condemnation claim. The owner continued to possess the right to produce native gas from wells bottomed on his own land, and therefore there was no inverse condemnation. ANR did seek to condemn the underground storage cavern, but not the native gas located therein, and the court found that ANR could exercise its eminent domain power as to the storage space. The court also rejected other inverse condemnation claims based on diminution in value or interference with the use of the mineral estate, finding that the evidence did not show either a diminution or interference with the owner’s right to continue to produce native gas. [↑](#footnote-ref-45)
45. 44In *Loretto*, the Supreme Court noted that there is a difference between a permanent occupation and a temporary physical invasion. 458 U.S. at 434, 436 (n.12). This point was emphasized in Charlottesville Division v. Dominion Transmission, Inc., 138 F. Supp. 3d 673 (W.D. Va. 2015) which upheld a Virginia statute, Va. Code § 56-49.01, that authorized employees of certificated pipelines to enter upon the surface for purposes of surveying prospective pipeline locations. In Atlantic Coast Pipeline, LLC v. Avery, 2016 Va. Cir. LEXIS 73 (May 9, 2016), the court again determined that the surveying right given a potential condemnee did not constitute a per se taking relying on *Charlottesville Division*. *In accord*: Indiana & Michigan Electrict Co. v. Stevenson, 173 Ind. App. 329, 363 N.E.2d 1254 (Ind. Ct. App. 1977). [↑](#footnote-ref-46)
46. 44.1Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). In *Cedar Point*, the Supreme Court applied the per se physical invasion test to a state regulation that required the owner of land where agricultural workers were employed to allow access to union organizers. The three-justice dissenting opinion treated the state requirement as a “regulation” and not an “appropriation” and would thus have applied the *Penn Central* ad hoc balancing test. 141 S. Ct. at 2081 (Breyer, J., dissenting).

    *Cedar Point* and *Loretto* were used to support the conclusion that a North Dakota statute authorizing ***oil*** and gas lessees to utilize the pore space without compensation to the surface owner constitutes a per se taking. Northwest Landowners Association v. State, 2022 ND 150, 978 N.W.2d 679. [↑](#footnote-ref-47)
47. 45Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). One can claim a *Lucas*-type taking even where the ***oil*** and gas lease has terminated since the taking may have occurred while the lease was still alive. City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017). Subsequently a trial court award of over $33 million in inverse condemnation damages was upheld with the Court of Appeals saying that the facts supported such an award under either the *Lucas* or *Penn Central* tests. Subsequently, a jury verdict finding inverse condemnation damages in the amount of $32,000,000 for the denial of several well permit applications was upheld in City of Dallas v. Trinity East Energy, LLC, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas Aug. 1, 2022, pet. for rev. filed). [↑](#footnote-ref-48)
48. 45.1Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020), the court said that Ohio had waived its affirmative defense that state nuisance law would impact an owner’s right to inject wastewater underground by not raising that argument in the court of appeals.

    *See also*: United Affiliates Corp. v. United States, 143 Fed. Cl. 257 (2019) (court rejected U.S. assertion that background principles of West Virginia property law precluded a mining operator from disposing of spoil or overburden).

    For another example of the physical invasion test, see Baker v. City of McKinney, 601 F. Supp. 3d 124 (E.D. Tex. 2022); 571 F. Supp. 3d 625 (E.D. Tex. 2021). In *Baker*, the court rejected the idea that a governmental activity can never constitute a taking where such activity is taken pursuant to the valid exercise of the police power. Thus, where a municipal law enforcement action effectively destroyed the plaintiff’s house, she could recover under the Fifth Amendment. There are, however, a number of cases that find that even a destruction of one’s property interest as a result of a valid exercise of the police power cannot constitute a taking. Lech v. Jackson, 791 F. Appx. 711 (10th Cir. 2019); Johnson v. Manitowoc County, 635 F.3d 331 (7th Cir. 2011); Amerisource Corp. v. United States, 525 F.3d 1149 (Fed. Cir. 2008).

    The Sixth Circuit, however, has suggested that a state may not change or redefine a property interest so as to avoid a possible inverse condemnation claim. Hall v. Meisner, 51 F.4th 185 (6th Cir. 2022), *reh’g en banc denied*, 2023 U.S. App. LEXIS 149 (6th Cir. Jan. 4, 2023). [↑](#footnote-ref-49)
49. 46Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); Nollan v. California Coastal Comm’n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). In City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), the Supreme Court found that the “rough proportionality” test of *Dolan* was inapposite to a regulatory takings claim that did not involve exactions.

    It is reasonably rare for the *Nollan/Dolan* exactions doctrine to be applied in the ***oil*** and gas arena, but in City of Arlington v. Texas ***Oil*** & Gas Association, 2014 Tex. App. LEXIS 10486 (Tex. App.—Ft. Worth Sept. 18, 2014), the association was claiming that an annual permit fee increase to $2,400/well/year was an unconstitutional exaction. Without getting to the merits, the court determined that under the “rough proportionality” test individual, fact-intensive inquiries were not required so that the association had standing to sue. [↑](#footnote-ref-50)
50. 47Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (validity of temporary moratoria on development judged by ad hoc *Penn Central* test); Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 93 O.&G.R. 300 (1987); Pennsylvania Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

    In one of the few cases finding that there was a *Penn Central* taking, the Alabama Supreme Court in Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787, 159 O.&G.R. 433 (Ala. 2004) affirmed a jury award of inverse condemnation damages for the taking of a severed coal estate by ADOT because after ADOT condemned the surface estate for a highway, ADOT regulations prohibited the mining of coal within 100 feet of the proposed right-of-way. ADOT fruitlessly argued that there could be no taking because its experts showed that the coal underlying the 120-acre tract could not have been produced at a profit.

    In State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020), the court analyzed the three-factor *Penn Central* ad hoc balancing test and determined that there were unresolved issues of fact that precluded the lower court’s granting of a summary judgment in favor of the state. The underlying issue related to the indefinite suspension of an injection well permit.

    In PBS Coals, Inc. v. Department of Transportation, 244 A.3d 386 (Pa. 2021), the court applied *Penn Central* to a claim that a roadbuilding project was a de facto taking or inverse condemnation of a severed mineral estate. In determining the impact of the project, the court considered the likelihood that the severed mineral owner would eventually receive the required permits to mine for coal. Concluding that the evidence was lacking on that issue, the Pennsylvania Supreme Court reversed the lower court’s finding of a de facto taking.

    In United Affiliates Corp. v. United States, 147 Fed. Cl. 412 (2020), 143 Fed. Cl. 257 (2019), the court allowed a mining operator’s inverse condemnation claim to proceed based on a revocation of a mining permit under a *Penn Central* analysis.

    In Reoforce, Inc. v. United States, 2017 U.S. App. LEXIS 4725 (Fed. Cir. Mar. 17, 2017), *aff’g on different grounds* 118 Fed. Cl. 632 (2014), both courts applied the *Penn Central* test to the plaintiff’s claim that its unpatented mining claim had been taken due to a memorandum of understanding executed between the Bureau of Land Management and the State of California. Both courts found that plaintiff had not shown either a permanent or temporary taking given BLM’s strong governmental interest in managing public lands and the highly speculative nature of the investment. [↑](#footnote-ref-51)
51. 48Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). [↑](#footnote-ref-52)
52. 49Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

    In Langved v. Cont’l Res., Inc., 2017 ND 179, 899 N.W.2d 267, the landowner asserted that a compulsory pooling order amounts to a violation of his “substantive due process” rights even though he was citing to the North Dakota constitutional provision on the taking of property without just compensation. N.D. Const. art. I, § 16.

    In Maytown Sand & Gravel, Inc. v. Thurston County, 198 Wn. App. 560, 395 P.3d 149 (2016), the court upheld a jury verdict finding that the county’s efforts to impede the mining company’s operations taken pursuant to a valid permit constituted a substantive due process violation. The permit afforded the mining company a vested right which is recognized as a property right and there was evidence in the record to support a finding that the county’s actions met the “shock the conscience” standard. [↑](#footnote-ref-53)
53. 50Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) *overruled in part*, Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

    For cases applying the *Hamilton Bank* ripeness test in the context of the Surface Mining Control and Reclamation Act, see Stearns Co., Ltd. v. United States, 396 F.3d 1354 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 385, 163 L. Ed. 2d 170; Greenbrier v. United States, 193 F.3d 1348 (Fed. Cir. 1999).

    A regulatory takings claim is not ripe where a federal land manager has not made a final decision on a proposed mining permit application. Freeman v. United States, 124 Fed. Cl. 1 (2015).

    One of the prongs of the *Hamilton Bank* ripeness test was that an inverse condemnation claim was not ripe until an action was filed in state court seeking inverse condemnation damages. That had the practical impact of removing inverse condemnation claims brought against state and/or local governments from the federal court system because of the preclusive effect of the state court decision. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). For examples of this preclusive effect see e.g., Texas Gas Transmissions, LLC v. Butler County Board of Commissioners, 625 F.3d 973 (6th Cir. 2010); River City Capital, LP v. Board of County Commissioners, Clermont County, Ohio, 491 F.3d 301 (6th Cir. 2007); Nat’l Fuel Gas Supply Corp. v. Town of Wales, 904 F. Supp. 2d 324 (W.D.N.Y. 2012) (New York provides an inverse condemnation claim therefore regulatory takings claim is not ripe when filed in federal court).

    In Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), the Supreme Court in a 5-4 opinion overruled that part of the *Hamilton Bank* ripeness test and concluded that a property owner could file an inverse condemnation claim in federal court without having to first seek a state court judgment on that claim. *See* Stewart E. Sterk & Michael C. Pollack, *A Knock on Knick’s Revival of Federal Takings Litigation*, 72 Fla. L. Rev. 419 (2020).

    In State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020), the court found that the property owner need not have submitted a comprehensive plan to re-start its underground well injection program because it would have been futile given the state agency’s rejection of two other attempts to undo the suspension order.

    In City of Houston v. Commons at Lake Houston, Ltd., 587 S.W.3d 494 (Tex. App.—Houston [14th Dist.] 2019), the court applied the second prong of *Hamilton Bank* to dismiss an inverse condemnation claim as not ripe for decision since there had been no final decision determining what use could be made of the tract in question.

    In addition to ripeness, some courts require the plaintiff to assert its regulatory takings claim at the administrative hearing stage, otherwise the issue will be treated as nonreviewable. Thus, a regulatory takings challenge to a compulsory pooling order will not be heard when the claim was not made at the pooling hearing. Lindquist v. Arkansas ***Oil*** & Gas Commission, 2000 Ark. App. LEXIS 442 (Ark. Ct. App. May 31, 2000) (unpublished opinion).

    In Louisiana an inverse condemnation claim is not treated as a continuing tort and therefore the prescriptive period during which the claim must be filed is governed by La. Rev. Stat. 13:5111. Crooks v. State of Louisiana Department of Conservation, 340 So. 3d 574 (La.), *on motion for reh’g*, 2020 La. LEXIS 675 (La. Apr. 9, 2020).

    In North Dakota, an owner may not assert an inverse condemnation claim through an appeal of an Industrial Commission’s compulsory pooling or unitization order. Langved v. Cont’l Res., Inc., 2017 ND 179, 899 N.W.2d 267.

    In Texas where the regulation that allegedly causes the regulatory taking is not a direct regulation of land use but some other type of regulation such as a road use regulation, the onus on the property owner is especially difficult. City of Port Arthur v. Thomas, 659 S.W.3d 96 (Tex. App.—Beaumont 2022), relying on City of Baytown v. Schrock 645 S.W.3d 174 (Tex. 2022). In *Port Arthur,* the court dismissed an inverse condemnation claim that a road use regulation prevented a landowner from using his lot to dispose of oilfield wastes rendering it without value. [↑](#footnote-ref-54)
54. 51City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). The Supreme Court treated the § 1983 action as the equivalent of a tort action for which a jury trial is guaranteed under the Seventh Amendment. The dissenting opinion would treat the regulatory takings claim as more analogous to an eminent domain action, rather than a tort action, for which no jury trial is required under the Seventh Amendment. 119 S. Ct. at 1650 (Souter, J. dissenting). [↑](#footnote-ref-55)
55. 51.1Northwest Landowners Association v. State, 2022 ND 150, 978 N.W.2d 679. The court rejected the application of the “no set of circumstances” standard to the facial attack that had been mentioned in United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) and Larimore Public School Dist. No. 44 v. Aamodt, 2018 ND 71, 908 N.W.2d 442. Instead, the court allowed the surface owners to allege that the mere act of creating a statutory right by mineral owners or lessees to use the pore space constituted a regulatory taking even if there were circumstances under which the statutory program could be constitutionally applied. *See* City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999); Sorum v. State, 2020 ND 175, 947 N.W.2d 382. [↑](#footnote-ref-56)
56. 52Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 500–01, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 93 O.&G.R. 300 (1987); Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130–31, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

    In Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021), the Supreme Court introduced another categorization issue, namely whether the “regulation” is really an “appropriation” of a property interest to be judged under the per se physical invasion test or just a “regulation” that would be judged under the *Penn Central* test. In *Cedar Point*, the majority concluded that a state regulation requiring an agricultural employer to allow union representatives onto his land was an “appropriation” of the right to exclude which was deemed an essential stick in the bundle of sticks that make up a property interest.

    Analogous to the denominator issue is whether a state conservation agency must give a mineral owner the opportunity to produce its fair share of a common source of supply. These issues arise with drilling and spacing rules as well as with proration rules. *See* §§ 5.01–5.02 *supra*. In *Seagull Energy E & P, Inc. v. Railroad Commission*, 226 S.W.3d 383, 168 O.&G.R. 323 (Tex. 2007), an operator argued that the application of the Commission’s commingling rules acted as an inverse condemnation of its leasehold estate since it could not produce from two wells on the same spacing unit even though they were perforated in different, but commingled, reservoirs. The court noted that all property, including mineral estates, are held subject to the reasonable exercise of the police power and that the Commission’s commingling rules were reasonable. The operator was still able to produce its ***oil*** and gas from either of its two wells, but not from both.

    In State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020), the court concluded that there were unresolved factual issues regarding both *Lucas* and *Penn Central* claims where Ohio had suspended a permit to inject wastewater due to seismic activity near the wellbore. [↑](#footnote-ref-57)
57. 53Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 500–01, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 93 O.&G.R. 300 (1987); Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115, 120–21, 161 O.&G.R. 232, *on reconsideration in part*, 162 Fed. Ct. 481, 161 O.&G.R. 269 (2003); Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir.), *cert. denied*, 528 U.S. 951, 120 S. Ct. 373, 145 L. Ed. 2d 291 (1999). [↑](#footnote-ref-58)
58. 54Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115, 121, 161 O.&G.R. 232 (2003), citing Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991). [↑](#footnote-ref-59)
59. 55Murr v. Wisconsin, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017). *Murr* was a 5-3 decision with recently appointed Justice Gorsuch not participating in the decision. The denominator issue arises in both the *Lucas* total taking analysis as well as the ad hoc *Penn Central* analysis since a court will have to determine the relevant parcel to determine if there is a total taking. For a critical analysis of *Murr*, see Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J. L & Liberty 151 (2017). [↑](#footnote-ref-60)
60. 56137 S. Ct. at 1944. [↑](#footnote-ref-61)
61. 57137 S. Ct. at 1944–45. [↑](#footnote-ref-62)
62. 58137 S. Ct. at 1945. [↑](#footnote-ref-63)
63. 59Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners, 38 P.3d 59, 153 O.&G.R. 222 (Colo. 2001)*, reh’g denied,* 8 P.3d 522, 148 O.&G.R. 291 (Colo. Ct. App. 2000). [↑](#footnote-ref-64)
64. 60For cases agreeing with this approach, see Appolo Fuels, Inc. v. United States, 381 F.3d 1338 (Fed. Cir. 2004) (all coal leases obtained by lessee as part of its mining plan constitute the relevant parcel, not just the portions of leases included in the order declaring certain lands unsuitable for mining); Cane Tennessee, Inc. v. United States, 57 Fed. Cl. 115, 122, 161 O.&G.R. 232 (2003) (entire parcel purchased by plaintiff considered the denominator, not just the parcel subject to surface mining prohibition); Machipongo Land & Coal Co. v. Commonwealth, 569 Pa. 3, 799 A.2d 751, *cert. denied*, 537 U.S. 1002, 123 S. Ct. 486, 154 L. Ed. 2d 397 (2002) (denominator includes all land owned by the property owner, not just the regulated portion); Forest Properties, Inc. v. United States, 177 F.3d 1360 (Fed. Cir.), *cert. denied,* 528 U.S. 951, 120 S. Ct. 373, 145 L. Ed. 2d 291 (1999) (entire 62 acre tract owned by plaintiff was the denominator, not merely the 7.8 acres of regulated wetlands); Deltona Corp. v. United States, 228 Cl. Ct. 476, 657 F.2d 1184 (1981), *cert. denied*, 455 U.S. 1017, 102 S. Ct. 1712, 72 L. Ed. 2d 135 (1982) (same); Karan v. State Department of Environmental Protection, 308 N.J. Super. 225, 705 A.2d 1221 (App. Div. 1998), *aff’d*, 157 N.J. 187, 723 A.2d 943, *cert. denied*, 528 U.S. 814 (1999) (same).

    In Schmude ***Oil***, Inc. v. Dep’t of Envtl. Quality, 306 Mich. App. 35, 856 N.W.2d 84 (2014), the court implicitly treated the plaintiff’s interest as encompassing more than just the interests for which drilling permits had been denied. The court notes that the plaintiff could still drill in areas of limited development within the state forest rather than focusing solely on the areas where development was prohibited. [↑](#footnote-ref-65)
65. 61*See* State *ex rel.* R.T.G., Inc. v. State, 98 Ohio St. 3d 1, 2002 Ohio 6716, 98 Ohio St. 3d 1, 2002 Ohio 6716, 780 N.E.2d 998 (2002), *motion granted*, 101 Ohio St. 3d 1451, 2004 Ohio 449, 802 N.E.2d 1125 (2004) (denominator includes only land that is regulated so that effect on mineral estate reviewed rather than effect on combined surface and mineral estate owned by the plaintiff); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir.1994) (look only to regulated parcel, not to entire parcel in light of wetlands regulation); Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 115 O.&G.R. 180 (Fed. Cir. 1991) (mineral estate relevant parcel, not mineral and surface estate). [↑](#footnote-ref-66)
66. 62State *ex rel.* R.T.G., Inc. v. State, 98 Ohio St. 3d 1, 2002 Ohio 6716, 780 N.E.2d 998 (2002), *motion granted*, 101 Ohio St. 3d 1451, 2004 Ohio 449, 802 N.E.2d 1125 (2004). [↑](#footnote-ref-67)
67. 63State *ex rel.* R.T.G., Inc. v. State, 98 Ohio St. 3d 1, 2002 Ohio 6716, 780 N.E.2d 998 (2002), *motion granted*, 101 Ohio St. 3d 1451, 2004 Ohio 449, 802 N.E.2d 1125 (2004). In Nat’l Lime & Stone Co. v. Blanchard Twp., 2005 Ohio 5758 (Ohio Ct. App. Oct. 31, 2005) (unreported opinion), the court acknowledged the *R.T.G.* holding but then distinguished it in finding that a zoning ordinance that precluded limestone quarrying was not a regulatory taking.

    In State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020), the Ohio Supreme Court took a somewhat narrow view of the denominator issue when the owner of a wastewater injection well permit had that permit suspended due to seismic activity near the injection well’s location. The court in both its *Lucas* and *Penn Central* analysis took the position that the relevant property interest was the permit for the well that was suspended and did not necessarily include the entire tract of land which included a second disposal well whose permit was not suspended. [↑](#footnote-ref-68)
68. 64State ex rel. Shelly Materials v. Clark County Bd. of Comm’rs, 115 Ohio St. 3d 337, 2007 Ohio 5022, 875 N.E.2d 59 (Ohio 2007). [↑](#footnote-ref-69)
69. 65875 N.E.2d at 66–67. [↑](#footnote-ref-70)
70. 66In Greenbelt Advocates v. Div. of Mineral Res. Mgmt., 176 Ohio App. 3d 638, 2008 Ohio 3238, 893 N.E.2d 230 (Ohio Ct. App. 2008), plaintiff argued that the Division’s denial of an unsuitable for mining request was driven by the Division’s fear of a regulatory takings claim based on *R.T.G.* The court upheld the Division’s decision under a deferential arbitrary, capricious and unlawful standard and did not discuss the continued viability of *R.T.G.* following the *Shelly Materials* opinion. [↑](#footnote-ref-71)
71. 67Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 146 O.&G.R. 193*, reconsideration denied,* 44 Fed. Cl. 366, 44 Fed. Cl. 370 (1999), *aff’d*, 247 F.3d 1355, 156 O.&G.R. 252 (Fed. Cir.), *reh’g denied*, 270 F.3d 1347, 156 O.&G.R. 268 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958, 122 S. Ct. 2660, 153 L. Ed. 2d 835 (2002). *See also* Appolo Fuels, Inc. v. United States, 381 F.3d 1338 (Fed. Cir. 2004) (*Rith* analysis of which constitutes a reasonable investment-backed expectation in highly regulated coal mining industry followed). [↑](#footnote-ref-72)
72. 68Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382 (5th Cir. 2001). The court noted that it would be unlikely for the federal court to hear the state inverse condemnation action, find for the governmental entity, and then hold a second trial on the federal regulatory takings claim because of the doctrine of collateral estoppel. [↑](#footnote-ref-73)
73. 69El Dorado Land Co., L.P. v. City of McKinney, 395 S.W.3d 798 (Tex. 2013), *rev’g*, 349 S.W.3d 215 (Tex. App.—Dallas 2011).

    It is an obvious requirement that before one can bring a regulatory takings claim one must own a valid property interest at the time of the alleged taking. Reoforce, Inc. v. United States, 119 Fed. Cl. 1 (Fed. Cl. 2013); Wyatt v. United Sates, 271 F.3d 1090 (Fed. Cir. 2001); Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003). The property owner, however, did not own the property interest at the time of the trial. *Id*. An unpatented mining claim on public lands is merely a potential property interest until such time that the discovery of a valuable mineral has been verified. Freeman v. United States, 124 Fed. Cl. 1 (2015); Freeman v. United States Department of the Interior, 37 F. Supp. 3d 313 (D.D.C. 2014), 83 F. Supp. 3d. 173 (D.D.C. 2015), *aff’d*, 650 Fed. Appx. 6 (D.C. Cir. 2016); Ickes v. Underwood, 141 F.2d 546, 548 (D.C. Cir. 1944). There are some contrary opinions by the Court of Federal Claims and Federal Circuit that unpatented mining claims may constitute a property interest protected by the Fifth Amendment. Reoforce, Inc. v. United States, 2017 U.S. App. LEXIS 4725 (Fed. Cir. Mar. 17, 2017), *aff’g on different grounds* 118 Fed. Cl. 632 (2014); Kunkes v. United Sates, 78 F.3d 1549, 1551 (Fed. Cir. 1996). In Marvin R.Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 188 L. Ed. 2d 272 (2014), the issue was whether patents from the United States or deeds from individuals granted to a railroad entity were conveyances of a fee simple absolute or easements. If the grants were only easements than the owners of the servient estate would own a property interest in the surface estate upon the abandonment of railroad use. As the owners of a property interest, the enactment of the National Trail Systems Act, 16 U.S.C. § 1247(d) purporting to convert abandoned railroad lines into trails, would constitute a regulatory taking. The Supreme Court considered the patents and deeds as only conveying an easement and thus the plaintiffs owned a property interest that could not be taken without the payment of just compensation. *In accord* Biery v. United States, 753 F.3d 1279 (Fed. Cir. 2014). This same issue has arisen in California regarding the scope of the railroad’s property interest insofar as it would allow the railroad to rent out a subsurface easement for the purpose of locating a pipeline. Union Pacific RR Co. v. Santa Fe Pacific Pipelines, Inc., 231 Cal. App. 4th 134, 180 Cal. Rptr. 3d 173 (2014) (RR was not presumptively entitled to rent payments since the property interests received from the United States were for the most part easements and not fee simple interests).

    In Creegan v. State, 305 Kan. 1156, 391 P.3d 36 (2017), the court found that both real property interests and certain types of contract rights are both protected by the Fifth Amendment. Thus, where an interest in real property which is burdened by a real covenant both the owner of the real property interest and the owner of the real covenant are entitled to just compensation. Cases from other jurisdictions have split on this issue. *Compare* Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 107 Cal. Rptr. 76, 507 P.2d 964 (1973) (compensable); Mercantile-Safe Deposit & Trust Co. v. Mayor & City Council of Baltimore, 308 Md. 627, 521 A.2d 734 (compensable) *with* Arkansas State Highway Comm’n v. McNeill, 238 Ark. 244, 381 S.W.2d 425 (1964) (not compensable); Ryan v. Manalapan, 414 So. 2d 193 (Fla. 1982) (not compensable).

    The existence and parameters of property interests are the subject of state, not federal, law. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); ***Kerns*** v. Chesapeake Exploration, Inc., 762 Fed. Appx. 289, 2019 U.S. App. LEXIS 3450 (6th Cir. 2019), *cert. denied*, 2019 U.S. LEXIS 3450 (U.S. Feb. 4, 2019); Citizens Allied for Integrity & Accountability, Inc. v. Schultz, 335 F. Supp. 3d 1216 (D. Idaho 2018); *but cf.* Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed.3d 592 (2001). But in Hall v. Meisner, 51 F.4th 185 (6th Cir. 2022), *reh’g en banc denied*, 2023 U.S. App. LEXIS 370649 (7th Cir. Jan. 4, 2023), the court said that a state may not re-define a property interest so as to exclude that interest from an inverse condemnation claim. The statute in question allowed state and sub-state governmental units to foreclose on real property for failing to pay taxes and for such unit to retain any value in excess of the amount of tax owed.

    *See also*: State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020) (owner of permit to inject wastewater into an underground formation has a property interest in that permit);

    Minnesota Sands, LLC v. County of Winona, 940 N.W.2d 183 (Minn. 2020) (mineral lessee did not own an unconditional right to mine on the land subject to the lease; without such a right there is no protected property interest).

    JTC ***Oil*** Co. v. City of Grandview, 604 S.W.3d 806 (Mo. Ct. App. 2020) (question of fact exists as to whether ***oil*** and gas lease is still alive; dismissal of inverse condemnation claim reversed). [↑](#footnote-ref-74)
74. 70The court labels the interest a reversionary interest but under classic property theory the right of entry or power of termination was not a true reversionary interest. The mislabeling is unimportant because the right or entry is an interest in real property and therefore can support an inverse condemnation claim. [↑](#footnote-ref-75)
75. 70.1PBS Coals, Inc. v. Department of Transportation, 244 A.3d 386 (Pa. 2021), *rev’g* 206 A.3d 1204 (Pa. Commw. Ct. 2019). *See also*: *In re* De Facto Condemnation and Taking of Lands of WBF Associates, LP, 588 Pa. 242, 903 A.2d 1192, 1199 (2006).

    In Gibraltar Rock, Inc. v. Pennsylvania Department of Environmental Protection, 258 A.3d 572 (Pa. Commw. Ct. 2021), *appeal granted*, 2021 Pa. LEXIS 3918 (Pa. Nov. 2, 2021), the court concluded that the Environmental Hearing Board’s decision to invalidate a non-coal surface mining permit constitutes a de facto taking. [↑](#footnote-ref-76)
76. 70.2PBS Coals, Inc. v. Department of Transportation, 244 A.3d 386 (Pa. 2021), *rev’g* 206 A.3d 1204 (Pa. Commw. Ct. 2019). [↑](#footnote-ref-77)
77. 70.3This issue is similar to the one in Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). [↑](#footnote-ref-78)
78. 70.4This doctrine is based on a trio of Pennsylvania cases: Parker Avenue, LP v. City of Philadelphia, 122 A.3d 483 (Pa. Commw. Ct. 2015); Williams v. Borough of Blakely (In re Condemnation by Borough of Blakely), 25 A.3d 458 (Pa. Commw. Ct. 2011); In re Petition of 1301 Filbert Ltd. Partnership for Appointment of Viewers, 62 Pa. Commw. 605, 441 A.2d 1345 (1982). [↑](#footnote-ref-79)
79. 70.5Under Pennsylvania law, however, the severed mineral owners might still be able to recover for consequential damages that flowed from the taking of the adjacent surface estate that might impact access to their property interest. That issue was remanded because it had not been raised in the lower courts who had focused solely on the de facto taking issue. [↑](#footnote-ref-80)
80. 70.6Hughes v. UGI Storage Co., 243 A.3d 278 (Pa. Commw. Ct. 2020), quoting from *In re* Condemnation by DOT v. DOT (Appeal of Norberry One Condo. Ass’n), 805 A.2d 59 (Pa. Commw. Ct. 2002). [↑](#footnote-ref-81)
81. 70.7*Hughes,* 241 A.3d at 284. In *Hughes*, the storage operator had a FERC certificate of public convenience and necessity so it had the power to condemn which only extended to lands described in the certificate. Because plaintiffs’ lands were outside of the described lands, it could not condemn such lands and the alleged injuries could not have arisen from the exercise of the power to condemn. The Commonwealth Court noted that while there could be no de facto taking claim, it was possible for there to be a trespass claim. A concurring and dissenting opinion, however, further noted that earlier decisions had found that trespass claims had been subsumed by the de jure and de facto condemnation process. *Id.*, 243 A.3d at 291–93 (concurring and dissenting opinion of P.J. Leavitt). [↑](#footnote-ref-82)
82. 70.8Hughes v. UGI Storage Co., 263 A.3d 1144 (Pa. 2021). The court noted that the Eminent Domain Code, 26 Pa. Cons. Stat. § 103, puts the requirement of having the power of eminent domain into its definition of a condemnor suggesting that earlier decisions containing such a requirement were incorporated into the Eminent Domain Code. *See, e.g.*, Stephens v. Cambria & I.R. Co., 242 Pa. 606, 89 A. 672, 673 (1914). [↑](#footnote-ref-83)
83. 71Kenai Landing, Inc. v. Cook Inlet Natural Gas Storage Alaska, LLC, 441 P.3d 954 (Alaska 2019).

    While the Court of Claims normally has jurisdiction to hear inverse condemnation claims against the United States, it does not have jurisdiction where there is a prior claim filed in another court that arises out of the same conduct. 28 U.S.C. § 1500. In Solenex, LLC v. United States, 163 Fed. Cl. 128 (2022), the court dismissed the inverse condemnation action based on an earlier-filed suit in the district court relating to the same event which was the allegedly wrongful termination of a federal ***oil*** and gas lease. [↑](#footnote-ref-84)
84. 72Unless the habendum clause of the lease had a provision allowing it to be maintained by the storage of natural gas, the lease would automatically terminate upon the cessation of production of the native gas. But in this case the lease was unitized and there was production from the unit that would maintain the lease into the secondary term. 441 P.3d at 960–61. [↑](#footnote-ref-85)
85. 73There was a dispute as to the amount of just compensation for the use value of the pore space that was resolved in favor of the storage operator. 441 P.3d at 963–65. [↑](#footnote-ref-86)
86. 74Del-Rio Programs, Inc. v. United States, 146 F.3d 1358, 141 O.&G.R. 167 (Fed. Cir. 1998)*, rev’g* 37 Fed. Cl. 157, 136 O.&G.R. 211, *withdrawing* 35 Fed. Cl. 186 (1996). A detailed statement of facts regarding this case is provided in § 16.06 *above*. *See also* Holden v. United States, 38 Fed. Cl. 732 (1997) where the Court of Claims found no regulatory takings because a road closure did not prevent the mining claimants from having access by other means to their unpatented mining claims. [↑](#footnote-ref-87)
87. 75Tribal Consent Act, 25 U.S.C. §§ 323–328 (1994). [↑](#footnote-ref-88)
88. 7637 Fed. Cl. at 161–163. Del Rio also asserted that because of the delay in getting Tribal consent, the unitization agreement covering its land expired, making lease-by-lease development economically infeasible. Obviously, the Court of Federal Claims did not reach the merits of that claim. [↑](#footnote-ref-89)
89. 77146 F.3d at 1362. A federal official or employee acting outside of the scope of his or her duties cannot create a governmental regulatory taking. Hooe v. United States, 218 U.S. 322, 31 S. Ct. 85, 54 L. Ed. 1055, 46 Ct. Cl. 655 (1910). [↑](#footnote-ref-90)
90. 77.1In BP America Prod. Co. v. U.S., 148 Fed. Cl. 185 (2020) and 142 Fed. Cl. 446 (2019), the court determined that the Tucker Act gave the Court of Federal Claims jurisdiction to resolve a claim seeking reimbursement for overpaid federal ***oil*** and gas royalties where Congress had stripped the agency of the power to make such reimbursements. The Tucker Act, however, does not confer jurisdiction on the Court of Claims to hear matters relating to the Administrative Procedures Act. Petro Mex LLC v. United States, 164 Fed. Cl. 476 (2023). [↑](#footnote-ref-91)
91. 78146 F.3d at 1365. The court distinguished several earlier cases that require the claimant to concede the correctness of the government action as a condition precedent to bringing a regulatory takings claim under the Tucker Act. *See, e.g.,* Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993); Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 1053, 107 S. Ct. 926, 93 L. Ed. 2d 978 (1987).

    In order for an inverse condemnation claim to be ripe where the Tucker Act applies, the claim must be filed in the Court of Federal Claims. Detroit International Bridge Co. v. Government of Canada, 133 F. Supp. 3d 70 (D.D.C. 2015), *vacated by, remanded by, appeal dismissed as moot by*, Detorit International Bridge Co. v. Government of Canada, 2016 U.S. App. LEXIS 6187 (D.C. Cir. April 4, 2016). In order to bring an inverse condemnation claim under the Tucker Act in the Court of Federal Claims one must seek just compensation damages and may not bring an action seeking injunctive relief to prevent future, potential actions of the United States. Ford v. United States, 101 Fed. Cl. 234 (2011).

    In addition to jurisdiction over takings claims, the Court of Federal Claims also has jurisdiction over breach of contract claims. In Marathon ***Oil*** Co. v. United States, 177 F.3d 1331, 143 O.&G.R. 74 (Fed. Cir. 1999), *withdrawing* 158 F.3d 1253, 141 O.&G.R. 534 (Fed. Cir. 1998), the court reversed a Court of Federal Claims finding that the U.S. breached the provisions of an OCS lease by frustrating contract performance. In an analysis analogous to a regulatory takings claim, the appellate court concluded that the claimants did not have a vested contract right to drilling permits without getting the necessary state approvals under the Coastal Zone Management Act. Thus, the failure of the U.S. to issue the permits prior to the enactment of the Outer Banks Protection Act, which placed a moratorium on drilling permits, did not constitute a breach of the OCS lease issued to the plaintiffs. The Outer Banks Protection Act was subsequently repealed. Pub. L. No. 104-134 Title I, Department of the Interior, § 109, 110 Stat, 1321 (1996). Since the U.S. could not issue any permits without state approval, the owners of the OCS leases had no contract or property right to the subsequent permits and thus the OBPA did not breach the terms of the leases. The Supreme Court, however, reversed the Federal Circuit decision, *sub nom.* Mobil ***Oil*** Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 120 S. Ct. 2423, 147 L. Ed. 2d 528, 150 O.&G.R. 98 (2000). The Supreme Court first noted that when the U.S. enters into a contractual relationship, its rights and duties will be determined under the law as it affects private parties. Thus, if the U.S. repudiated the contract/lease by substantially breaching a performance duty, the lessees would be entitled to all of the contractual remedies, including restitution. Here, the Supreme Court agreed with the Court of Federal Claims that the U.S. had the obligation to review and approve the exploration plan submitted by the lessees within 30 days. When the U.S. failed to act, regardless of the cause, they breached the contract. While the lease made the parties subject to existing statutes and regulations, the OBPA was enacted after the lease and not incorporated into the lease. Even though the U.S. argued that North Carolina would never have approved the drilling plan as required by the CZMA, the Court concluded that the U.S. had a duty to approve the exploration plan. It thus ordered the U.S. to make restitution of the $158 million paid in bonus. Justice Stevens dissented but only as to the appropriate remedy. He argued that because it was unlikely that drilling would ever occur under the existing statutes, the only damages that could be recovered were those that were caused by the delay in giving U.S. approval so that the lessees could move forward with their other permit approvals.

    The OCS lease language, as interpreted in *Mobil* ***Oil*** does allow the United States to apply post-lease OCS-authorized regulatory changes to be applied to the lessor without constituting an actionable breach of contract. *See* Century Exploration New Orleans, LLC v. United States, 745 F.3d 1168 (5th Cir. 2014), *aff’g* 110 Fed. Cl. 148 (2013). See also *Amber Resources*, discussed in the next paragraph.

    In Petro Mex LLC v. United States, 164 Fed. Cl. 476 (2023), the court dismissed both inverse condemnation and breach of contract claims on statute of limitations grounds.

    In state breach of contract and tort claims, the issue of sovereign immunity oftentimes must be overcome. In City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017), the court found that the execution of ***oil*** and gas leases by the City was a proprietary function for which sovereign immunity was waived under the Texas Tort Claims Act, and that the lease constituted a valid contract for which sovereign immunity was also statutorily waived.

    The measure of damages for breaches such as occurred in *Mobil* ***Oil*** may be difficult to calculate. *See e.g.*, Mann v. United States, 86 Fed. Cl. 649, 168 O.&G.R. 129 (2009) (geothermal lessee had proven restitutionary and/or reliance damages for breach of the lease but had not shown damages for lost profits); Amber Resources Co. v. United States, 538 F.3d 1358, 166 O.&G.R. 505 (Fed. Cir. 2008) (federal ***oil*** and gas lessee entitled to restitutionary damages for anticipatory breach of its lease by the United States). On remand, the Court of Federal Claims in a very lengthy opinion awarded the federal lessees more than $91 million in remedies based on the repudiation of their leases. Amber Resources Co. v. United States, 87 Fed. Cl. 16, 171 O.&G.R. 1 (Fed. Cl. 2009). On remand, the Court of Federal Claims, in a very lengthy opinion, awarded the federal lessees more than $91 million in rescission and restitutionary damages based on the repudiation of their leases. Amber Resources Co. v. United States, 87 Fed. Cl. 16, 171 O.&G.R. 1 (2009). In a related case, Nycal Offshore Development Corp. v. United States, 92 Fed. Cl. 209, 171 O.&G.R. 62 (2010), the court allowed a co-lessee of the plaintiffs in *Amber Resources* to file its own claim seeking lost profits as the damage model and not rescission and restitutionary damages as was awarded in *Amber Resources*. In Nycal Offshore Dev. Corp. v. United States, 106 Fed. Cl. 222 (2012), *aff’d*, 743 F.3d 837 (Fed. Cir. 2013), both courts after extensively reviewing the expert testimony regarding the amount of proven and producible reserves, along with the costs of production concluded that Nycal had not shown that it would have been entitled to the required air pollution permits from the State of California in order to construct and operate the offshore platform. Because of this supervening cause, plaintiff was unable to satisfy its burden of proof on the issue of showing expectancy, or loss of profits, damages. In a second related case, Ram Energy, Inc. v. United States, 94 Fed. Cl. 406, 171 O.&G.R. 67 (2010), a co-lessee who had not joined in the *Amber Resources* litigation had its claims rejected because the six-year statute of limitations had run prior to its filing of its claim. The claim accrued at the time the United States revoked its suspension of operations in 2001 which led to the termination of the leases.

    In Griffin & Griffin Exploration, LLC v. United States, 116 Fed. Cl. 163 (2014), the Court of Federal Claims held that the United States breached its lease contract with Griffin when it discovered after the lease sale that the leasehold acreage was under a valid lease to a third party. The breach occurred when BLM was unable to convey a valid leasehold interest to Griffin.

    In Torch Energy Advisors, Inc. v. Plains Exploration & Prod. Co., 409 S.W.3d 46 (Tex. App.—Houston [1st Dist.] 2013), a dispute arose between two parties to a 1996 agreement as to their entitlement of a portion of the payments made in *Amber Resources*. The court determined that the agreement was ambiguous as to whether or not it granted or reserved the right to recover bonus money from the United States. On appeal, the Texas Supreme Court reversed. Plains Exploration & Prod. Co. v. Torch Energy Advisors, Inc., 58 Tex. Sup. Ct. J. 1115, 473 S.W.3d 296 (2015). The court determined that the language of the purchase and sale agreement was unambiguous and did not exclude the *Amber*-related claims from the conveyance.

    It is typically incumbent upon a party to seek a drilling permit before one can assert a regulatory taking. Cane Tennessee, Inc. v. United States, 44 Fed. Cl. 785, 148 O.&G.R. 338 (1999) dismissed a regulatory taking claim because the plaintiff had never sought a permit to mine from DOI as required under the Surface Mining Control and Reclamation Act.

    When the Jemez National Recreation Act, 16 U.S.C. § 460jjj *et seq.*, was enacted it essentially prohibited the patenting of unpatented mining claims within the National Recreational Area. A holder of 23 contiguous pumice mining claims sued claiming that the Act constituted a regulatory taking. Cook v. United States, 42 Fed. Cl. 788 (1999). This led to a settlement of the dispute where the mining claimant relinquished 19 mining claims, retained 4 as unpatented mining claims and was paid nearly $4 million. A number of years later several federal agencies seek to stop further mining activities on the claims based on the lack of locatable valuable minerals. The mining claimant sues again asserting a taking and a breach of the settlement agreement. In Cook v. United States, 85 Fed. Cl. 820 (2009), *aff’d*, 2010 U.S. App. LEXIS 4376 (Fed. Cir. Mar. 8, 2010) the court dismisses all of the claims finding that the United States has the power to contest the validity of any unpatented mining claim because it does not in fact contain a discovery of valuable minerals or is that the minerals located on the claim are not locatable. The owner of an unpatented mining claim does not have a vested property interest in maintaining the claim if it cannot show that it complies with the various statutory requirements for such claims.

    For further litigation regarding unpatented mining claims within the boundaries of the Jemez National Recreational Area, see United States v. Copar Pumice Co., 714 F.3d 1197 (10th Cir. 2013); Copar Pumice, Inc. v. Tidwell, 603 F.3d 780 (10th Cir. 2010), *aff’g* Copar Pumice, Inc. v. Bosworth, 502 F. Supp. 2d 1200 (D.N.M. 2007). Further litigation alleging a regulatory taking instituted by Copar Pumice was also summarily dismissed. Copar Pumice Co. v. United States, 112 Fed. Cl. 515 (2013). To the extent that Copar Pumice was arguing that the enactment of the Jemez National Recreation Act amounted to a taking of its unpatented mining claims, those causes of action were barred by the six-year statute of limitations contained within the Tucker Act. The United States has also brought trespass, conversion, and unjust enrichment claims Copar Pumice and its owners. [↑](#footnote-ref-92)
92. 79Miller Brothers v. Department of Natural Resources, 203 Mich. App. 674, 513 N.W.2d 217, 128 O.&G.R. 518, *appeal denied*, 447 Mich. 1038, 527 N.W.2d 513 (1994). *Miller Bros.* is also discussed in § 3.02[4][a] *above*. Governmental restrictions on access to private mineral holdings may constitute a regulatory taking if the restrictions totally deny access but will not constitute a regulatory taking if other means of access are still available. Holden v. United States, 38 Fed. Cl. 732 (1997).

    In Minnesota Sands, LLC v. County of Winona, 917 N.W.2d 775 (Minn. Ct. App. 2018), *review granted*, 2018 Minn. LEXIS 631 (Minn. Oct. 24, 2018), the owner of a mining lease claimed that a total prohibition on mining operations involving silica sand constituted a regulatory taking. The court concluded that the mining lessee had not shown that it had a property right to mine silica sand since it never applied for a discretionary permit prior to the term of its lease expiring. On appeal, the Minnesota Supreme Court affirmed. Minnesota Sands, LLC v. County of Winona, 940 N.W.2d 183 (Minn. 2020). The court did note that in ascertaining whether or not the claimant owned a property interest, the severance of the surface and mineral estate was a relevant factor, although in this case the mining lessee, pursuant to the terms of the mining lease, did not have a possessory interest in the sand.

    There is dicta in Belden & Blake Corp. v. Commonwealth of Pennsylvania, Dep’t of Conservation and Natural Resources, 600 Pa. 559, 969 A.2d 528 (Pa. 2009), that suggests that any lessening of the mineral owner’s implied easement of surface use by a state agency, such as one owning a public park, would constitute a regulatory taking. There should be no reason why a governmental body owning a surface estate cannot regulate surface use even if it makes access to, or development of, the mineral estate more expensive so long as there is not a complete denial of access.

    In PBS Coals, Inc. v. Department of Transportation, 244 A.3d 386 (Pa. 2021), the court examined the impact of a state roadbuilding project on an as yet undeveloped severed coal estate. After noting, that Pennsylvania has a statutory procedure for de facto takings (inverse condemnation), 26 Pa. Cons. Stat. §§ 101–1106), the court found that the *Penn Central* ad hoc balancing test should apply. The key factor for the court was the coal owner’s inability to prove that it was likely that it would receive the required permits to mine for coal in the relevant area. Without such a showing, the economic impact of the roadbuilding project on the severed mineral estate was too speculative to rise to the level of a de factgo taking. [↑](#footnote-ref-93)
93. 80The Texas Supreme Court specifically embraced the concept that if directional drilling were a feasible alternative, there would be no taking even if there were a physical invasion or occupation of the property interest. Tarrant County Water Control & Improvement Dist. No. 1 v. Haupt, Inc., 854 S.W.2d 909, 119 O.&G.R. 580 (Tex. 1993), *on remand*, 870 S.W.2d 350, 134 O.&G.R. 308 (Tex. App. 1994), *writ denied sub nom.* Tarrant County Water Control & Improvement Dist. 1 v. Fullwood, 41 Tex. Sup. Ct. J. 411, 963 S.W.2d 60, 139 O.&G.R. 426 (Hecht, J. dissenting). *Haupt* was distinguished in City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017), where the court found the takings claim ripe upon the denial of permits for three proposed well sites even though the City alleged that there were other drill site locations available. Subsequently, a jury award of over $33 million in regulatory takings damages was upheld in Subsequently, a jury verdict finding inverse condemnation damages in the amount of $32,000,000 for the denial of several well permit applications was upheld in City of Dallas v. Trinity East Energy, LLC, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas Aug 1, 2022, pet. for rev. filed). [↑](#footnote-ref-94)
94. 81For a general discussion of the futility exception for permit applications, see Southern Pacific Transp., Inc. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943, 112 S. Ct. 382, 116 L. Ed. 2d 333 (1991). *See also* Freeman v. United States, 124 Fed. Cl. 1 (2015) (where Forest Service makes requests for additional information, it is not futile for the permit applicant to provide such information); Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597 (Fed. Cl. 2014), *aff’d*, 805 F.3d 1049 (Fed. Cir. 2015) (rejects application of futility exception where federal ***oil*** and gas lessee did not apply for an APD); Stearns Co. v. United States, 396 F.3d 1354 (Fed. Cir. 2005) (where permit applicant has two avenues to seek a permit and only utilizes one, the futility exception will not apply). [↑](#footnote-ref-95)
95. 82Schmude ***Oil***, Inc. v. Dep’t of Envtl. Quality, 306 Mich. App. 35, 856 N.W.2d 84 (2014). [↑](#footnote-ref-96)
96. 83Schmude ***Oil***, Inc. v. Dep’t of Envtl. Quality, 306 Mich. App. 35, 856 N.W.2d 84, 86–87 (2014) describes the nature of the restrictions. These same restrictions were discussed in Hobson Petroleum Corp. v. State, 2001 Mich. App. LEXIS 2708 (Dec. 21, 2001) in an analogous regulatory takings claim. The history of the development of drilling regulations in the Pigeon River Country State Forest is explored in Western Michigan Environmental Action Council v. Natural Resources Commission, 405 Mich. 741, 275 N.W.2d 538 (1979). [↑](#footnote-ref-97)
97. 84Schmude ***Oil***, Inc. v. Dep’t of Envtl. Quality, 306 Mich. App. 35, 856 N.W.2d 84, 93–94 (2014). This is similar to the approach taken by the Texas Supreme Court in Tarrant County Water Control & Improvement Dist. Number One v. Haupt, Inc., 854 S.W.2d 909, 119 O.&G.R. 850 (Tex. 1993).

    *But cf*. City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017). Subsequently, a jury verdict finding inverse condemnation damages in the amount of $32,000,000 for the denial of several well permit applications was upheld in City of Dallas v. Trinity East Energy, LLC, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas Aug 1, 2022, pet. for rev. filed). In so holding, the court concluded that the City had not shown that there were alternative drill sites that would allow the lessee to access the leasehold acreage. The court factually distinguished *Haupt* and concluded that under either *Lucas* or *Penn Central*, the lessee had proven an inverse condemnation. [↑](#footnote-ref-98)
98. 85Panhandle Eastern Pipe Line Co. v. Madison County Drainage Bd., 898 F. Supp. 1302 (S.D. Ind. 1995).

    In Baker v. Conoco Pipeline Co., 280 F. Supp. 2d 1285 (N.D. Okla. 2003) and Cason v. Conoco Pipeline Co., 280 F. Supp. 2d 1309 (N.D. Okla. 2003), the surface owners asserted an inverse condemnation claim against the pipeline company after the pipeline cleared trees from a 50-foot wide strip. The owners claimed that the easement deed only provided for a 30-foot wide right-of-way and that the pipeline’s occupation of the additional area constituted an inverse condemnation. The court did not resolve the issue because of the existence of an arbitration clause which required the parties to have an arbitrator resolve damage issues relating to activities within the 30-foot wide strip. When that decision is rendered, the district court will resolve the issues relating to the inverse condemnation claim. [↑](#footnote-ref-99)
99. 86898 F. Supp. at 1304, 1306, applying Ind. Code § 36-9-27-48, which states in part “(c) If the board finds that the relocation of a pipeline, cable, or similar equipment owned by a public utility is necessary in the construction or reconstruction of a regulated drain, the cost of relocation shall be paid by the public utility.” *Id.* at 1308. [↑](#footnote-ref-100)
100. 87Panhandle Eastern Pipe Line Co. v. State Highway Comm’n, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (1935).

     *See also* American Energy Corp. v. Texas Eastern Transmission, LP, 2010 U.S. Dist. LEXIS 28413 (S.D. Ohio 2010) (a severed coal owner is not restricted to filing an inverse condemnation claim against a FERC-certificated interstate pipeline when it files an action seeking to have the pipeline develop a mitigation plan to relocate its pipelines to avoid interfering with an expansion of the owner’s longwall coal mining operation). [↑](#footnote-ref-101)
101. 88*See, e.g.*, Erie R.R. v. Board of Pub. Util. Comm’rs, 254 U.S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1931); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897). [↑](#footnote-ref-102)
102. 89898 F. Supp. at 1311. New Orleans Gas Light Co. v. Drainage Comm’n, 197 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831 (1905) was thereby distinguished. [↑](#footnote-ref-103)
103. 90Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992), rejected a physical invasion analysis for rent control ordinances that had been accepted in Pinewood Estates of Michigan v. Barnegat Township Leveling Bd., 898 F.2d 347 (3d Cir. 1990), and Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986). [↑](#footnote-ref-104)
104. 91898 F. Supp. at 1311–1312. [↑](#footnote-ref-105)
105. 92898 F. Supp. at 1312 (citing Panhandle Eastern Pipe Line Co. v. State Highway Comm’n, 294 U.S. 613, 622–623, 55 S. Ct. 563, 79 L. Ed. 1090 (1935)). [↑](#footnote-ref-106)
106. 93An analogous situation is where a riparian owner engages in activities that are subject to the federal navigational servitude. The U.S. does not have to pay compensation for property interests taken when it exercises its navigational servitude, even though at the time the property interest was created the servitude was not being fully utilized. *See, e.g.*, United States v. Willow River Power Co., 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101, 103 Ct. Cl. 797 (1945). [↑](#footnote-ref-107)
107. 94Trail Enters., Inc. v. City of Houston, 957 S.W.2d 625, 138 O.&G.R. 454 (Tex. App.—Houston [14th Dist.] 1997, writ denied), *cert. denied,* 525 U.S. 1070, 119 S. Ct. 802, 142 L. Ed. 2d 663, *reh’g denied,* 525 U.S. 1172, 119 S. Ct. 1099, 143 L. Ed. 2d 98 (1999). Texas governmental entities regularly condemn only the surface rights when engaging in water impoundment projects. *See also* Tarrant County Water Control & Improvement Dist. No. 1 v. Haupt, Inc., 854 S.W.2d 909, 119 O.&G.R. 580 (Tex. 1993).

     “To assert an inverse-condemnation claim against the State, a party must plead these elements: (1) the State intentionally performed an act in the exercise of its lawful authority; (2) that resulted in the taking, damaging, or destruction of the party’s property; (3) for public use.” City of Port Arthur v. Thomas, 659 S.W.3d 96, 117 (Tex. App.—Beaumont 2022).

     In Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382 (5th Cir. 2001), the court was again dealing with a total prohibition by a municipality on mining operations. The court did not reach the merits of the case because the trial court had erroneously dismissed the federal regulatory takings claim.

     In Centre Lime & Stone, Inc. v. Spring Township Board of Supervisors, 787 A.2d 1105 (Pa. Commw. Ct. 2001), *appeal denied*, 798 A.2d 1291 (Pa. 2002), the court refused to find that a separate mineral estate existed for limestone so that a township zoning ordinance prohibiting the surface mining of limestone did not constitute a regulatory taking. *Accord* Stabler Development Co. v. Board of Supervisors of Lower Mt. Bethel Township, 695 A.2d 882 (Pa. Commw. Ct. 1997), *appeal denied*, 553 Pa. 701, 718 A.2d 787 (1998).

     Pennsylvania inverse condemnation law is governed by its Eminent Domain Code. 26 Pa. Cons. Stat. § 502(c). In order for a property owner to show what Pennsylvania calls a “de facto taking,” the owner must show that the alleged condemnor possesses the power of eminent domain, that there are exception circumstances that substantially deprive the owner of the beneficial use and enjoyment of the property and that the deprivation of those rights is the immediate, necessary and unavoidable consequence of the exercise of the power to condemn. Fay v. Dominion Transmission, Inc., 2012 U.S. Dist. LEXIS 102671 (M.D. Pa. July 24, 2012). In *Fay*, no “de facto taking” was found because the surface owner was unable to show that the defendant’s injection of gas into an underground storage facility migrated to his land, caused any contamination or interfered with his ongoing surface uses.

     In Coastal Petroleum Co. v. Florida Wildlife Fed’n, Inc., 766 So. 2d 226 (Fla. Dist. Ct. App. 2000), the court remanded Coastal’s regulatory takings claim to the trial court after Coastal had been denied a drilling permit on a state offshore ***oil*** and gas lease. [↑](#footnote-ref-108)
108. 95The court borrowed the 10-year statute of limitations for actions relating to the recovery of real property (Tex. Civ. Prac. & Rem. Code § 16.026) rather than the two-year statute of limitations for trespass or damage to land (Tex. Civ. Prac. & Rem. Code § 16.003). The two-year statute would be appropriately used if the claim was for a damaging of real property rather than a total taking. 957 S.W.2d at 630. *See generally* Brazos River Auth. v. City of Graham, 163 Tex. 167, 354 S.W.2d 99 (1961); Hudson v. Arkansas Louisiana Gas Co., 626 S.W.2d 561 (Tex. App.—Texarkana 1961, writ ref’d n.r.e.).

     In Harris v. State *ex rel.* Kempthorne, 147 Idaho 401, 210 P.3d 86 (Idaho 2009), the court dismissed an inverse condemnation claim because it was filed beyond the four-year period allowed by the statute. Idaho Code § 5-224. The statute was triggered by the owner’s execution of a sand and gravel lease with the State when it was the title owner of the sand and gravel. The accrual of the cause of action occurs when the alleged substantial governmental interference with a property interest becomes “apparent.”

     In Super Mix of Wisconsin, Inc. v. Natural Gas Pipeline Co. of America, LLC, 2020 IL App (2d) 190034 (Jan. 28, 2020), the court found that plaintiff’s inverse condemnation claim was barred by the application of Illinois’ 20-year statute of limitations for actions relating to the recovery of land. 735 ILCS 5/13-101.

     In Crooks v. State of Louisiana Department of Conservation, 340 So. 3d 574 (La.), *on motion for reh’g*, 2020 La. LEXIS 675 (La. Apr. 9, 2020), the court applied the prescriptive period contained in La. Rev. Stat. 13:5111 to dismiss an inverse condemnationclaim. The court found that such a claim is separate from the concept of a continuing tort so that the prescriptive period does not continue to accrue.

     In Energy Management Corp. v. City of Shreveport, 397 F.3d 297, 304, 161 O.&G.R. 963 (5th Cir. 2005), the Fifth Circuit found that the plaintiff’s regulatory takings action challenging the validity of a City ordinance prohibiting drilling within 1000 feet of a lake was barred by prescription. The court held that the prescription period began to run upon adoption of the ordinance, not upon the denial of a “variance” request, since the ordinance on its face constitutes a regulatory taking, thus distinguishing *Hamilton Bank.*

     In a subsequent opinion, the Fifth Circuit noted that under the doctrine that applies the most analogous state statute of limitations or prescriptive period to a federal Section 1983 cause of action, if the state takings claim has been proscribed, the federal takings claim would also be proscribed. Energy Mgmt. Corp. v. City of Shreveport, 467 F.3d 471, 480, 169 O.&G.R. 716 (5th Cir. 2006), *on remand* 2006 U.S. Dist. LEXIS 80925 (W.D. La., Nov. 6, 2006). *See also* Drury v. U.S. Army Corps of Engineers, 359 F.3d 366 (5th Cir. 2004).

     In Reoforce, Inc. v. United States, 2017 U.S. App. LEXIS 4725 (Fed. Cir. Mar. 17, 2017), *aff’g on different grounds* 118 Fed. Cl. 632 (2014), the court found that the inverse condemnation claim was filed within the six-year limitations period (28 U.S.C. § 2501) because the claim did not accrue until the government made a decision on plaintiff’s unpatented mining claim many years after the claim was first located.

     In Ram Energy, Inc. v. United States, 94 Fed. Cl. 406, 171 O.&G.R. 67 (2010), the court dismissed a breach of contract claim against the United States based on the six-year statute of limitations because the statute began to run at the time the Interior Department revoked previously granted suspensions of the leases at issue that had led to their termination.

     In Petro-Hunt L.L.C. v. United States, 90 Fed. Cl. 51 (Fed. Cl. 2009), the Court of Federal Claims found that the plaintiff’s claims relating to the alleged permanent taking of its mineral servitudes could not be asserted because they were filed beyond the six-year statute of limitations contained in the Tucker Act.

     A permanent takings claim arises when all of the events that fix the government’s liability have occurred and the plaintiff knew or should have known of the existence of these events. *See* Petro Mex LLC v. United States, 164 Fed. Cl. 476 (2023) (statute of limitations barred inverse condemnation and breach of contract claims); Ingrum v. United States, 560 F.3d 1311 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 271 (2009). The court also found that the accrual date for permanent and temporary takings should be the same. [↑](#footnote-ref-109)
109. 96This creates some problems under the “ripeness” rules for regulatory takings cases since, in most cases, the landowner must receive a final governmental decision from the governmental agency. *See, e.g.*, Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), *overruled in part*, Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019). *Knick* overruled that part of the ripeness test requiring the claimant to file its action in state court.

     The ripeness doctrine is tempered by the “futility” exception whereby property owners are not required to engage in futile acts in order for there to be a final decision by a governmental body or agency from which an inverse condemnation claim may be made. In the latest iteration of this case, City of Houston v. Trail Enters., 300 S.W.3d 736, 175 O.&G.R. 271 (Tex. 2009), the Texas Supreme Court, while otherwise reversing the Court of Appeals decision that rendered a judgment for Trail Enterprises, concluded that the case was ripe for review. *See* Hallco Texas, Inc. v. McMullen County, 221 S.W.3d 50, 60 (Tex. 2006). In City of Dallas v. Trinity East Energy, LLC, 2017 Tex. App. LEXIS 1070 (Tex. App.—Dallas Feb. 7, 2017, pet. denied), the court found that the inverse condemnation claim was ripe for review after the city denied permits for three proposed drill sites even though there may have been other sites available for the well pads. After remand, the ***oil*** and gas lessee who was denied the discretionary permits to drill was awarded over $33 million in inverse condemnation damages. Subsequently, a jury verdict finding inverse condemnation damages in the amount of $32,000,000 for the denial of several well permit applications was upheld in City of Dallas v. Trinity East Energy, LLC, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas Aug 1, 2022, pet. for rev. filed). [↑](#footnote-ref-110)
110. 97The court also rejected the claim that the city cannot prohibit drilling under the estoppel by deed doctrine. The mineral owner had received a deed from the city prior to the enactment of the ordinance. But the deed also stated that the minerals could be exploited only if they did not cause a pollution of the lake. The objective of the no drilling ordinance was to prevent pollution of the lake. Therefore, the city was not denigrating the title to the minerals it had conveyed to a predecessor of the plaintiff. 957 S.W.2d at 632–633. [↑](#footnote-ref-111)
111. 98Trail Enterprises, Inc. v. City of Houston, 2002 Tex. App. LEXIS 1872 (Tex. App.—Houston [14th Dist. Mar. 14, 2002) (not designated for publication). [↑](#footnote-ref-112)
112. 99This analysis derives from Mayhew v. Town of Sunnyvale, 41 Tex. Sup. Ct. J. 517, 964 S.W.2d 922 (Tex. 1998).

     In State v. Riemer, 94 S.W.3d 103, 159 O.&G.R. 578 (Tex. App.—Amarillo 2002), the court had to analyze a regulatory takings claim based on the state’s alleged leasing of lands owned by a private party to determine whether the state was immune from suit. The court found that plaintiffs had to allege that “(1) the State intentionally performed certain acts (2) that resulted in a “taking” of property (3) for public use.” *Id.* at 109, relying on General Services v. Little-Tex Insulation, 44 Tex. Sup. Ct. J. 397, 39 S.W.3d 591 (Tex. 2001). The court found the pleadings sufficiently described the mineral interest allegedly taken by the state, even though there was no legal description of the premises so taken or a statement of the basis for the plaintiffs’ assertion of title. Upon remand, the trial court found that various landowners lacked standing and that the request for class certification should be denied. In Riemer v. State, 342 S.W.3d 809 (Tex. App.—Amarillo 2011), the court of appeals reversed on the standing issue finding that plaintiffs had sufficiently alleged an ownership interest at the time of the State’s alleged taking, but also upheld the decision not to certify the class because the putative class representatives would not fairly and adequately protect the interests of the class. In Riemer v. State, 392 S.W.3d 635 (Tex. 2013), the Supreme Court reversed the Court of Appeals and trial court decisions refusing to certify a class based on the alleged inadequacy of the named plaintiffs. The Supreme Court found that the plaintiffs met the adequacy of representation requirement and remanded the case back to the trial court for a determination as to whether the class should be certified in light of other challenges based on the requirements of Tex. R. Civ. P. 42. [↑](#footnote-ref-113)
113. 100The notion that a regulation that does not substantially advance a legitimate state interest constitutes a regulatory taking was specifically rejected by the Supreme Court in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). While the Texas Supreme Court has decided some inverse condemnation after *Lingle*, it has not definitively stated whether the substantive due process inverse condemnation claim is still viable. [↑](#footnote-ref-114)
114. 101As to the substantive due process inverse condemnation claim, the court found that Trail Enterprises was collaterally estopped from making that claim due to the fact that in Trail I the court found that the drilling prohibition served a legitimate state interest. [↑](#footnote-ref-115)
115. 102Trail Enters. v. City of Houston, 255 S.W.3d 105 (Tex. App.—Waco 2008, pet. filed). The case was moved to the Waco Court of Appeals under a Texas legislative program designed to equalize the burden on all of the Courts of Appeals. 255 S.W.3d at 115, 116 (Gray, C.J., dissenting on grant of motion for rehearing).

     In City of Dallas v. Trinity East Energy, LLC, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas Aug 1, 2022, pet. for rev. filed), the court upheld an award of over $33 million in inverse condemnation damages after the city denied the lessee’s applications for several discretionary permits in order to drill. The court found no alternative drill sites were available and that the city’s actions constituted an inverse condemnation under either a *Lucas* or *Penn Central* analysis.

     In State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020), the court applied a similar ripeness argument to find that an inverse condemnation claim was ripe even though the state agency argued that the plaintiff had not submitted a comprehensive plan to support the removal of a suspension order as it impacted an underground injection well permit. [↑](#footnote-ref-116)
116. 103*See* Hallco Texas, Inc. v. McMullen County 221 S.W.3d 50, 60 (Tex. 2006).

     In Koch v. Texas General Land Office, 273 S.W.3d 451 (Tex. App.—Austin 2008), the court applied the *Little-Tex Insulation* test to determine whether or not the plaintiff had asserted a valid regulatory takings claim. The underlying issue was whether or not a patent from the State reserved to the State the limestone. The State had sold the limestone and the patentee claimed that it was a sale of her property. The court concluded that even though the State asserted ownership and sale of the limestone was based on its belief that it was the title owner, the State’s actions were intentional and may have resulted in a taking of the plaintiff’s property. While this case is really a title case, because the State of Texas may not be sued in a trespass to try title action without giving its consent, a regulatory takings claim may be asserted without the State asserting sovereign immunity.

     While the State of Texas has not waived its sovereign immunity for trespass to try title actions, a property owner can still sue an individual official acting in his official capacity in an ultra vires manner. Tex. Parks & Wildlife Dep’t v. Sawyer Trust, 54 Tex. Sup. Ct. J. 1621, 354 S.W.3d 384 (Tex. 2011). In *Sawyer Trust*, the court dismissed the regulatory takings claim because all the State was doing was asserting that a river through Sawyer Trust property was navigable which would give the State the right to the riverbed. The thrust of the landowner’s claim is not a regulatory taking since it is not seeking compensation for the alleged taking of its property interest.

     The *Koch* holding regarding the waiver of sovereign immunity in a regulatory takings claim was followed in State v. BP America Production Co., 290 S.W.3d 345 (Tex. App.—Austin 2009).

     The holdings in *Koch* and *BP America* regarding the intent element for an inverse condemnation claim in Texas have been questioned in City of Dallas v. CKS Asset Mgmt., 345 S.W.3d 199 (Tex. App.—Dallas 2011).

     In City of Anson v. Harper, 216 S.W.3d 384, 167 O.&G.R. 16 (Tex. App.—Eastland 2006), the owner of the mineral rights brought an inverse condemnation action against the City which had purchased the surface estate for the purpose of operating a municipal landfill on the site. Relying on *Little-Tex Insulation*, the court finds that plaintiffs have stated an inverse condemnation cause of action because the City began to clear the land that allegedly caused damage to the mineral estate. While the City owned the surface the surface estate was burdened by the implied easement of surface use held by the mineral estate owner and the City’s actions were sufficient to injure and severed mineral estate. The mineral owner’s declaratory judgment action is dismissed on sovereign immunity grounds but the inverse condemnation claim based on the physical operations undertaken by the City are to be tried. [↑](#footnote-ref-117)
117. 104255 S.W.3d at 113–14. [↑](#footnote-ref-118)
118. 105City of Houston v. Trail Enters., 300 S.W.3d 736, 175 O.&G.R. 271 (Tex. 2009). The Texas Supreme Court reversed without having oral argument, a reasonably rare event for the Texas Supreme Court. [↑](#footnote-ref-119)
119. 106City of Houston v. Trail Enters., 377 S.W.3d 873, 175 O.&G.R. 274 (Tex. App.—Houston [14th Dist.] 2012, rev. denied). In Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, rev. denied), the court also applied the *Penn Central* test to a claim that limits on the amount of groundwater that could be used pursuant to a permit constituted a regulatory taking. The court of appeals did remand the just compensation award limiting such an award to the difference in value of the pecan orchard prior to the imposition of limits on groundwater withdrawals and the value with the restrictions. The *Bragg* court rationale, if followed, might provide for inverse condemnation claims made under the proration/allowable system used in Texas to restrict production in some types of fields. Certainly, the *Bragg* rationale was not utilized by the Texas Supreme Court in Seagull Energy E&P, Inc. v. R.R. Comm’n, 226 S.W.3d 383, 168 O.&G.R. 323 (Tex. 2007). [↑](#footnote-ref-120)
120. 107Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004). [↑](#footnote-ref-121)
121. 108*See* Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998). *See also* Hobson Petroleum Corp. v. State, 2001 Mich. App. LEXIS 2708 (Dec. 21, 2001). [↑](#footnote-ref-122)
122. 109Maguire ***Oil*** Co. v. City of Houston, 69 S.W.3d 350, 154 O.&G.R. 428 (Tex. App.—Texarkana 2002). *Maguire* ***Oil*** is also analyzed in § 24.02[4], *below*, insofar as the court accepted Maguire ***Oil***’s estoppel, promissory estoppel and waiver claims.

     On remand to the trial court, the court dismissed the regulatory takings claim on *Hamilton Bank* ripeness grounds. *Hamilton Bank* was overruled in part in Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), but only insofar as *Hamiilton Bank* required a claimant to file its inverse condemnation claim in state court. In Maguire ***Oil*** Co. v. City of Houston, 243 S.W.3d 714, 169 O.&G.R. 48 (Tex. App.—Houston [14th Dist.] 2007, rev. denied), the court reversed, finding that the relevant ordinances did not allow for an appeal of the permit revocation decision to the city council so that the administrative decision was a final decision that was ripe for review. In dicta, the court added that Maguire ***Oil*** likely would have met the futility exception to the final order rule because as interpreted by the city, the proposed location for Maguire’s well was in an area where such drilling was absolutely prohibited. [↑](#footnote-ref-123)
123. 11069 S.W.3d at 358–59. In Texas, the ETJ is statutorily defined as areas outside of existing city limits. [↑](#footnote-ref-124)
124. 11169 S.W.3d at 360. The court said: “Construction of a statute by an administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute … . Here, however, the plain language of the ordinance prohibits drilling only in the city’s ETJ. Therefore, we will give no weight to the city’s construction of the ordinance.” See §§ 24.05[5] and 24.06[4] *below* discussing the issue of judicial deference to agency interpretation of statutes. [↑](#footnote-ref-125)
125. 112For other cases using the comparable sales methodology for valuing mineral interests, see St. Genevieve Gas Co. v. Tennessee Valley Authority, 747 F.2d 1411 (11th Cir. 1984); United States v. 179.26 Acres of Land, 644 F.2d 367 (10th Cir. 1981); Cal-Bay Corp. v. United States, 169 F.2d 15 (9th Cir.), *cert. denied*, 335 U.S. 859, 69 S. Ct. 134, 93 L. Ed. 406 (1948).

     In Kansas, statutory changes in 1999 transformed the measure of damages in eminent domain cases from a system that preferred the use of comparable sales to a system that can use one of three methodologies to determine fair market value: comparable sales, depreciated replacement cost, and capitalization of income. In addition, parties are free to present evidence of the value of their mineral estate even though Kansas continues to follow the “unit” approach to valuation, namely that you look at the value of the entire property interest, not its component parts in determining the amount of just compensation. Creason v. Unified Government of Wyandotte County, 272 Kan. 482, 33 P.3d 850, 154 O.&G.R. 60 (2001). [↑](#footnote-ref-126)
126. 113Maguire ***Oil*** Co. v. City of Houston, 243 S.W.3d 714, 169 O.&G.R. 48 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).In Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597 (Fed. Cl. 2014), *aff’d*, 805 F.3d 1049 (Fed. Cir. 2015), the court rejected the federal ***oil*** and gas lessee’s attempt to use the futility exception to the ripeness/final decision rule where the lessee had not applied for an APD. [↑](#footnote-ref-127)
127. 114City of Houston v. Maguire ***Oil*** Co., 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). [↑](#footnote-ref-128)
128. 115Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). [↑](#footnote-ref-129)
129. 116342 S.W.3d at 738–39. The *Penn Central* approach was adopted as it applies to interpreting the Texas constitutional taking provision in Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004). In Edwards Aquifer Auth. v. Day, 369 S.W.3d. 814 (Tex. 2012), the Texas Supreme Court reaffirmed the three analytical categories for inverse condemnation claims, namely physical invasions, per se total takings and the *Penn Central* ad hoc balancing approach. In determining whether the Authority’s regulatory program relating to groundwater withdrawals violated the *Penn Central* test, the court remanded for further factual development of the record, noting that even though the owner of the groundwater owns the groundwater in place, just like ***oil*** and gas, the government may still impose regulations on its use and/or consumption. The approach taken by the courts in *Sheffield Dev.* and *Day* was followed in Walton v. City of Midland, 409 S.W.3d 926 (Tex. App.—Eastland 2013, rev. denied).

     In Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, rev. denied), the court of appeals upheld a regulatory takings claim made by a user of groundwater who was made subject to permit restrictions limiting his withdrawals for use for agricultural purposes. The court applied the *Penn Central* analysis and concluded that while there was an important governmental interest in restricting groundwater withdrawals, the other two factors strongly favored the owner. [↑](#footnote-ref-130)
130. 117342 S.W.3d at 739. [↑](#footnote-ref-131)
131. 118The City relies on two sovereign immunity cases for that proposition: City of El Paso v. Heinrich, 284 S.W.3d 366 (Tex. 2009), and *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401 (Tex. 1997). [↑](#footnote-ref-132)
132. 119Maguire ***Oil*** Co. v. City of Houston, 69 S.W.3d 350, 358, 154 O.&G.R. 428 (Tex. App.—Texarkana 2002, rev. denied). [↑](#footnote-ref-133)
133. 120*See* Kopplow Dev., Inc. v. City of San Antonio, 399 S.W.3d 532 (Tex. 2012); City of Keller v. Wilson, 168 S.W.3d 802, 808 (Tex. 2005); Tarrant Reg’l Water Dist. v. Gragg, 151 S.W.3d 546 (Tex. 2004); City of Dallas v. Jennings, 142 S.W.3d 310, 313–14 (Tex. 2004).

     There is substantial disagreement on the issue of requiring intent in regulatory takings cases. In Harris County Flood Control District v. Kerr, 58 Tex. Sup. Ct. J. 1085, 485 S.W.3d 1, a 5-4 majority held that intent was required in a case asserting that the governmental entities allowed private development that caused the plaintiffs’ lands to be flooded. [↑](#footnote-ref-134)
134. 121Seagull Energy E & P, Inc. v. Railroad Commission, 226 S.W.3d 383, 168 O.&G.R. 323 (Tex. 2007).

     In Berkley v. R.R. Comm’n of Tex., 282 S.W.3d 240, 177 O.&G.R. 889 (Tex. App.—Austin 2009), the court rejected a regulatory takings claim made by adjacent surface and mineral owners who asserted that a Commission injection well permit would cause fluids to migrate across property lines. Since the permit did not, and could not, either authorize a trespass or a taking, no regulatory taking occurred. The *Berkley* rationale was followed in Walton v. City of Midland, 409 S.W.3d 926, 178 O.&G.R. 893 (Tex. App.—Eastland 2013, rev. denied), where the court rejected a claim that the City’s issuance of a well drilling permit with a requirement that the operator also drill a water well to irrigate trees that the operator was also obligated to plant constituted an inverse condemnation of the surface owner’s property interest. The permit could not authorize the ***oil*** and gas operator to engage in any actions on the surface owner’s property that the operator was not otherwise authorized to undertake. *See* FPL Farming, Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 178 O.&G.R. 500 (Tex. 2011). In Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 58 Tex. Sup. Ct. J. 293, 457 S.W.3d 414 (Tex. App. 2015), the Texas Supreme Court ultimately affirmed a take-nothing judgment against the surface owner who had failed to show that the alleged trespass was unauthorized or not consented to. [↑](#footnote-ref-135)
135. 122226 S.W.3d at 385. The issue of commingling production from multiple reservoirs is discussed in § 5.01[4] *supra*. [↑](#footnote-ref-136)
136. 123226 S.W.3d at 385. The wells are only 1,200 feet apart and thus require an exception permit. [↑](#footnote-ref-137)
137. 124226 S.W.3d at 387–88. [↑](#footnote-ref-138)
138. 125226 S.W.3d at 388 citing Benz-Stoddard v. Aluminum Company of America, 368 S.W.2d 94 (Tex. 1963). *Benz-Stoddard* is analyzed at § 5.01[4] *supra*. [↑](#footnote-ref-139)
139. 126226 S.W.3d at 388–89, *relying on* Railroad Commission v. Gulf Production Co., 134 Tex. 122, 132 S.W.2d 254, 255 (1939). [↑](#footnote-ref-140)
140. 126.1Murphy v. Amoco Production Co., 729 F.2d 552 (8th Cir. 1984). [↑](#footnote-ref-141)
141. 126.2729 F.2d at 558. The court ignored that prior to the Act, an ***oil*** and gas lessee was deemed to be the owner of an easement that allowed reasonable, non-negligent and non-excessive use of the surface without compensation. [↑](#footnote-ref-142)
142. 126.3729 F.2d at 58, citing to Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). [↑](#footnote-ref-143)
143. 126.4Northwest Landowners Association v. State, 2022 ND 150, 978 N.W.2d 679. [↑](#footnote-ref-144)
144. 126.52019 N.D. SB 2344; 2019 N.D. Laws ch. 300. SB 2344 amended a number of different provisions in the ***Oil*** & Gas Production Damage Compensation Act as well as other provisions relating to the ownership of the pore space. 978 N.W.2d at 679–80. [↑](#footnote-ref-145)
145. 126.6978 N.W.2d at 688–89. The court did not cite to the *Murphy* case in describing the impact of the Act on the common law implied easement. [↑](#footnote-ref-146)
146. 126.7978 N.W.2d at 688–89. The statutory recognition of the ownership of pore space took place in 2019. N.D. Cent. Code. § 47-31-01 *et seq.*; Mosser v. Denbury Resources, 2017 ND 169, 898 N.W.2d 406. [↑](#footnote-ref-147)
147. 126.8978 N.W.2d at 690–91. *See generally* Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, 705 N.W.2d 850. [↑](#footnote-ref-148)
148. 126.9978 N.W.2d at 691. *See also* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021); Arkansas Game & Fish Commission v. United States, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). [↑](#footnote-ref-149)
149. 126.10978 N.W.2d at 692. [↑](#footnote-ref-150)
150. 126.11978 N.W.2d at 694–95. N.D. Cent. Code § 38-11.1-03(3) and N.D. Cent. Code § 38-11.1-04 were amended. [↑](#footnote-ref-151)
151. 126.12The court having found specific provisions in S.B. 2344 invalid—N.D. Cent. Code §§ 38-08-25(5), 38.11.1-03(3), 38-11.1-04 & 47-31-09(1)—concluded that the other provisions of S.B. 2344 may be severed and thus enforced. [↑](#footnote-ref-152)
152. 127Clark Stone Co. v. North Carolina Department of Environment & Natural Resources, 164 N.C. App. 24, 594 S.E.2d 832 (N.C. Ct. App. 2004) (mining permit). *See also* Cerrillos Gravel Prods. v. Bd. of County Comm’rs, 2005-NMSC-23, 138 N.M. 126, 117 P.3d 932, 160 O.&G.R. 1112, *aff’g* 136 N.M. 247, 96 P.3d 1167, 2004-NMCA-096, 160 O.&G.R. 1101 (mining permit does not give permittee the right to violate permit conditions or other regulatory requirements under the vested rights doctrine).

     In Seven Up Pete Venture v. State, 327 Mont. 306, 2005 MT 146, 114 P.3d 1009, the court found that a statutory amendment adopted by voter initiative that prohibited certain types of mining techniques did not constitute a regulatory taking where the mining operator had not received a mining permit prior to the effective date of the amendment. Without a permit there was no vested right to mine and no property interest in utilizing an available mining technique when mining operations eventually started.

     The issue of whether a party has a “fundamental vested right” under California law is instrumental in heightening the scope of judicial review of an agency decision. In Hardesty v. Sacramento Metropolitan Air Quality Management Dist., 202 Cal. App. 4th 404, 136 Cal. Rptr. 3d 132 (2011), the court found that a sand and gravel operator did not have such a right in challenging a decision of the District to order the suspension of its operations until such time as certain remedial actions were taken regarding air pollution. [↑](#footnote-ref-153)
153. 128O’Brien ***Oil***, L.L.C. v. Norman, 2010 OK CIV APP 23, 233 P.3d 413, 173 O.&G.R. 492. In Leavell v. Department of Natural Resources, 397 Ill. App. 3d 937, 337 Ill. Dec. 978, 923 N.E.2d 829 (Ill. App. Ct. 5th Dist. 2010), *appeal denied*, 236 Ill. 2d 555 (2010), the court found that a series of plugging and abandonment orders, including several that transferred ownership of the wellbore to third parties, did not constitute a regulatory taking.

     In Bailey v. Spangler, 771 S.E.2d 684 (Va. 2015), a surface owner challenged the validity of a state statute (Va. Code § 55-154.2) that created a presumption that a severance deed would not give the surface owner ownership of the mine voids. The Virginia Supreme Court, in responding to a certified question, concluded that the statute did not overcome the presumption that statutes do not act retroactively. That would have the effect of giving to the surface owner a property interest that might be subject to a regulatory takings challenge. [↑](#footnote-ref-154)
154. 129Sunray ***Oil*** Co. v. Cortez ***Oil*** Co., 1941 OK 77, 112 P.2d 792, 795. [↑](#footnote-ref-155)
155. 130*See* Turley v. Flag-Redfern ***Oil*** Co., 1989 OK 144, 782 P.2d 130, 105 O.&G.R. 553. [↑](#footnote-ref-156)
156. 131The surface owner is not without redress as he may have a right to compensation for the use of its surface estate through the procedures provided by the Oklahoma Surface Damages Act, 52 O.S. Supp.1982 §§ 318.2–318.9. [↑](#footnote-ref-157)
157. 132Indiana Department of Natural Resources v. United Minerals, Inc., 686 N.E.2d 851 (Ind. Ct. App. 1997)*, transfer denied,* 698 N.E.2d 1185 (Ind. 1998).

     *See also* Exxon Corp. v. State, 40 P.3d 786, 151 O.&G.R. 317 (Alaska 2001), where the court analyzed the issue of whether Exxon had a property interest in the field cost deductions allowed for production from the Prudhoe Bay Unit under a settlement agreement that applied to expansions of the unit. The court concluded that since the state reserved a discretionary power to allow expansion of the unit, Exxon did not have a “vested” property interest in the field cost deductions that were taken when the state refused to allow an expansion of the unit to include a newly-discovered reservoir.

     The issue of whether an applicant for a non-competitive federal ***oil*** and gas lease has a vested right to the lease is analyzed in *Richard D. Sawyer*, 160 IBLA 158, 2003 IBLA LEXIS 58 (Oct. 22, 2003). The court found that when the Mineral Leasing Act was amended in 1987, an applicant for a non-competitive federal ***oil*** and gas lease did not acquire a vested right to have the Department of the Interior issue that lease. 30 U.S.C. § 226. All the offeror has is a preferential right to a non-competitive lease should one be issued. Haley v. Seaton, 281 F.2d 620, 624, 13 O.&G.R. 579 (D.C. Cir. 1960). The issue of whether the Mineral Leasing Act creates a vested right on behalf of the high bidder was further explored in in Impact Energy Res., LLC v. Salazar, 2010 U.S. Dist. LEXIS 91095 (D. Utah Aug. 31, 2010), *aff’d*, 693 F.3d 1239 (10th Cir. 2012). While the BLM regulations were consistent with the *Sawyer* decision, the District Court found that the Mineral Leasing Act requires that a lease be issued once a competitive lease bid has been initially accepted, in essence creating a vested right in the lease once the auction has been held. Notwithstanding that finding both the District Court and the Tenth Circuit dismissed the claims because the plaintiffs had not filed their claims within the 90-day period allowed by the Mineral Leasing Act (30 U.S.C. § 226-2). The Tenth Circuit did not comment on the District Court’s rejection of *Sawyer.*

     In Bush v. United States, 58 Fed. Cl. 123 (2003), the court found that the mining claimant did not have a property interest in the mining claims that could be taken because he had abandoned the claims prior to the time the United States prohibited the claimant from continuing to prospect on the putative claims. *In accord*: Ware v. United States, 57 Fed. Cl. 782 (2003) (once Interior Department determines that claimant’s mining claims are invalid, there can be no assertion of a regulatory taking since no property interest exists that can be taken). [↑](#footnote-ref-158)
158. 133686 N.E.2d at 855–856. In Preble Aggregate, Inc. v. Town of Preble, 263 A.D.2d 849, 694 N.Y.S.2d 788, 792, 143 O.&G.R. 257 (1999), *appeal denied*, 94 N.Y.2d 760, 706 N.Y.S.2d 81, 727 N.E.2d 578 (2000), the court found that an owner acquires a vested right to complete a project “when the activities undertaken in furtherance of that project are such that the deprivation worked by the enforcement of a subsequently enacted or modified zoning law would inequitably cause a serious hardship or loss … or ‘when substantial work is performed and obligations are assumed in reliance on a permit legally issued.’ ” [↑](#footnote-ref-159)
159. 134Shelby Operating Co. v. City of Waskom, 964 S.W.2d 75, 139 O.&G.R. 388 (Tex. App.—Texarkana 1997, writ denied), *on later appeal,* 1999 Tex. App. LEXIS 4250 (Tex. App.—Texarkana) (not for publication).

     In Dos Republicas Coal Partnership v. Saucedo, 477 S.W.3d 828 (Tex. App.—Corpus Christi 2015), the court found that a mineral owner does not have a vested right to engage in mining operations if the owner has not complied with valid police power regulations. [↑](#footnote-ref-160)
160. 135Tex. Gov’t Code § 481.143, repealed by Act of June 1, 1997, ch. 1041, § 51.

     The current version of the vested rights statute is found at Tex. Loc. Gov’t Code § 245.001 *et seq*. *See* City of Arlington v. Texas ***Oil*** & Gas Ass’n, 2014 Tex. App. LEXIS 10486 (Tex. App.—Ft. Worth Sept. 18, 2014). [↑](#footnote-ref-161)
161. 136Pantera Energy Co. v. Railroad Commission, 150 S.W.3d 466 (Tex. App.—Austin 2004, no writ). [↑](#footnote-ref-162)
162. 137The court had earlier found that the rule was procedural in nature. 150 S.W.3d at 472–73, discussed at § 24.05[3][b] *below*. [↑](#footnote-ref-163)
163. 138The court distinguished Buttes Resources Co. v. Railroad Commission, 732 S.W.2d 675, 104 O.&G.R. 66 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.), where the court found that Buttes had a vested property right that was deleteriously impacted by the Commission’s retroactive effective date for a pooled unit. In that case, the Commission could not change an existing situation after the fact without running afoul of the producer’s vested right to develop. In this case, Pantera was seeking a change from the status quo, rather than having its extant condition continue. 150 S.W.3d at 476. [↑](#footnote-ref-164)
164. 139Coastal Petroleum v. Chiles, 701 So. 2d 619, 138 O.&G.R. 293 (Fla. Dist. Ct. App. 1997), *review denied*, 707 So. 2d 1123 (Fla.), *cert. denied*, 524 U.S. 953, 118 S. Ct. 2369, 141 L. Ed. 2d 738 (1998). The Alaska courts utilize a similar takings analysis as does Florida, applying a per se test first and then an ad hoc balancing test. A key factor is the claimant’s establishment of a property interest in that which is being regulated. Beluga Mining Co. v. State, 973 P.2d 570 (Alaska 1999).

     In Mays v. Tennessee Valley Authority, 699 F. Supp. 2d 991, 1025–26 (E.D. Tenn. 2010), the court said that to plead an inverse condemnation claim allegedly caused by the release of coal ash from a TVA disposal facility, plaintiffs would have to prove both causation and appropriation. The causation prong merely requires the plaintiff to plead that a property interest has been taken through some action that was caused by the defendant while the appropriation prong requires plaintiff to plead that the governmental action appropriated a benefit to the government at the expense of the private property owner. [↑](#footnote-ref-165)
165. 140701 So. 2d at 623. In Florida the fourth test is governed by the principles of *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla.), *cert. denied,* 454 U.S. 1083, 102 S. Ct. 640, 70 L. Ed. 2d 618 (1981). [↑](#footnote-ref-166)
166. 141701 So. 2d at 625. [↑](#footnote-ref-167)
167. 142For a general discussion of the executive power and the duty to lease, see 2 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers,* ***Oil*** *and Gas Law* §§ 338–339.3 (LexisNexis Matthew Bender). [↑](#footnote-ref-168)
168. 143Cane Tennessee, Inc. v. United States, 44 Fed. Cl. 785, 789–790, 148 O.&G.R. 338 (Fed. Cir. 1999); Avenal v. United States, 33 Fed. Cl. 778 (1995), *aff’d*, 100 F.3d 933 (Fed. Cir. 1996). *See also* Kinross Copper Corp. v. State, 160 Or. App. 513, 981 P.2d 833, 142 O.&G.R. 473, *on reh’g*, 163 Or. App. 357, 988 P.2d 400 (1999), *review denied*, 330 Or. 71, 994 P.2d 133 (2000) (no property interest in discharging wastewater, therefore, denial of permit not a taking). [↑](#footnote-ref-169)
169. 144Phillips v. Washington Legal Foundation, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998). [↑](#footnote-ref-170)
170. 145Cane Tennessee, Inc. v. United States, 44 Fed. Cl. 785, 148 O.&G.R. 338 (Fed. Cir. 1999) examined an instrument either leasing or selling coal to determine if the seller retained a royalty interest, which if taken by governmental action, would entitle the seller/owner to inverse condemnation damages. [↑](#footnote-ref-171)
171. 146*See, e.g.*, McKay v. United States, 199 F.3d 1376, 147 O.&G.R. 461 (Fed. Cir. 1999) (spraying potentially toxic effluent on the surface does not invade the property interests of the mineral owner); Tarrant County Water Control & Improvement Dist. #1 v. Haupt, Inc., 36 Tex. Sup. Ct. J. 963, 854 S.W.2d 909, 119 O.&G.R. 580 (Tex. 1993) (interference with surface use not a taking if within the parameters of the “reasonable accommodation” doctrine). [↑](#footnote-ref-172)
172. 147Devon Energy Corp. v. United States, 45 Fed. Cl. 519, 145 O.&G.R. 21 (1999). [↑](#footnote-ref-173)
173. 14845 Fed. Cl. at 522–532, citing the 1986 Potash Order, 51 Fed. Reg. 39425 (Oct. 18, 1986). New Mexico also has a statutory and regulatory scheme to resolve developmental conflicts between potash mining and ***oil*** and gas drilling. The New Mexico regulatory program is discussed at length in Bass Enterprises Production Co. v. Mosaic Potash Carlsbard, Inc*.*, 2010-NMCA-065, 148 N.M. 516, 238 P.3d 885. [↑](#footnote-ref-174)
174. 149It appears clear that a regulatory takings claim will not be ripe until the federal ***oil*** and gas lessee has applied for an APD. Fred. E. Payne, 159 IBLA 69, 80, 2003 IBLA LEXIS 28 (May 20, 2003). Thus, where BLM imposes a general no surface occupancy buffer zone policy for ***oil*** and gas well drilling activities within a designated distance from an active raptor nest, there is no takings claim until such time as the APD is applied for and then denied or conditionally granted. *Id*. The IBLA further noted that it lacks jurisdiction to hear regulatory takings claims. *Fred E. Payne*, cited above in this note; Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994); Phillips Petroleum Co., 116 IBLA 152 (1990).

     In Barlow & Haun, Inc. v. United States, 118 Fed Cl. 597 (Fed. Cl. 2014), *aff’d*, 805 F.3d 1049 (Fed. Cir. 2015), the court held that a federal ***oil*** and gas lessee’s regulatory takings claim based on an indefinite suspension of operations was not ripe because the lessee had never applied for an APD. [↑](#footnote-ref-175)
175. 150Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *Hamilton Bank* was overruled in part in Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), insofar as it required a property owner to bring its inverse condemnation claim in state court prior to filing a federal court claim. *Knick* did not overrule the *Hamilton Bank* ripeness analysis regarding the need for there to be a final governmental decision that allegedly caused the regulatory taking. In City of Houston v. Commons at Lake Houston, Ltd., 587 S.W.3d 494 (Tex. App.—Houston [14th Dist.] 2019), the court found the inverse condemnation claim not ripe for review since there was no final decision regarding what uses would be allowed on the tract of land in question. [↑](#footnote-ref-176)
176. 15145 Fed. Cl. at 528. [↑](#footnote-ref-177)
177. 152If regulatory takings claims are filed under Section 1983, there is no need to exhaust administrative remedies. Patsy v. Florida Board of Regents, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982). *See also* Maguire ***Oil*** Co. v. City of Houston, 243 S.W.3d 714, 169 O.&G.R. 48 (Tex. App.—Houston [14th Dist.] 2007, writ denied). [↑](#footnote-ref-178)
178. 153*In accord*: Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363–1364, 141 O.&G.R. 167 (Fed. Cir. 1998), discussed above in this section. [↑](#footnote-ref-179)
179. 15443 C.F.R. § 3106.1(b). In Riviera Drilling & Exploration Co. v. United States, 61 Fed. Cl. 395, 160 O.&G.R. 1035 (2004), the court concludes that because there was no evidence in the record that the Department of the Interior had approved assignments of ***oil*** and gas leases to Riviera, Riviera lacked the necessary contractual privity to claim a breach of contract against the United States.

     In KC Res. v. United States, 115 Fed. Cl. 602 (2014), a former operator of two wells located on a federal ***oil*** and gas lease tried to argue that because it had not filed the appropriate requests for approval of the assignment of the lease it was still the operator at the time it alleged the wells were improperly plugged and abandoned. The court concluded that the former operator lacked standing to bring an inverse condemnation claim since at the time of the plugging and abandonment it did not own a property interest in the wells. [↑](#footnote-ref-180)
180. 155Pan American Petroleum Corp. v. Gibbons, 168 F. Supp. 867, 11 O.&G.R. 569 (D. Utah), *aff’d*, 262 F.2d 852, 11 O.&G.R. 563 (10th Cir. 1958). [↑](#footnote-ref-181)
181. 156Bass Enterprises Production Co. v. United States, 45 Fed. Cl. 120, 144 O.&G.R. 86 (1999)*, on remand from,* 133 F.3d 893, 138 O.&G.R. 606 (Fed. Cir. 1998). [↑](#footnote-ref-182)
182. 157See coverage of First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), *above*, which discusses the temporary takings theory that follows from the Supreme Court’s decision in that case. [↑](#footnote-ref-183)
183. 158Bass Enterprises Production Co. v. United States, 54 Fed. Cl. 400 (2002). [↑](#footnote-ref-184)
184. 159Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

     In State *ex rel*. AWMS Water Solutions, LLC v. Mertz, 162 Ohio St. 3d 400, 165 N.E.3d 1167 (2020), the court applied *Tahoe-Sierra* to support a claim for a temporary taking where the state agency had suspended a permit to inject wastewater underground for an indefinite period. [↑](#footnote-ref-185)
185. 160Bass Enterprises Production Co. v. United States, 54 Fed. Cl. 400, 404 (2002). [↑](#footnote-ref-186)
186. 161Riviera Drilling & Exploration, Inc. v. United States, 61 Fed. Cl. 395, 160 O.&G.R. 1035 (2004). The Court of Federal Claims regularly requires a federal ***oil*** and gas lessee to have sought the needed permit to avoid dismissal on ripeness grounds. Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597 (2014), *aff’d*, 805 F.3d 1049 (Fed. Cir. 2015) (failure to seek an APD requires dismissal of regulatory takings claim on ripeness grounds). [↑](#footnote-ref-187)
187. 162The failure of Riviera to have the assignments approved led to the dismissal of its breach of contract claims because of the lack of contractual privity between Riviera and the United States. 61 Fed. Cl. at 401–02. [↑](#footnote-ref-188)
188. 16345 Fed. Cl. at 123–124, citing Kimball Laundry Co. v. United States, 338 U.S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765 (1949); Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577, 112 O.&G.R. 9 (Fed. Cir. 1990). This issue is also discussed in § 3.02[4][a] *above*, where such damage models as option price and before and after value may also be appropriate.

     In City of Blue Mound v. Southwest Water Co., 449 S.W.3d 678 (Tex. App.—Ft. Worth 2014), the court relies on *Kimball Laundry* to state that when a municipality attempts to condemn an ongoing business, the business is entitled to recover damages for loss of the ongoing business value in addition to the value of the real and personal property condemned. [↑](#footnote-ref-189)
189. 164Any other recovery would afford Bass a double recovery should a permanent taking or condemnation later occur or if Bass is eventually allowed to drill for ***oil*** and gas. The problem with the measure of damages is the uncertainty given the fact that the well has not been drilled so neither the expenses nor the income stream are easily ascertainable. In addition, in many circumstances the temporary taking period will be reasonably short making profit or well payout determinations difficult. In this case, there was a four year temporary taking period which might allow the lessee to prove that a profit would have been achieved. [↑](#footnote-ref-190)
190. 165Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336, 150 O.&G.R. 430 (2001). [↑](#footnote-ref-191)
191. 166The playa lake bed was not connected to any stream or river system, but occasionally collected water from run-off that quickly evaporated because the bed of the lake contained an impermeable clay layer. The EPA order was based on its determination that the playa lake bed was used as habitat for migratory birds. That position was invalidated by the Supreme Court while this litigation was ongoing. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). [↑](#footnote-ref-192)
192. 167*See* Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053, 107 S. Ct. 926, 93 L. Ed. 2d 978 (1987). [↑](#footnote-ref-193)
193. 168*See* the last footnote in the previous paragraph. [↑](#footnote-ref-194)
194. 169Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363–1364, 141 O.&G.R. 167 (Fed. Cir. 1998), is analyzed above in the text of this section. [↑](#footnote-ref-195)
195. 170It is axiomatic that before one can assert a regulatory taking, one must have a property interest. In Wyatt v. United States, 271 F.3d 1090, 156 O.&G.R. 237 (Fed. Cir. 2001), *cert. denied sub nom.* Eastern Minerals Int’l, Inc. v. United States, 535 U.S. 1077, 122 S. Ct. 1960, 152 L. Ed. 2d 1021 (2002), the court found that the plaintiff, having allowed the coal lease to terminate before the United States denied the surface mining permit, could not sustain a takings claim since it had no property interest at the time of the alleged taking. [↑](#footnote-ref-196)
196. 171Stearns Co., Ltd. v. United States, 53 Fed. Cl. 446, 153 O.&G.R. 253 (2002)*, reconsideration granted,* 58 Fed. Cl. 229 (2003). *See also* Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787, 2004 Ala. LEXIS 21, 159 O.&G.R. 433 (Ala. Feb. 6, 2004) (jury verdict finding that a coal estate was taken when state condemned and paid for surface estate to build highway would not be disturbed; state law prohibiting coal mining within minimum distance of highway right-of-way caused coal owner to lose its ability to lease the coal and receive a royalty). [↑](#footnote-ref-197)
197. 17230 U.S.C. § 1272. [↑](#footnote-ref-198)
198. 17353 Fed. Cl. at 455, citing United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336, *reh’g denied*, 318 U.S. 798, 63 S. Ct. 557, 87 L. Ed. 1162 (1943). It is often added that the owner is entitled to the highest and best use of the property interest. Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934). *See also* Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787, 159 O.&G.R. 433 (2004) (Ala.) (coal owner entitled to lost royalties even though coal never leased). [↑](#footnote-ref-199)
199. 17458 Fed. Cl. at 229. [↑](#footnote-ref-200)
200. 175Stearns Co., Ltd. v. United States, 396 F.3d 1354 (Fed. Cir. 2005).*See also* Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597 (Fed. Cl. 2014), *aff’d*, 805 F.3d 1049 (Fed. Cir. 2015) (relies on *Stearns*to narrowly construe futility exception from ripeness/final decision requirement). [↑](#footnote-ref-201)
201. 176*Id*. at 1356, relying on Yee v. City of Escondido, 503 U.S. 519, 527, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); Forest Properties, Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999) and Tuthill Ranch, Inc. v. United States, 381 F.3d 1132 (Fed. Cir. 2004). [↑](#footnote-ref-202)
202. 177*Id.* at 1356. *See also* Greenbrier v. United States, 193 F.3d 1348, 1359 (Fed. Cir. 1999). [↑](#footnote-ref-203)
203. 178The United States is obviously constrained by the limitations in the Fifth Amendment’s taking clause as well. *See, e.g.,* Del Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 141 O.&G.R. 534 (Fed. Cir. 1998); Holden v. United States, 38 Fed. Cl. 732 (1997). Federal takings claims are typically brought in the Court of Federal Claims with appeal to the United States Court of Appeals for the Federal Circuit. *See also* Karolyn Nelson, *Takings Law West of the Pecos: Inverse Condemnation of Federal* ***Oil*** *and Gas Lease Rights,* 37 Nat. Res. J. 253 (1997).

     In addition to regulatory takings claim, the United States may also be sued for breach of contract damages in the Court of Federal Claims. In Mobil ***Oil*** Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 120 S. Ct. 2423, 147 L. Ed. 2d 528, 150 O.&G.R. 98 (2000), *rev’g, sub nom.* Marathon ***Oil*** Co. v. United States, 177 F.3d 1331, 143 O.&G.R. 74 (Fed. Cir. 1999), *withdrawing* 158 F.3d 1253, 141 O.&G.R. 534 (Fed. Cir. 1998), the United States was required to make restitutionary damages to and Marathon after the court found that it breached the terms of their ***oil*** and gas lease agreement by suspending, and then eliminating, the lessee’s right to seek exploration permits in offshore North Carolina waters. The Federal Circuit held on remand that the amount of restitution was not to be reduced by the alleged diminution in value of the leasehold estates caused by the decline in ***oil*** and gas prices at the time of the breach. Marathon ***Oil*** Co. v. United States, 236 F.3d 1313, 150 O.&G.R. 134 (Fed. Cir. 2000).

     In Century Exploration New Orleans, LLC v. United States, 745 F.3d 1168 (5th Cir. 2014), *aff’g*, 110 Fed. Cl. 148 (2013), the Federal Circuit applied *Mobil* ***Oil*** as being limited to non-OCS related statutory and regulatory changes that occur after the execution of the OCS lease. The OCS lease, on its face, allows the United States to make OCS-authorized regulatory changes without such changes constituting an actionable breach of contract.

     The rationale underlying *Mobil* ***Oil*** was used in an analogous situation involving restitutionary claims for bonus paid for OCS leases that became subject to the requirements of the Coastal Zone Management Act that effectively precluded the leases from being developed. In Amber Resources Co. v. United States, 68 Fed. Cl. 535, 166 O.&G.R. 435 (2005), the court found that imposing the consistency requirements under the CZMA for offshore California leases, when it was clear that California would not make a consistency finding, constituted an anticipatory repudiation and breach of the lease contracts entitling the lessees to a return of their bonus money.

     Subsequent developments in *Amber Resources* dealt with the issues of when the breach occurred and what damages the plaintiff was entitled to. In Amber Resources Co. v. United States, 73 Fed. Cl. 738, 166 O.&G.R. 467 (2006), the court found that the breach occurred not with the enactment of the CZMA but when the lease extensions were cancelled for failing to comply with the state’s consistency determination procedures in 2001. The bonus payments were ordered to be re-paid to the plaintiffs and various “sunk” costs were recoverable as reliance damages based on the anticipatory repudiation doctrine. In a subsequent decision, the Court of Federal Claims rejected the United States’ assertion that it was entitled to any offset for the loss of speculative value of the leases. Amber Resources Co. v. United States, 78 Fed. Cl. 508, 166 O.&G.R. 492 (2007). In Amber Resources Co. v. United States, 538 F.3d 1358, 166 O.&G.R. 505 (Fed. Cir. 2008), the Court of Appeals for the Federal Circuit affirmed the lower court’s review that the application of the consistency requirements to the lease extension decisions essentially repudiated the leases, relying heavily on the *Mobil* ***Oil*** court’s reasoning. The 1990 CZMA amendments, as implemented through the 2001 revocation of lease suspensions, combined to repudiate the contracts between the operators and the United States. Because of this repudiation, the operators are entitled to a restitutionary recovery consisting of a return of the bonus money they paid for the leases. Because the operator chose not to continue performance after the breach, they are not entitled to additional damages for their sunk costs.

     On remand, the Court of Federal Claims, in a very lengthy opinion, awarded the federal lessees more than $91 million in rescission and restitutionary damages based on the repudiation of their leases. Amber Resources Co. v. United States, 87 Fed. Cl. 16, 171 O.&G.R. 1 (2009). In a related case, Nycal Offshore Development Corp. v. United States, 92 Fed. Cl. 209, 171 O.&G.R. 62 (2010), the court allowed a co-lessee of the plaintiffs in *Amber Resources* to file its own claim seeking lost profits as the damage model and not rescission and restitutionary damages as was awarded in *Amber Resources*. In Nycal Offshore Dev. Corp. v. United States, 106 Fed. Cl. 222 (2012), *aff’d*, 743 F.3d 837 (Fed. Cir. 2013), both courts after extensively reviewing the expert testimony regarding the amount of proven and producible reserves, along with the costs of production concluded that Nycal had not shown that it would have been entitled to the required air pollution permits from the State of California in order to construct and operate the offshore platform. Because of this supervening cause, plaintiff was unable to satisfy its burden of proof on the issue of showing expectancy, or loss of profits, damages. In a second related case, Ram Energy, Inc. v. United States, 94 Fed. Cl. 406, 171 O.&G.R. 67 (2010), a co-lessee who had not joined in the *Amber Resources* litigation had its claims rejected because the six-year statute of limitations had run prior to its filing of its claim. The claim accrued at the time that the United States revoked its suspension of operations in 2001, which led to the termination of the leases.

     Even though the lessees in *Amber Resources* received restitutionary damages based on a material breach of contract theory, that material breach did not excuse those lessees from properly plugging and abandoning any well that may have been drilled prior to the material breach. In Noble Energy, Inc. v. Salazar, 770 F. Supp. 2d 322 (D.D.C. 2011), the court found that while common law contract principles applied to the OCS lease, it did not find that once the United States breached the leases that the lessees were excused from their duty of performance of their contractual and regulatory obligation to properly plug and abandon any OCS well. On appeal, Noble Energy, Inc. v. Salazar, 671 F.3d 1241, 178 O.&G.R. 416 (D.C. Cir. 2012), the court of appeals vacated and remanded the District Court opinion because it wanted the United States to interpret its plugging and abandonment regulations to see whether or not the specific order was authorized once the federal ***oil*** and gas lease was deemed to have been breached. On subsequent appeal, Noble Energy, Inc. v. Jewell, 110 F. Supp. 3d 5 (D.D.C. 2015), *aff’d,* 650 Fed. Appx. 9 (D.C. Cir. 2016), the court upheld the BSEE’s interpretation of the regulatory requirements for plugging and abandoning an OCS lease.

     In Torch Energy Advisors, Inc. v. Plains Exploration & Prod. Co., 409 S.W.3d 46 (Tex. App.—Houston [1st Dist.] 2013), a dispute arose between two parties to a 1996 agreement as to their entitlement of a portion of the payments made in *Amber Resources*. The court determined that the agreement was ambiguous as to whether or not it granted or reserved the right to recover bonus money from the United States. On appeal, the Texas Supreme Court reversed. Plains Exploration & Prod. Co. v. Torch Energy Advisors Inc., 58 Tex. Sup. Ct. J. 1115, 473 S.W.3d 296 (2015). The language of the purchase and sale agreement was unambiguous and did not exclude from the sale, the *Amber*-related claims.

     In Seven Up Pete Venture v. State, 327 Mont. 306, 2005 MT 146, 114 P.3d 1009, *cert. denied*, 546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 48 (2006), the court upheld against a Contracts Clause claim the constitutionality of a state statutory amendment adopted by voter initiative that prohibited certain types of mining techniques. The claim that the prohibition impaired existing mining leases was rejected because the amendment was reasonably related to achieving the legitimate public interest in protecting the environment and the impact on the mining leases was not substantial.

     In Wyoming Department of Revenue v. Guthrie, 2005 WY 79, 115 P.3d 1086, 169 O.&G.R. 99, the court found that the Department decision dealing with the valuation of natural gas production for purposes of the severance tax did not impair the contracts creating various overriding royalties and net profits interests who would have to pay a higher tax.

     In White v. State, Department of Natural Resources, 14 P.3d 956, 152 O.&G.R. 1 (Alaska 2000), the court refused to hear a state ***oil*** and gas lessee’s claim that the state either breached its contract or engaged in a regulatory taking when it refused to extend the lease that had been subject to a judicial and administrative suspension prior to its expiration. The plaintiff had lost an earlier suit asserting that the state’s actions amounted to a force majeure under the lease which, if accepted, would have required the state to extend the term of the lease. The court found the earlier suit was res judicata on the breach of contract and inverse condemnation actions even if those issues were not litigated, since the plaintiff had the opportunity to raise those issues during that lawsuit. [↑](#footnote-ref-204)
204. 179ANR Pipeline Co. v. 60 Acres of Land, 418 F. Supp. 2d 933, 164 O.&G.R. 427 (W.D. Mich. 2006), discussed *supra* at § 2.03[3]. [↑](#footnote-ref-205)
205. 179.1Sveen v. Melin, 138 S. Ct. 1815, 201 L. Ed. 2d 180 (2018); United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). These cases are discussed at length in Warner Valley Farm, LLC v. SWN Production Co., LLC, 2023 U.S. Dist. LEXIS 12202 (M.D. Pa. Jan. 24, 2023), *recons. denied,* 2023 U.S. Dist. LEXIS 35031 (M.D. Pa. Mar. 1, 2023).

     In Murphy v. Amoco Production Co., 729 F.2d 552 (10th Cir. 1984), the Eighth Circuit also dismissed a Contracts Clause claim brought by an ***oil*** and gas lessee after North Dakota imposed a damages payment for surface use without the surface owner having to prove negligent or unreasonable use of the surface. The Eighth Circuit relied on Allied Structural Steel v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978) in concluding that not every impairment of a pre-existing contract is unconstitutional. *Murphy*, however, does not analyze the difference between a contractually-set damage recovery versus a statutorily-imposed damage recovery based on a strict liability standard. [↑](#footnote-ref-206)
206. 179.2Warner Valley Farm, LLC v. SWN Production Co., LLC, 2023 U.S. Dist. LEXIS 12202, at \*8 (M.D. Pa. Jan. 24, 2023), *recons. denied,* 2023 U.S. Dist. LEXIS 35031 (M.D. Pa. Mar. 1, 2023). [↑](#footnote-ref-207)
207. 179.32023 U.S. Dist. LEXIS 12202, at \*8. [↑](#footnote-ref-208)
208. 179.4Warner Valley Farm, LLC v. SWN Production Co., LLC, 2023 U.S. Dist. LEXIS 12202 (M.D. Pa. Jan. 24, 2023), *recons. denied,* 2023 U.S. Dist. LEXIS 35031 (M.D. Pa. Mar. 1, 2023). [↑](#footnote-ref-209)
209. 179.52023 U.S. Dist. LEXIS 12202, at \*8–9. 58 Pa. Stat. § 34.2(a) authorizes a lessee to drill a well on separate tracts that the lessee has leases on where he allocates production between the multiple tracts and none of the leases prohibits cross-unit wells. The Pennsylvania statute is discussed at § 7.05[2][a] *supra*. [↑](#footnote-ref-210)
210. 180Hermosa Beach Stop ***Oil*** Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 103 Cal. Rptr. 2d 447, 151 O.&G.R. 161 (2001). *See also* E & B Natural Resources Management Corp. v. County of Alameda, 2019 U.S. Dist. LEXIS 63625 (N.D. Cal. Apr. 12, 2019) (dismissal of Section 1983 claims of constitutional violations due to rejection of renewal of conditional use permits; court granted ***oil*** and gas operation leave to amend the complaint to describe the nature of the constitutional violations more specifically). [↑](#footnote-ref-211)
211. 181103 Cal. Rptr. 2d at 461.

     The Supreme Court has made it clear that only some impairments are unconstitutional, although no single or uniform test has been applied. *See, e.g.,* Sveen v. Melin, 138 S. Ct. 1815, 1817, 201 L. Ed. 2d 180 (2018); Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 93 O.&G.R. 300 (1987); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569, 76 O.&G.R. 593 (1983); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934).

     In *In re* Ultra Petroleum Corp., 611 B.R. 813 (Bankr. S.D. Tex. 2019), a bankrupt producer successfully argued that the Wyoming Royalty Payment Act (Wyo. Stat. § 30-5-304) should not be applied retroactively to govern royalty payment obligations accruing prior to the passage of the Act. The court further noted that because of the impairment of contracts problem, the Wyoming Supreme Court regularly finds that statutes are not to be retroactively applied in the absence of clear language to the contrary. *See e.g.*, Cities Service ***Oil*** & Gas Corp. v. State, 838 P.2d 146, 156 (Wyo. 1992); Moncrief v. Harvey, 816 P.2d 97 (Wyo. 1991); Independent Producers Marketing Corp. v. Cobb, 721 P.2d 1106 (Wyo. 1986). [↑](#footnote-ref-212)
212. 182Bass Energy Inc. v. City of Highland Heights, 2010-Ohio-2102 (Ohio App.). [↑](#footnote-ref-213)
213. 183The City’s actions were taken through a resolution authorizing the Mayor to enter into two natural gas leases. [↑](#footnote-ref-214)
214. 184Ohio courts, in applying their constitutional provision, Ohio Const. Art. 2, § 28, have used the same methodology the Supreme Court of the United States has used in applying U.S. Const. art. 1, § 10, cl. 1. [↑](#footnote-ref-215)
215. 185The court noted that its findings as to the constitutional violation were not final as it was merely making a determination of Bass’s request for a preliminary injunction. [↑](#footnote-ref-216)
216. 186Okla. Const. Art. II, § 23; Palmer ***Oil*** Corp. v. Phillips Petroleum, 231 P.2d 997 (Okla. 1951), *appeal dismissed*, 343 U.S. 390 (1952); O’Brien ***Oil***, L.L.C. v. Norman, 2010 OK CIV APP 23, 233 P.3d 413. [↑](#footnote-ref-217)
217. 18752 O.S. Supp. 1982 § 318.2 *et seq*. [↑](#footnote-ref-218)
218. 188O’Brien ***Oil***, L.L.C. v. Norman, 2010 OK CIV APP 23, 233 P.3d 413, 419. [↑](#footnote-ref-219)
219. 189Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 560 U.S. 702, 130 S. Ct. 2592, 2602, 177 L. Ed. 2d 184 (2010). [↑](#footnote-ref-220)
220. 190Northern Natural Gas Co. v. ONEOK Field Servs. Co., L.L.C., 296 Kan. 906, 296 P.3d 1106, 1126–27 (2013). The Kansas Supreme Court alternatively held that even if it was to follow the plurality opinion of *Stop the Beach*, the challenged judicial injunction did not constitute a taking of the plaintiff’s personal property interest in injected natural gas that migrated outside the boundaries of the storage field. In Sanders v. Belle Exploration, Inc., 481 Fed. Appx. 98 (5th Cir. 2011), the court dismissed the judicial takings claim made in a boundary line dispute because the issue had not been raised at trial. [↑](#footnote-ref-221)