No. 04-5031

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STEARNS COMPANY, LTD.

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF
THE UNITED STATES COURT OF FEDERAL CLAIMS
SENIOR JUDGE LOREN SMITH

CORRECTED BRIEF OF AMICUS CURIAE KENTUCKY RESOURCES COUNCIL, INC. (URGING REVERSAL OF THE JUDGMENT FOR PLAINTIFF-APPELLEE)

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April 2, 2004

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Amicus Kentucky Resources Council, Inc. (the "Council") respectfully submits this brief amicus curiae in support of the United States and urges the Court to reverse the judgment of the U.S. Court of Federal Claims.

STATEMENT OF INTEREST

The Council is a nonprofit, public interest organization incorporated under the laws of the Commonwealth of Kentucky and dedicated to prudent use and conservation of the natural resources of the Commonwealth. The Council is headquartered in Frankfort, Kentucky and has approximately 360 individual and organizational members, including many individuals who live, work, reside and recreate in areas directly affected by surface coal mining operations and underground mining activities beneath public lands. Council members include persons who use, and intend to use within the near future, the scenic and natural resources of federal lands in Kentucky, including the Daniel Boone National Forest and the Big South Fork National Recreation Area.

The Council provides legal and technical assistance, without cost, to low income individuals, communities and local governments within the Commonwealth on air, land, water and resource extraction issues. Through its National Citizens Coal Law Project, the Council provides national support and

assistance on regulatory matters pertaining to the 1977 Surface Mining Control and Reclamation Act ("SMCRA) to grassroots citizens groups in our nation's coalfields.

The Council has an interest in this case because the plaintiff's sweeping takings challenge to SMCRA threatens the ability of the Council and its members to rely on the provisions of this landmark legislation to protect the natural resources of Kentucky.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has presented cogent and persuasive arguments for why the judgment of the U.S. Court of Federal Claims should be reversed. In an effort to assist the Court, and to avoid burdening the Court with repetitive argument, this brief amicus curiae focuses on the single line of analysis that, in the view of the Council, provides the simplest and most straightforward basis for disposing of this case.

The Council submits that the key to resolution of this case is the specific nature of the novel, extreme theory of takings liability advanced by plaintiff and accepted by the court of claims. Stearns contends that it suffered a taking on December 3, 1980, when the Office of Surface Mining Reclamation and Enforcement "("OSM") notified Stearns's lessee that the property could be not be

mined without first obtaining, pursuant to SMCRA, a determination that Stearns had "valid existing rights" to mine or an affirmative "compatibility' determination. The United States has described plaintiff's claim using almost the exact same language that plaintiff uses. Compare Brief of Appellant United States, at 12 with Brief for Plaintiff the Stearns Company, Ltd, at 1 (filed in the U.S. Court of Federal Claims, June 5, 1999). And the court of claims expressly embraced this theory of takings liability. See, e g., Stearns v. United States, 53 Fed.Cl. 446, 451 (2002) ("Simply because the secretary has the discretion to grant a permit to applicants such as Stearns does not alter the fact that as a result of the enactment of SMCRA and the December 3, 1980, letter, the property rights previously held by Stearns were transferred to the government. When the owners' rights over a parcel change through governmental action, then a taking has occurred.") Consistent with the theory that the mere assertion of regulatory jurisdiction constituted the taking, the court of claims awarded tens of millions of dollars in compensation without regard to whether OSM would have granted permission to Stearns to do precisely what it wished to do with the property.

Stearns combined this extreme theory of takings liability with a second argument: that the federal government was not only acting as a regulator, but was acting in its capacity as landowner to benefit publicly owned lands, namely the

Daniel Boone National Forest. According to this argument, prior to enactment of SMCRA, Stearns possessed a "dominant estate" under Kentucky property law that granted it the right to gain access to and exploit its coal interest. Following passage of SMCRA, according to Stearns, the dominant estate was destroyed, and the rights of the United States qua landowner were correspondingly enhanced. The court of claims ruled that the assertion of regulatory jurisdiction over Stearns, in the context of the fact that the United States owned the surface estate associated with Stearns's coal interests, supported the conclusion that the United States effected "a physical taking by operation of law." Id. at 447.

The judgement is mistaken and should be overturned The first reason the award should be reversed is that the claim is barred by the applicable six-year statute of limitations. As discussed, consistent with its theory that the mere imposition of regulatory jurisdiction effected a taking, Stearns contended (and the trial court accepted) that the alleged taking occurred on December 3, 1980, when OSM specifically informed Stearns's lessee of the requirement that it obtain valid existing rights or compatibility determinations prior to mining. Because Stearns did not file its claim until nine years later, on October 31, 1989, the claim is time-barred. Contrary to the reasoning of the court of claims, the limitations period was not tolled by Stearns's efforts to "ripen" its challenge to the valid existing rights

process by seeking an administrative resolution of whether it possessed valid existing rights. Because Stearns's theory of liability rests on the idea that the mere assertion of regulatory jurisdiction constitutes a taking, nothing more was needed to ripen the taking claim once it became clear that Stearns's property was subject to regulation under SMCRA.

Second, even if the claim were not time-barred, the claim fails because the theory of takings liability advanced by Stearns and embraced by the court of claims is mistaken as a matter of law. The Supreme Court and this Court have explicitly and repeatedly stated that the mere assertion of regulatory jurisdiction, which might or might not yield permission for a property owner to do what she wants to do with her property, cannot constitute a taking. Because this case is based on a theory of takings liability that has no basis in law, the judgment must be overturned.

Third, the court of claims compounded its error by concluding that the mere imposition of regulatory jurisdiction could constitute a per se taking on a physical-occupation theory. Particularly in light of the decision of the U.S. Supreme Court in Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), it is clear that the physical occupation category of takings claims is confined to a very narrow set of cases where the government actually physically

invades, or authorizes third parties to invade, private property. Under any plausible view, this case involves potential restrictions on Stearns's ability to exploit or otherwise use its mineral interest, not an actual physical occupation of those interests.

Finally, the court of claims erred in attaching decisive significance to the fact that the United States owns the surface estate associated with Stearns' coal interests. The fact that the government sells certain property to a private party while retaining other property (or, as in this case, purchases only a portion of a private seller's property) does not preclude the government from adopting regulations governing use of private land that would, among other things, protect public land from harm. The fact that the government, acting in its capacity as regulator, may benefit public property holdings is not an irrelevant consideration in takings analysis. Indeed, the Supreme Court has expressly recognized that it is a factor appropriately considered in the fact-intensive analysis mandated under Penn Central Transp. Co, v. City of New York, 438 U.S. 104 (1978). However, contrary to the trial court's reasoning, this factor cannot support a finding of a per se taking.

ARGUMENT

I. Plaintiff's Claim Is Time-Barred.

Stearns contends that the date of the alleged taking was December 3, 1980, when OSM sent a letter specifically informing Stearns that, pursuant to the provisions of SMCRA, it could not proceed with planned mining operations until it received (1) a determination that it possessed valid existing rights to proceed with mining, or (2) a determination that its planned mining operation was "compatible" with protection of National Forest resources. Because the complaint was filed in 1989, far outside the six-year limitation period, the claim is time-barred. Because the claim is time-barred, there is no need to address any other issue in this appeal.

Stearns's legal theory is that it suffered a taking because SMCRA added new regulatory review requirements above and beyond the restrictions that were already in place prior to enactment of the statute.[1] Stearns contends that the existence of the review process itself, regardless of how that process might have

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[1] In fact, under the terms of the 1937 deeds, the United States possessed significant legal authority to restrict mining activities that would adversely affect the surface estate. Thus, it is debatable whether SMCRA imposed restrictions on Stearns's property interests that went beyond the restrictions inherent in its title. Because the Court can and should reverse the judgment on other grounds, there is no need to resolve this specific issue.

been implemented, caused a taking of its property rights, because the process effectively reduced the bundle of rights Stearns previously possessed. Setting aside the separate point that this legal theory of liability is mistaken (as we discuss below), the claim accrued for the purpose of the limitations period when the regulatory review process became effective as to Stearns. That occurred, at the latest, on December 3, 1980, meaning that this case, filed on October 31, 1989, was filed three years too late.

Nonetheless, the court of claims concluded that the claim was not time-barred, ruling that the limitations period had been tolled. Specifically, the court concluded the limitations period was tolled while Stearns was pursuing separate litigation in the Sixth Circuit and ending in 1986, when the government formally determined that Stearns did not possess valid existing rights. In that other litigation, Stearns challenged the application of SMCRA to its coal interests on the theory that they were not "on federal lands" within the meaning of the statute. Stearns also argued that, if its statutory claim were rejected, the statute would effect a taking. The Sixth Circuit rejected the statutory argument, and said that any possible taking claim was not "ripe," relying on Hodel v. Virginia Surface Mining & Reclamation, 452 U.S. 264 (1981). In Hodel, the Supreme Court rejected a facial challenge to SMCRA as a matter of law, and dismissed an as

applied challenge to the statute on ripeness grounds. In the present case, the court of claims reasoned that Stearns was effectively obligated to ripen its challenge on the valid existing rights issue as a result of the ruling of the Sixth Circuit. Therefore, the court of claims ruled, the limitations period on this taking claim was tolled until 1986, when OSM made its valid existing rights determination and the claim became ripe.

The court's ruling that the limitations period was tolled is wrong and should be rejected. First, on their face, the conclusions that Stearns's claim accrued in 1980, but that the limitations period was tolled until 1986 (when the claim ostensibly ripened), are fatally inconsistent. If the claim truly did not ripen until 1986, then the alleged taking could not have occurred prior to 1986, and the court of claims was wrong to accept 1980 as the date of the alleged taking. In other words, under the court of claims' rationale for tolling the statute of limitations, there should have been no need for tolling at all. Stearns's allegation that the taking occurred in 1980 is dictated, of course, by Stearns's theory that the mere imposition of the regulatory review process effected a taking But, having alleged a taking as of 1980 based on one theory, Stearns cannot argue for tolling the statute of limitations on the ground that a different taking claim based on a different legal theory would have accrued at a later date.

Second, as the United States has persuasively argued in its opening brief, equitable tolling is not available under 28 U.S.C. §1501. Because equitable tolling is not available to plaintiff, this excuse for the late filing of its complaint must be rejected as a matter of law.

Third, even if plaintiff were entitled to invoke equitable tolling, there is no ground for tolling the statute of limitations in this case. As the United States explains in its brief, numerous precedents of this Court establish that the statute of limitations for a taking claim is not tolled by a claimant's choice to first pursue separate judicial or administrative challenges to a government action. Thus, the fact that Stearns pursued separate litigation in the Sixth Circuit provides no excuse for not filing its taking claim in timely fashion in this court.

This conclusion is not affected by the fact that the Sixth Circuit opined that any takings claim by Stearns based on the application of SMCRA would not be ripe until Stearns had exhausted the process for determining whether it possessed valid existing rights. In making that statement the Sixth Circuit apparently assumed that Stearns would be making an as applied taking challenge to SMCRA and concluded, based on the authority of Hodel, that any such challenge would not be ripe unless and until the company had exhausted available administrative procedures for obtaining authorization to mine. However, the Sixth Circuit's

analysis has no bearing on the actual claim presented by Stearns in the court of claims which, as discussed, is based on the theory that mere imposition of the SMCRA regulatory review process effected a taking without any further action by Stearns to seek authorization or exemption. Because under Stearns's theory the actual claim in this litigation became ripe, at the latest, as of the date Stearns was informed of the existence of the regulatory process, no further steps were required to ripen the claim, and the court of claims was wrong to rely on the Sixth Circuit decision to reach a different conclusion.

The court of claims' reliance on the Sixth Circuit decision is further contradicted by the fact that the Sixth Circuit's comments on the takings issue were likely dictum. Although it is not entirely clear from the materials available to the Council, Stearns appears to have raised the takings issue as an argument to support its proposed reading of the statute, not as a freestanding legal claim. Thus, the Sixth Circuit's comments on the need for Stearns to ripen its possible taking claim probably do not constitute an actual holding.

Furthermore, the appropriate remedy for an alleged taking is monetary relief, and the U.S. Court of Claims is the only federal court with jurisdiction to hear money claims of this type against the United States. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984). Thus, the federal district court in

which Stearns filed its original legal challenge to SMCRA did not have jurisdiction to address a taking claim on the merits; nor did the Sixth Circuit have appellate jurisdiction over this issue. A ruling by another federal court on a legal claim within the exclusive jurisdiction of the U.S. Court of Federal Claims has no preclusive effect in the claims court. See Christopher Village, L.P. v. United States, 360 F.3d 1319 (Fed.Cir. 2004). Thus, even if the Sixth Circuit decision can be read as containing a substantive ruling on the taking issue, that ruling is not binding in this litigation.

The court of claims suggests that it would be a "comedy" and "unjust" to rule that this claim is barred by the statute of limitations. See 53 Fed.Cl. at 449. Just the opposite is true: It would be absurd and unfair if Stearns were permitted to assert a claim for compensation based on the mere imposition of regulatory jurisdiction, which allegedly occurred in 1980, by relying on the argument that the claim not did actually ripen, and hence accrue, until 1986. The argument is simply nonsensical. The Takings Clause's purpose to promote "justice and fairness" will be furthered by recognizing that this claim is barred by the statute of limitations.[2]

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[2] Of course, as the United States points out in its brief, if Stearns were correct that it had to ripen its taking challenge on the valid existing rights issue, then it also had to ripen its challenge on the compatibility issue, in order to

II. Stearns' Theory of Takings Liability is Wrong as a Matter of Law.

Even if the claim were not time-barred, the claim should be rejected on the merits as a matter of law. As discussed, Stearns's theory of liability is that the mere requirement that it undergo a regulatory review process, to obtain either a valid existing rights determination or a compatibility determination, effected a taking. This precise theory has been expressly and repeatedly rejected by the U.S. Supreme Court as well as by this Court.

In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Supreme Court articulated the rule of law that disposes of Stearns's taking claim: "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense; after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." Id. at 126-27.

The Court's reasoning reflects the fact that it is the outcome of a regulatory review process, not the mere fact that it has been established, that is the critical event for the purpose of takings analysis. If the review process concludes that the owner can do as she wishes with the property, there is no taking. If the process

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proceed with this litigation. In other words, if the Court were to accept Stearns's ripeness argument, then it would have to conclude that this entire litigation is not ripe.

concludes that the owner cannot proceed with the proposed use of the property, that decision, depending on the facts and circumstances, might result in a taking. Similarly, if the review process is so arduous or inhospitable that it would be futile for the owner to pursue the process, that too might provide the basis for a taking claim. But the theory embraced by the court of claims – that a taking results from the mere imposition of a regulatory review process (regardless of whether it will yield the precise answer the owner seeks) – has no support in the law. Until the administrative process has been exhausted, there is no way to determine what, if anything, might be taken.

This Court has followed Riverside Bayview Homes in numerous cases. For example, in Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 800-801 (Fed.Cir. 1993), the Court rejected the claim that the United States effected a taking by obtaining a cease and desist order barring a property owner from filling and developing wetlands on his property without first obtaining a permit under the Clean Water Act. "In this case," the court said, "the cease and desist order, while stopping the filling of the wetlands, specifically left the door open to development by obtaining a permit. That type of regulatory action has been unequivocally held not to effect a taking." Id. at 800-801 (emphasis in original). Just as in this case, the plaintiff contended that imposition of the regulatory review process was a

taking because it rendered the property unmarketable, at least for a period. The Court rejected the argument, stating that "mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered a 'taking' in the constitutional sense.'" Id. at 801, quoting Agins v. City of Tiburon, 447 U.S. 255, 263 n. 9 (1980).

Similarly, in Greenbrier v. United States, 193 F.3d 1348 (Fed Cir. 1999), cert. denied, 530 U.S. 1274 (2000), the Court rejected the claim that enactment of the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 effected a taking by requiring the owners of low and moderate income housing to seek permission before prepaying certain loans. The Court said:

> "The Supreme Court "[h]as ma[d]e quite clear that the mere assertion of regulatory jurisdiction does not constitute a regulatory taking.....[B]oth ELIHPA and LIHPRHA 'merely assert regulatory jurisdiction' over the Owners' ability to prepay their mortgage loans. Their enactment cannot therefore constitute a taking of any property rights."

See also Boise Cascade v. United States, 296 F.3d 1339 1349-1350 (Fed. Cir. 2002), cert. denied, 538 U.S. 906 (2003) (ruling that a government-obtained injunction prohibiting logging of land without a permit under the Endangered Species Act did not effect a taking, because applicable precedents "make it

perfectly clear that the imposition of ....[a permit] requirement, without more, simply cannot give rise to a compensable taking"); Wyatt v. United States, 271 F.3d 1090, 1097 (Fed. Cir. 2001), cert. denied sub nom. Eastern Minerals Intern., Inc. v. United States, 535 U.S. 1077 (2002) ("We note that the existence and initiation of permit proceedings does not itself constitute a taking.").

While Riverside Bayview and its progeny are sometimes cited in cases addressing ripeness questions, the Council understands the basic principle of Riverside Bayview – that the mere assertion of regulatory jurisdiction cannot constitute a taking – to articulate a rule of substantive takings law. The simple requirement that an owner undergo a regulatory review process, which might or might not yield a negative result from the landowner's perspective, and which might or might not result in a decision amounting to a taking, does not itself constitute a taking. For landowners, the requirement to navigate a regulatory review process (at least where the process itself is not futile or unreasonably delayed) is simply one of the prices of living in a civilized society, and does not constitute a taking.

As a matter of policy, the trial court's novel theory of takings liability, if adopted by the courts generally, would have disastrous implications. It would impose an enormous new economic burden on the administration of numerous

provisions of SMCRA, with the likely practical effect of gutting the statute. Likewise, most of the nation's land use and environmental laws, including the Clean Water Act and the Clean Air Act, would routinely constitute takings under this theory, not because they fail to achieve a reasonable accommodation between public and private interests, but simply because they create regulatory review processes.

Significantly, in its 1995 decision in this case, the court of claims appeared to adopt the view that the only possible basis for plaintiff to challenge the compatibility review process as a taking, in advance of actually going through the process, was on the theory that the process was so arduous or unpromising that the barrier erected by the process itself could be regarded as a taking. See Stearns v. United States, 34 Fed.Cl. 264, 272 (1994). However, in its 2002 decision, the trial court adopted the current, far more extreme theory, that the mere imposition of a requirement to undergo regulatory review constitutes a taking. The evidence presented at the trial showed that, far from being a futile procedure, the SMCRA regulatory review process, as applied to other mining companies on this specific national forest, frequently produced affirmative answers to the question of whether the companies could proceed with mining. See 53 Fed. Cl. at 451. Seemingly undaunted by this evidence, and without explanation, the trial court jettisoned its

earlier theory of liability. As discussed, the far more extreme takings theory embraced by the court of claims in its later decision has no basis in precedent or logic.

The court of claims sought to support its ruling with the following rhetorical pronouncement: "The fact that my neighbor always lets me use his lawnmower does not mean that I own it." Id. at 447. The court's thinking seems to be that, even if the federal government might allow Stearns to exploit its mineral interests as it wishes, that does not alter the fact that Stearns suffered a taking of its property rights as a result of the earlier requirement that it seek a valid existing rights or compatibility determination before proceeding. This statement is simply beside the point, because its premise is mistaken. Your neighbor presumably actually owns his lawnmower. But the government did not become the owner of Stearns's coal interests by requiring that the company complete a government review process prior to exploiting these interests. The review process might have yielded a positive or a negative answer, and might or might not have resulted in a taking. But the mere fact that government decides to subject an owner's proposed use of his property to review does not, ipso facto, convert an owner's private property into public property.

Reduced to its essence, Stearns's taking claim comes down to the following

quite radical proposition: that any government interference, even if it is purely procedural in nature, with the exercise of private property interests previously available for exploitation without government permission constitutes a taking of such interests. This is not the law. In fact, the Supreme Court has frequently recognized that newly enacted regulatory measures that restrict or even destroy existing property interests do not necessarily constitute a taking. Thus, in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 489 n. 18 (1987), the Court recognized that it "has repeatedly upheld regulations that destroy or adversely affect real property interests." To like effect in Penn Central. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978), the Court said that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." Similarly, in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992), the Court said, "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."

In this case, of course, there is no contention that government has actually restricted or destroyed property interests by restricting their use. Instead, this case

only involves a challenge to the imposition of a regulatory regime that allows the government to decide whether or not it might restrict or destroy private property interests. If the actual restriction or destruction of property interests does not necessarily constitute taking, it logically follows that the mere imposition of a regulatory review process cannot constitute a taking.

Stated differently, the court of claims appears to believe that a mere requirement that a property owner present itself to government officials can be a taking, regardless of whether the government actually intends to restrict use of the property. In the court's words, "[o]wnership and use are not synonymous." Id. at 447. This theory has, so far as we know, no basis in modern takings jurisprudence. Private property rights consist of rights to use, occupy and dispose of interests in land and other real property, not in some abstract interest in being able to avoid having to talk to government officials at all.[3]

[3] While the argument is of questionable relevance in this case, the court of claims is simply incorrect in contending that the compatibility review process subjected Stearns to "purely discretionary [government] power." 53 Fed. Cl. at 447. In fact, relatively detailed regulations guide the exercise of OSM's statutory authority. See 30 CFR §761.

III. The Trial Court's Theory that Stearns Suffered a Physical-Occupation Taking is Plainly Incorrect.

For the reasons discussed, the court of claims' theory of takings liability is foreclosed as a matter of law, because the mere imposition of a regulatory review process cannot constitute a taking. However, the court of claims compounded its error by declaring that the imposition of the regulatory regime was not merely a taking, but that it effected a per se taking because it amounted to a "physical occupation" of Stearns's coal interests. This theory is plainly wrong as well.

First, the conclusion that the SMCRA regulatory review process effected a physical occupation is inconsistent with the nature of the regulatory program at issue. A physical occupation occurs when the government occupies private property (as by flooding, or by constructing a public building on, private property), or authorizes third parties to occupy private party (as by authorizing the public to walk or bicycle across private property). On the other hand, a use restraint involves a negative prohibition against an owner's use of private property (as by restricting building upon, cutting trees on, or excavating minerals from private land). A restriction on the exploitation of mineral interests under SMCRA would plainly be a use restriction. The government could in no sense be occupying the property or appropriating it for its own use; it would simply be

restricting the owner's ability to use the property. It necessarily follows that the imposition of the SMCRA regulatory review process, in order to decide whether or not to authorize an applicant's proposed mining activity, is a use restriction as well.

The court of claims' characterization of this claim as a physical-occupation type taking claim is all the more remarkable because, less than four months prior to the court of claims' August 5, 2002, decision, the U.S. Supreme Court provided important guidance on the scope of per se takings analysis generally, and on the scope of the physical-occupation theory in particular. The Court's decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), which the court of claims neither cites nor discusses, demonstrates that a physical-occupation theory cannot sensibly be applied in this case.

In Tahoe-Sierra, the Supreme Court stated that "[t]he temptation to adopt what amount to per se rules" must be resisted, id. at 321, and use of the per se test must be tightly cabined to avoid "transform[ing] government regulation into a luxury few governments could afford." Id. at 324. Addressing per se physical occupation claims specifically, the Court said that this test must be reserved for "relatively rare" cases in which the physical occupation can be "easily identified."

Id. The Court also stressed the need to maintain clear analytical lines between regulatory takings claims and physical occupation claims; it is "inappropriate," the Court said, "to treat cases involving physical occupations as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." Id.

The court of claims' decision is inconsistent with the teachings of Tahoe-Sierra. The court's ruling evinces no awareness that it was applying a test properly confined to the "relatively rare" case where the fact of a physical occupation can be "easily identified." In this case, no physical taking can be identified at all, much less "easily identified." Nor did the court recognize the need to maintain a clear analytic line between regulatory takings claims and physical occupation claims. Indeed, it hopelessly muddied the distinction between these two concepts.

Following the Tahoe-Sierra decision, this Court has repeatedly rejected efforts by litigants to shoehorn regulatory takings claims into the per se physical occupation category. Thus, in Boise Cascade v. United States, 296 F.3d 1339, 1355 (Fed.Cir. 2002), cert. denied, 538 U.S. 906 (2003), the Court rejected the plaintiff's claim that a restriction on logging on private lands amounted to a physical taking, characterizing the "argument [as] merely an attempt to convert a

regulatory takings claim, governed by Penn Central... into a per se taking governed by the more generous rule of Loretto." Similarly, in Conti v. United States, 291 F.3d 1334, 1343 (2002), cert. denied, 537 U.S. 1112 (2003), the Court recognized that a ban on the use of fishing gear raised, at best, a regulatory taking claim, because the plaintiff "retained possession" of the property. See also Seiber v. United States, 53 Fed.Cl. 570, 576 (2002), appeal pending, No. 03-5010 ("In its recent decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the Supreme Court reiterated the distinction between a physical taking and a regulatory taking, stating that a physical taking 'gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose.' The Supreme Court contrasted a regulatory taking as a taking that 'does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.' The Supreme Court also stated that this longstanding distinction makes it inappropriate to treat cases addressing physical takings as controlling precedents for regulatory takings cases and vice versa.") (citations omitted).

In sum, the court of claims' conclusion that there was a physical occupation in this case is plainly wrong and must be rejected.

IV. The Fact that SMCRA Serves in Part to Protect Public Lands Raises, at Most, a Potentially Relevant Factor in a Proper Penn Central Case.

Finally, Stearns and the trial court made much of the fact that the federal government owns the surface estate of the lands at issue and that SMCRA in this instance helps protect the values of these public lands. As the Council explains below, the fact that a regulation may protect public landholdings potentially represents a consideration that may, depending on other circumstances, be weighed in a proper takings analysis. However, the fact that public lands may be benefitted by regulation represents, at most, only one factor among many to be considered under the fact-intensive Penn Central takings analysis. There is, so far as we know, no support for the proposition that a per se takings analysis should apply simply because a regulation helps protect public lands, and the Court should reject this position.

Stearns's contention arises from the land transfers that created the current ownership pattern that led to this takings dispute. Stearns's predecessor in interest once owned the lands at issue in fee simple. In 1937, it transferred surface ownership rights in some 47,000 acres to the federal government, which included the lands in the National Forest System. The company reserved various mineral interests, subject to various detailed terms and conditions designed to

minimize conflict between exploitation of the mineral interests and protection of the surface estate.

First, without expressly asserting that the decision is on point, the court of claims suggested that the claim could appropriately be analogized to the case of United States v. Winstar, 518 U.S. 839 (1996). See 53 Fed.Cl. at 454. However, in reality, Winstar is plainly distinguishable. That decision stands for the proposition that the government may be held financially liable for breach of contract as a result of legislative action that abrogates a contract containing an express promise concerning government regulatory treatment of private parties. In this case, there was no such express promise of regulatory treatment, nor indeed any type of ongoing contractual relationship between the parties.[4]

Second, following a somewhat more plausible but ultimately unavailing line of argument, the court of claims also suggested that this history of land transfers lends support to Stearns's takings claim. The court of claims implicitly distinguished this case from other types of takings cases in which the challenged

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[4] Furthermore, assuming for the sake of argument that the 1937 transaction had included an express contractual commitment by the United States to refrain from exercising regulatory controls over Stearns's mineral interests, that commitment would provide no support for this taking claim. Such a commitment would, at most, support a claim for breach of contract, which Stearns has not asserted in this case. See Castle v. United States, 301 F.3d 1328 (Fed.Cir. 2002), cert. denied, 123 S.Ct. 2572 (2003).

regulation is primarily designed to protect other private property owners, or the community at large, from harm. Because this regulation serves to benefit publicly owned lands, the court suggested, it raises a greater concern about whether the government is imposing a regulatory burden on private property owners that in fairness and justice should be borne by the public as a whole.

There is, in must be acknowledged, an intuitive plausibility to the distinction suggested by the court of claims. Indeed, Professor Joseph Sax, in a 1966 law review article, developed a theory of taking jurisprudence that rested on the distinction between government actions that "enhance[] the economic value of some governmental enterprise," and actions designed to "improve[]... the public condition through resolution of conflict within the private sector," a distinction that arguably parallels the distinction drawn by the court of claims. See Joseph L. Sax, "Takings and the Police Power," 74 Yale Law Journal 36, 37 (1996). Importantly for present purposes, however, Professor Sax expressly repudiated this theory in a second law review article, published five years later. See Joseph L. Sax, "Takings, Private Property and Public Rights," 81 Yale Law Journal 149, 150 n.5 (1971) ("I am compelled.... to disown the view that whenever government can be said to be acquiring resources for its own account, compensation must be paid. I now view the problem as considerably more complex.") So far as we

know, following Professor Sax's in depth examination of the issue, no court other than the court of claims in this case has placed the same decisive weight on the fact that a regulation protects public resources. Cf. Maryland Port Administration v. QC Corp., 529 A.2d 829, 833 (Md. 1987) (rejecting the enterprise theory of takings liability and observing that Professor Sax has "disavowed" the theory).

Instead, Supreme Court precedent confirms that whether government action benefits public resources is a factor appropriately addressed, along with other factors, as part of the Penn Central analysis. Indeed, in Penn Central itself, the Court identified the issue of whether a government action can be characterized as the "acquisition[] of resources to permit or facilitate uniquely public functions" as one factor for consideration in the "essentially ad hoc factual inquiries" governing takings analysis generally. See 438 U.S. 103, 134, 138. See also Eastern Enterprises v. Apfel, 524 U.S. 498, 544 (1998) (Kennedy, J. concurring) (recognizing that "there are instances where the Government's self-enrichment may make it all the more evident a taking has occurred").

The error committed by the trial court was not in assigning some significance to the fact that the United States owned the surface estate of the lands at issue in this case, but rather in giving this factor decisive importance through application of a per se analysis. The Supreme Court and this Court have made

clear that the per se takings categories are narrowly drawn and must be carefully confined to two basic situations, where the government causes a physical occupation of private property and where regulations deprive the owner of a fee simple estate of all of the property's value. Government benefit to publicly owned lands does not fall into either of these categories and is appropriately considered as a factor, along with other relevant factors, under Penn Central. It was error for the Court to rely upon this factor to support a finding of a per se taking.

Given the basic nature of the taking claim in this case, it would be inappropriate for the Court to consider in this appeal how this factor might actually be considered in a properly framed Penn Central case. As discussed, the taking claim in this litigation rests on the theory that Stearns suffered a taking as a result of the requirement that it seek a valid existing rights determination or a compatibility determination. For the reasons explained above, the mere imposition of a regulatory review process cannot, as matter of law, constitute a taking. This is the case regardless of whether the taking claim is framed as a

categorical claim or a Penn Central claim. And this conclusion is not altered by the fact that, in this case, the regulatory authority was allegedly being exercised to protect publicly owned lands. This single factor cannot convert a fundamentally illegitimate taking claim into a legitimate taking claim.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the U.S. Court of Federal Claims.

Respectfully submitted,

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April 2, 2004.