# LAKE TAHOE CLARITY AND TAKINGS JURISPRUDENCE: THE SUPREME COURT ADVANCES LAND USE PLANNING IN *TAHOE-SIERRA*

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## I. INTRODUCTION

The Tahoe Regional Planning Agency ("TRPA") is the government entity charged with regulating the part of the world that Mark Twain called "the fairest picture the whole earth affords."[1] Since its inception pursuant to the Compact Clause of the Constitution,[2] TRPA has repeatedly been accused of violating the Fifth Amendment's prohibition against taking property without just compensation for its regulations governing development in the Lake Tahoe Region.[3] In April 2002, the U.S. Supreme Court decided *Tahoe-Sierra Preservation Council v. TRPA* ("Tahoe-Sierra"),[4] a longstanding battle over the constitutionality of a temporary planning moratorium used to preserve the status quo while TRPA undertook a comprehensive planning effort. The six-justice majority ruled in favor of TRPA, finding that the 32-month development freeze was constitutionally sound and, therefore, TRPA did not have to pay affected landowners. The decision extends well beyond Lake Tahoe, advancing rational planning and environmental protection nation-wide.

The recent TRPA victory is a welcome addition to the chaotic precedent that comprises modern takings jurisprudence. Ever since the Fifth Amendment was interpreted to require compensation for regulations

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1 MARK TWAIN, ROUGHING IT 187 (Penguin Books 1981) (1872).

2 U.S. CONST., Art. I, § 10, cl. 3. TRPA is one of several "Compact creatures" through which two or more states regulate a shared natural resource. Another is the Columbia River Gorge Commission, authorized by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544 (1986).

3 The Takings Clause reads as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. This protection was "designed to bar Government from forcing some people alone to bear the burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

4 Tahoe-Sierra Pres. Counsel v. TRPA, 535 U.S. 302, 122 S.Ct. 1465 (2002) [hereinafter *Tahoe-Sierra*] (This article refers to *Tahoe v. Sierra* in the unofficial reporter because the pagination in the official reporter is not yet available.)

eighty years ago,[5] the decisions have been inconsistent at best. In recent times, the Supreme Court's regulatory takings cases have invariably restricted the ability of government to protect resources without triggering the constitutional obligation to compensate.[6] The new moratorium decision is the second TRPA takings challenge heard by the Supreme Court in the past five years. As set forth in this article after a brief background on TRPA, both cases contribute significantly to regulatory takings law. In 1997's *Suitum v. TRPA*,[7] the Court was presented with TRPA's transferable development rights ("TDR") program. The majority ruled on procedural grounds and sidestepped the broader constitutional issue concerning TDRs. Fortunately, the High Court avoided making law that would have substantially curtailed the ability of government to regulate the environment for the benefit of all without having to pay an affected few.

*Tahoe-Sierra*, hailed as the "environmental case of the decade,"[8] stands in sharp contrast to *Suitum*. The majority not only addresses head-on the constitutionality of moratoria, but creates takings law that will facilitate efficient resource planning across the county. With respect to the evolving regulatory takings doctrine, *Tahoe-Sierra* marks a "turning of the tide,"[9] which "restores needed balance to the judicial takings analysis."[10]

## II. Background

There is no place on earth like Lake Tahoe.[11] Surrounded by the majestic peaks of the Sierra Nevada mountain range, the large (191

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[5] Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (Justice Holmes' famous explanation that "while property may be regulated to a certain extent, if a regulation goes 'too far' it will be recognized as a taking.")

[6] "The [*Tahoe-Sierra*] decision represents the first clear-cut win for the government side in a land use of environmental takings case before the high court in 15 years." John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ELR 11235, 11235 (2002).

[7] Suitum v. TRPA, 520 U.S. 725 (1997).

[8] *Nina Totenberg, National Public Radio, Morning Edition,* April 25, 2002.

[9] *See* Echeverria, *supra* note 6.

[10] Richard Lazarus, *Celebrating Tahoe-Sierra*, Litigating Regulatory Takings Claims, Georgetown Environmental Law & Policy Institute (Berkeley, CA, Oct. 10-11 2002), on file with author.

[11] The two most similar geological formations are Crater Lake in Oregon and Lake Baikal in Russia. *See Tahoe-Sierra*, 122 S.Ct. at 1471, n. 2 *citing* S. Rep. No. 91-510, pp. 3-4 (1969). Crater Lake is located within a National Park and, therefore, is immune from the development pressures present at Lake Tahoe. *See* National Park Service, <<www.nps.gov>>. However, Lake Baikal – the world's largest, deepest, and oldest freshwater lake – faces environmental challenges commensurate with its dimensions, which dwarf Lake Tahoe in virtually every comparison, including: surface area (Baikal's 31,471 $km^2$ to Tahoe's 499 $km^2$), volume (Baikal's 23,000 $km^3$ to Tahoe's

square miles) and deep (average depth 1,027 feet) alpine lake is renowned for its spectacular water quality.[12] The sweeping views of inspiring mountains and forested landscapes are magnified exponentially when reflected in the "noble sheet of blue water."[13] On his first visit to Lake Tahoe, Mark Twain compared the perspectives: "Both pictures were sublime, both were beautiful; but that in the lake had a bewildering richness about it that enchanted the eye and held it with the stronger fascination."[14] Unfortunately, rapid development in the Lake Tahoe basin since the 1950s has yielded a corresponding decrease in water clarity. As recognized by the California Supreme Court over thirty years ago, "the region's natural wealth contains the virus of its ultimate impoverishment."[15]

California and Nevada realized that an unprecedented approach was required by the threat of unregulated development at Lake Tahoe.[16] The states agreed to the Tahoe Regional Planning Compact, which was approved by Congress in 1969.[17] The Compact states that, "to maintain an equilibrium between the region's natural endowment and its man-made environment . . . an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development" is needed at Lake Tahoe.[18] TRPA survived early legal challenges to its constitutionality,[19] but was unable to set up an effective regulatory regime because the 1969 Compact was inherently flawed. For instance, projects in the Tahoe Region would be automatically approved unless a

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156 km$^3$), or deepest point (Baikal's 1,637 m to Tahoe's 505 m). *See* Tahoe-Baikal Institute, <<http://www.tahoebaikal.org./lakeinfo/>>. Baikal faces environmental challenges, including point-source pollution from a government-owned factory, not experienced at Lake Tahoe. An international exchange program, the Tahoe-Baikal Institute ("TBI") was created in 1992 to expose students from both countries to the conservation approaches at both lakes. *See id.* at <<http://www.tahoebaikal.org./about/>>.

12 *See* DOUGLAS H. STRONG, TAHOE: AN ENVIRONMENTAL HISTORY 1 (1984).

13 TWAIN, *supra* note 1, at 187.

14 *Id.* at 195.

15 People ex rel. Younger v. County of El Dorado, 5 Cal.3d 480, 485, 487 P.2d 1193 (1971).

16 Perhaps the single-most important event for making the states realize the problem of unregulated development was the construction of the Tahoe Keys in the City of South Lake Tahoe. In the early 1960s, developers drained and filled a large marsh adjacent to Lake Tahoe's south shore to create strips of development, each with lake access. The environmental consequences have been severe, including a rapid increase in untreated sediment entering Tahoe and a tremendous loss of fish spawning habitat.

17 *See* Pub. L. 91-148, 83 Stat. 380 (1969) [hereinafter *1969 Compact*].

18 *1969 Compact*, Art. I(c).

19 People ex rel. Younger, 5 Cal. 3d 480 (rejecting argument that the 1969 Compact was unconstitutional because it improperly imposed improper taxes on local governments and unlawfully delegated legislative power to an administrative agency, among other arguments).

majority of TRPA's Governing Board members voted otherwise.[20] Other significant deficiencies included the lack of specific environmental targets and the absence of requirements for environmental documentation.[21] Despite the inadequacies of the 1969 Compact, the genesis of TRPA represents a giant step towards controlling growth and preserving the spectacular natural resource shared by Nevada and California.[22]

### *A. The Threat of Eutrophication*

TRPA from the outset realized that Lake Tahoe's greatest threat is the increased sediment loading as a result of development interfering with natural snow runoff patterns. The placement of impervious coverage onto environmentally sensitive areas causes more sediment to enter the Lake Tahoe. In a process known as eutrophication, the nitrogen and phosphorous in the sediment stimulates algal growth, turning the Lake's famous cobalt blue to a lackluster green,[23] thereby decreasing overall environmental health. Wetlands adjacent to the Lake and along mountain streams are critical because, once covered, these properties cease to function as natural sediment filters.[24] Moreover, given the geography of the basin, sediment that enters Lake Tahoe will stay there for a "very, very long time."[25] As a result of unrestrained development, "[t]he Lake lost about one half-meter of clarity between the early 1970s and the 1980s threatening both 'economic and ecological collapse' in the Tahoe Basin."[26]

To focus development away from sensitive lands, TRPA in 1972 adopted an ordinance that incorporated the system of land classification named for its inventor Robert G. Bailey.[27] The Bailey System carves the Tahoe Region into land capability districts based on steepness and flood

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20 *1969 Compact*, Art. VI (k).

21 *See* GARY A. OWEN, TAHOE REGIONAL PLANNING AGENCY, CALIFORNIA ENVIRONMENTAL LAW, § 64.04[6].

22 As a bi-state entity, TRPA confronts numerous jurisdictional anomalies. For instance, lakefront property owners in Nevada own in fee up to the low water mark (N.R.S. § 321.595 (1979)) while lakefront property owners in California own only to the high water mark (State v. Superior Court, 29 Cal. 3d 240, 625 P.2d 256 (1981)).

23 *See* Tahoe-Sierra Pres. Council v. TRPA, 34 F.Supp.2d 1226, 1231 (D. Nev. 1999) [hereinafter *Tahoe-Sierra*] (Judge Reed describing the process of "eutrophication").

24 *See id.* at 1231 ("When SEZ lands are filled in and paved over, they cease to perform their natural function.")

25 *Id.* ("Estimates are that, should the lake turn green, it could take over 700 years for it to return to a natural state, if that were ever possible at all.")

26 Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J.LAND USE & ENVTL. L. 179, 187 (1997), *citing* Respondent's Brief at 3, Suitum v. TRPA, No. 96-243 (1997).

27 *See* TRPA Ordinance No. 4 (1972), on file at TRPA.

hazard, among other indicators.[28] Those most capable of development were designated as Class 7 and those least supportive were assigned Class 1.[29] The Bailey System designates as Class 1b or stream environment zone ("SEZ") the most environmentally sensitive lands in the basin. TRPA's early identification of these fragile areas represents a major accomplishment towards protecting the "jewel of the Sierra" for future generations.

### *B. The 1980 Compact and 1981-1984 Moratorium*

In 1980, Congress approved a new Compact that provided TRPA with significantly clarified direction and heightened regulatory authority.[30] Perhaps the most important aspect of the 1980 Compact was the use of "environmental threshold carrying capacities" ("thresholds")."[31] This innovative planning device set forth environmental standards to be achieved for different resources, such as air and water.[32] The 1980 Compact directed TRPA to adopt these thresholds and, within one year thereafter, produce a comprehensive regional plan to ensure that the thresholds are attained.[33] To prevent the degradation of sensitive lands from adversely affecting Lake Tahoe while working on the thresholds, TRPA adopted Ordinance 81-5. This regulation "temporarily prohibit[ed] most residential and all commercial construction on land capability districts 1, 2, 3 and SEZs until a new regional plan was developed."[34] TRPA's nine thresholds were adopted on August 26, 1982, but the plan was not finalized on that date in 1983. Concerned about its authority to permit development in the Tahoe Region, TRPA adopted Ordinance 83-21 which "completely suspended all project review and approvals, including the acceptance of new proposals, for a period of ninety days."[35] Because TRPA did not yet have its plan in place on November 26, 1983, the blanket moratorium was extended informally.

### *C. The 1984 and 1987 Regional Plans*

The moratorium ended when TRPA adopted its regional plan on April 26, 1984. In order to attain the thresholds, this plan prohibited

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[28] *See* ROBERT G. BAILEY, U.S. FOREST SERVICE, U.S. DEPT. OF AGRICULTURE, LAND-CAPABILITY CLASSIFICATION OF THE LAKE TAHOE BASIN, CALIFORNIA-NEVADA, A GUIDE FOR PLANNING (1974), on file at TRPA.

[29] *See id.*

[30] *See* Pub. L. 96-551, 94 Stat. 3233 (1980) Cal. Gov. Code §§ 66800 *et seq.*, N.R.S. §§ 277.200 *et seq.*, *available at* www.trpa.org [hereinafter *1980 Compact*].

[31] *1980 Compact*, Art. I(b).

[32] TRPA has thresholds for water quality, air quality, noise, recreation, soils, vegetation, wildlife, fisheries and scenic quality.

[33] *See 1980 Compact*, Arts. V(1)(b), (c)

[34] *Tahoe-Sierra*, 34 F.Supp.2d at 1233.

[35] *Id.* at 1235.

development on lands with Bailey land districts 1, 2, and 3 in all but the rarest of circumstances.[36] Nevertheless, the 1984 Plan was perceived as deficient and its adoption was met with swift legal challenges from the State of California and the League to Save Lake Tahoe.[37] The Plan never took effect; Judge Garcia of the Eastern District of California ordered an injunction to prevent implementation while all stakeholders (including affected property owners) negotiated a settlement.[38] During this time, development was severely restricted in the Tahoe Region. The injunction was lifted in 1987 after TRPA adopted its 1987 Regional Plan, the result of an unprecedented consensus building process. Like its 1984 counterpart, the 1987 Plan prohibited the placement of coverage on sensitive lands.[39] However, the 1987 Plan redefined those parcels designated as sensitive by adopting a more sophisticated structure to overlay the Bailey System, the Individual Parcel Evaluation System ("IPES").

IPES is a point priority system that ranks vacant lots in the Tahoe Region eligible for single-family residences according to their suitability for development.[40] Vacant parcels in the Tahoe Region were "IPESed" in the late 1980s, *i.e.* scored by an interdisciplinary team of scientists based on factors relating to the capability for development. The more capable parcels received higher scores, and those scoring above 725 were immediately developable; those beneath must await TRPA's annual review to determine whether to lower the line.[41] IPES operates on the premise that buyout agencies, namely the U.S. Forest Service and the California Tahoe Conservancy, will purchase sensitive lands and remove them from the inventory of developable parcels in Tahoe. The IPES line only lowers if a certain, pre-determined number of lots having scores beneath the line have their development potential eliminated.[42] The annual

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36 *See id.* at 1236

37 *See id.*

38 *See* California ex rel. Van de Kamp v. TRPA, 1984 WL 6591 (E.D. Cal. 1984), *aff'd* 766 F.2d 1308 (9th Cir. 1985).

39 *See* TRPA Code of Ordinances ("Code") § 20.4.A (1987), *available at* www.trpa.org (prohibiting additional land coverage or other permanent land disturbance in stream environment zones).

40 *See* Chapter 37, TRPA Code.

41 *See* TRPA Code § 37.8.C.

42 IPES contains what is known as the "vacant lot equation" – a specific formula to determine whether the line can be lowered. The numerator is "the number of parcels having scores below the level defining the top ranked parcels" and the denominator is "the number of parcels in that jurisdiction that were identified as sensitive by TRPA on January 1, 1866." TRPA Code § 37.8.C(1)(e). The denominator, a fixed figure was adopted by TRPA in 1990. The numerator changes every year based on the amount of purchased lots in each jurisdiction, and the fraction is evaluated annually by TRPA. The IPES line can only drop if the vacant lot equation equals a predetermined percentage: 20% in California and 33% in Nevada. *See Id.*

analysis is performed independently for each of the four counties.[43] Although SEZ lots are given an automatic zero in the IPES scoring system for administrative convenience,[44] they cannot be developed owing to their status as the most sensitive in the basin.[45] IPES has met with legal challenges,[46] which continue to this day.[47]

Another important aspect of the 1987 Regional Plan involves the use of transferable development rights ("TDRs"). TRPA provides certain properties with TDRs to be either utilized or sold on the open market.[48] Two such TDRs, impervious land coverage and residential development rights, attach to all vacant lots in the Tahoe Region regardless of whether or not they can be developed. Every such parcel – even those designated as SEZ – has one development right (a conceptual ability to construct a single-family residence)[49] and a specific allotment of

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[43] The IPES line has dropped to virtually the bottom of the inventory in Nevada (Washoe and Douglas Counties) but has yet to move in California. Although the line is expected to drop in the near future for El Dorado, the prognosis is less sanguine for Placer County. *See* TRPA staff reports, on file at TRPA.

[44] *See* TRPA Code § 37.4.A(3) ("Parcels containing no area outside of an SEZ or SEZ setback shall receive a total score of zero.")

[45] *See* TRPA Code § 20.4. Although there are several exceptions to the SEZ coverage prohibition, they will apply in only the rarest of circumstances. *See* TRPA Code § 20.4.B.

[46] *See* TRPA v. Kelly, 855 P.2d 1027 (Nev. 1993) (Nevada Supreme Court rejecting a facial takings challenge to IPES).

[47] On September 18, 2002, the Ninth Circuit heard oral arguments on a challenge to the IPES system mounted by the Tahoe-Sierra Preservation Counsel ("TSPC") in 2000. TSPC, representing owners of SEZ lots and other parcels below the IPES line, argued that the system effected a taking for which "just compensation" was warranted. U.S. Const., Art. V. TRPA successfully had the case dismissed in the Eastern District of California. Judge Karlton in July 2000 found that the lawsuit was barred by the statute of limitations because IPES was adopted in 1987, the parcels received their IPES score in the late 1980s, and the vacant lot equation denominator was in place by 1990. *See* Tahoe-Sierra Pres. Council v. TRPA, No. CIV S-00-50 LKK DAD, July 28, 2000, Order Granting TRPA's Motion to Dismiss at 12, 14, 18 (E.D. Cal. 2000) [hereinafter *Tahoe-Sierra*], on file at TRPA. The Ninth Circuit originally set oral arguments fro September 2001, but postponed review of the appeal pending action by the Supreme Court after certiorari was granted the original TSPC lawsuit. At the September 2002 oral arguments, the panel – including Judge Reinhardt – asked informed questions focusing on whether IPES lends itself to creating timely challenges each year when TRPA performs the ministerial act of calculating the vacant lot equation and determining whether to lower the IPES line in each jurisdiction. A decision is expected in the upcoming months. *See infra* notes 116, 163.

[48] The TRPA Code establishes five types of TDRs: Coverage; Residential Development Rights; Residential Allocations; Commercial Floor Area; and Tourist Accommodation Units.

[49] A single-family home can only be constructed on a vacant parcel in the Tahoe Region if a residential development right is combined with another TDR, the government-issued residential allocation. Just as a sperm and egg combine to create the zygote, the development right and allocation combine to create a present ability to

coverage.[50] Owners of parcels that are ineligible for development can sell their development right to another property anywhere in the Tahoe Region. Unlike development rights, coverage may only be transferred within the nine scientifically-derived "hydrologic zones" within the Tahoe basin.[51] The concept behind the TDR program is to engage market forces to facilitate a shift in development away from environmentally sensitive lands towards those more capable of supporting development. Another important function of TDRs is to provide economic value to those property owners in the Tahoe Region without the present ability to build a home. As stated by the Supreme Court, TRPA "addresses the potential sharpness of its restrictions by granting property owners TDR's that may be sold to owners of parcels eligible for construction."[52]

## III. *SUITUM v. TRPA*

In 1972, Bernadette Suitum purchased a vacant parcel in Incline Village, Nevada.[53] The lot was subsequently designated SEZ and she was prevented by TRPA's regulations from building a home on her property. TRPA denied Ms. Suitum's application for a building permit,[54] as TRPA's regulations prohibit the placement of impervious coverage on her SEZ parcel.[55] Ms. Suitum mounted an "as applied" challenge to TRPA's regulations seeking just compensation under the Fifth Amendment, claiming that TRPA's SEZ coverage restriction deprived her of "all reasonable and economically viable use" of her property.[56] Her lawsuit made it all the way to the U.S. Supreme Court, although the majority opinion dealt exclusively with the procedural hurdle of "ripeness." Justice Scalia, however, wrote a concurring opinion that would consider the value of Suitum's TDRs only in determining whether the compensation was sufficient, suggesting that TRPA's SEZ regulations effect a categorical regulatory taking. *Suitum* is more important for its avoidance of this

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build. All property owners in the Tahoe Region are eligible to receive allocations from their county, although a lottery system is typically employed when demand outstrips supply.

50 The amount of "base coverage" attributed to each vacant parcel corresponds to its Bailey coefficient. *See* TRPA Code § 20.3.A. The most capable properties are given base allowable coverage in the amount of thirty percent of their total area while SEZ parcels have only one percent. *See id.*

51 Hydrologic zones prevent the concentration of coverage in certain portions of the Tahoe Region. Given the drastically different real estate markets around Tahoe, prices for coverage differ dramatically amongst hyrdrologic zone. For instance, coverage fetches approximately $25 per sq. ft. in Incline Village and only $5 per sq. ft. in the City of South Lake Tahoe. TRPA staff reports, on file at TRPA.

52 *Suitum*, 520 U.S. at 730.

53 *See id.* at 730.

54 *See id.* at 731.

55 *See* TRPA Code § 20.4.

56 *Suitum*, 520 U.S. at 731.

dangerous precedent advocated by the concurring justices than for its narrow ripeness holding.

### *A. The Majority Opinion*

One of TRPA's defenses throughout the *Suitum* litigation was that her challenge was not "ripe" for review. Article III of the U.S. Constitution requires that federal courts only consider controversies that are sufficiently ready for judicial resolution.[57] TRPA argued that as a prerequisite to bringing suit, Ms. Suitum had to realize the TDRs that belonged to her SEZ lot. The actual value of her TDRs remained unknown prior to and during her challenge because she refused to participate in TRPA's TDR program, which she considered an "idle and futile" exercise.[58] At trial, TRPA set forth evidence of a robust market for the TDRs.[59] The District of Nevada and Ninth Circuit agreed with TRPA that the TDRs were valuable and that Ms. Suitum did not have a ripe takings challenge unless and until their actual value was known:

> Without an application for the transfer of development rights there would be no way to know the regulation's full economic impact of the degree of their interference with [Suitum's] reasonable investment-backed expectations, and without action on a transfer application there would be no final decision from [the agency] regarding the application of the regulation[s] to the property at issue.[60]

Writing for the majority, Justice Souter reversed the lower court holdings and found that Ms. Suitum need not realize her TDRs prior to challenging TRPA.[61] An agency must make all of its discretionary decisions prior to a challenge being ripe for review,[62] and TRPA did not retain any discretion with respect to Suitum's TDRs.[63] While the valuation of Suitum's TDRs would certainly be relevant in the proceedings, this could be accomplished through testimony from a qualified appraiser.[64] Finally, the Supreme Court found that the issues presented by Suitum's constitutional challenge were "fit[ ]" for "judicial decision" because she

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[57] *See e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[58] *Suitum*, 520 U.S. at 732.

[59] *See id.*

[60] *Suitum*, 505 U.S. at 733, *quoting* Suitum v. TRPA, 80 F.3rd 359, 362-363 (9th Cir. 1996). *See also* Suitum v. TRPA, March 30, 1994, Order, Judge Reed, CV-N-91-040-ECR (D. Nev).

[61] *See Suitum*, 520 U.S. at 744.

[62] *See* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

[63] *See Suitum*, 520 U.S. at 739-40 ("The parties agree on the particular TDR's to which Suitum is entitled, and no discretionary decision must be made by any agency official for her to obtain them or to offer them for sale.")

[64] *See id.* at 742.

was merely seeking compensation and not attempting to invalidate TRPA's SEZ regulations.[65] The case was remanded back to the District Court, but the parties settled before trial.[66] The Supreme Court had "no occasion" to rule on the broader implications of TDRs and takings law.[67]

### *B. The Scalia Concurrence*

The *Suitum* outcome was highly anticipated by land use lawyers because the Supreme Court was expected to clarify the role of TDRs in the planning process.[68] Suitum, and her pro property-rights counsel,[69] sought a ruling in which TRPA had to compensate because its SEZ regulations prevented her from using her property (*i.e.* developing a home thereon). This position was based on *Lucas v. S. Carolina Coastal Comm'n*.[70] There, in 1992, the Supreme Court considered beachfront property deprived of economically viable use by state action protecting against erosion and held that such regulations require automatic compensation – without regard to the purposes of the regulation.[71] Although SEZ lots in the Tahoe Region cannot be developed, unlike the affected property in *Lucas*, they contain valuable TDRs that can be transferred for use on properties deemed capable of supporting development. TRPA defended its SEZ regulations arguing that these TDRs provide un-developable properties with significant value, thereby avoiding a "categorical" taking designation pursuant to *Lucas*.[72] Given the use of TDRs by planning entities around the United States,[73] whether TDRs are sufficient to preclude a taking presented a critical, unresolved issue in the area of land use planning.

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65 *Id.* at 744, *quoting Abbot Laboratories*, 387 U.S. at 147-148.

66 TRPA paid Ms. Suitum $600,000 to settle the lawsuit.

67 *Suitum*, 520 U.S. at 728.

68 The author remembers taking a Land Use Planning course at the University of Colorado School of Law in the Spring of 1997. Adjunct Professor Madeline Mason was an attorney for Boulder County, which employs a sophisticated TDR program. She informed the class that the decision was expected to clarify the viability of TDR programs, thereby affect planning nation-wide.

69 Ms. Suitum was represented by Pacific Legal Foundation, which was keenly aware of the agenda advancement opportunities presented by *Suitum*. *See* Lazarus, *supra* note 26, at 196-200.

70 Lucas v. S. Carolina Coastal Comm'n, 505 U.S. 1003 (1992).

71 *See id.* at 1019. In a *Lucas* situation, the character of the government action is only relevant to the extent that the regulation at issue cannot effect a taking for prohibiting a use that was already impermissible under "background principles of the State's law of property and nuisance." *Id.* at 1029.

72 *See* Lazarus, *supra* note 26, at 203-204.

73 The more well-known TDR programs in the United States include: Montgomery County, Maryland; Boulder County, Colorado; City of Malibu, California; and the New Jersey Pinelands Program.

Although the procedural posture of *Suitum* prevented the Supreme Court from adjudicating the merits,[74] Justice Scalia (joined by Justices Thomas and O'Connor) issued a separate opinion answering the question left unresolved by the majority.[75] According to the concurring justices, the value of TDRs is relevant only for the limited purpose of calculating just compensation.[76] If a regulation results in a taking, the government is constitutionally mandated to provide market value as just compensation; TDRs may partially or completely satisfy the constitutional requirement. The notion that property rendered useless by regulation cannot be "taken" so long as it is given TDRs was dismissed as a "clever, albeit transparent" attempt to circumvent the Fifth Amendment and pay less than just compensation.[77]

### C. *The Precedent*

*Suitum* narrowly holds that property owners need not realize the value from their TDRs before bringing a takings claim given the ability of appraisers to approximate those values.[78] Although this ruling was adverse to TRPA, the precedent is quite limited. The position advocated by the concurring justices, however, would have dramatically altered regulatory takings jurisprudence to the detriment of TRPA, government, and ultimately the environment. There are many problems with holding that TDRs are relevant only for compensation purposes, most notably that it directly contradicts the Supreme Court's 1978 decision *Penn Central v. City of New York*.[79] There, New York's Landmark Preservation Law prevented the plaintiff from building atop Grand Central Terminal, although the property was provided with valuable TDRs.[80] The Supreme Court found that no taking had occurred, by balancing three factors: (1) the economic impact of the regulation; (2) the existence of reasonable, investment-backed expectations; and (3) the character of government ac-

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[74] "Because the lower courts dismissed Suitum's complaint on ripeness grounds, the threshold question of ripeness is the only legal issue before the Court." Lazarus, *Litigating Suitum*, *supra* note 26, at 194.

[75] *See* Suitum v. TRPA, 520 U.S. 745 (1997) (Scalia, J., concurring).

[76] *See id.* at 747 (Scalia, J., concurring) ("Just as a cash payment from the government would not relate to whether the regulation 'goes too far' (*i.e.*, restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also *the marketable TDR*, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, *relates not to taking but to compensation.*") (emphasis added).

[77] *Id.* at 748 (Scalia, J., concurring).

[78] *Id.* at 728-729.

[79] *See* Penn Central Transp. Corp. v. City of New York, 438 U.S. 104, 124 (1978)

[80] *See id.* at 104.

tion.[81] The "economic impact" factor considered the loss in value attributable to the height restriction, but also the value added by the TDRs.[82] The *Suitum* concurrence would have reversed that aspect of *Penn Central*, thereby significantly undermining the precedent.

The most dangerous aspect of the *Suitum* concurrence is the three justices' desire to focus the takings inquiry exclusively on "use" and ignore the remaining "value" of regulated property. *Lucas* is cryptic in its automatic compensation requirement for regulations that render property devoid of "economically beneficial or productive use,"[83] begging the question of whether property that retains value can qualify as a *per se* taking. In *Suitum*, the District Court found that the subject SEZ property retained significant value (with or without TDRs),[84] even though TRPA regulations prevented Ms. Suitum from constructing a residence on her SEZ property.[85] Under a *Penn Central* analysis, the remaining value of the regulated property, including TDRs, is relevant in evaluating the "economic impact" factor.[86] The concurring justices felt that a deprivation of use – ostensibly Suitum's inability to develop a home – should trigger *Lucas'* automatic compensation requirement. Such a holding would have elevated *Lucas*, potentially rendering irrelevant the character of the government action behind the regulation any time a property owner cannot use his or her property as desired. Given the government's obligation to protect natural resources, the more flexible and encompassing *Penn Central* test should be implicated when regulations prohibit some uses but affected properties retain significant value.

Fortunately, the extreme view of the concurrence was not endorsed by a majority of the Supreme Court.[87] *Suitum* left open the possibility that regulated property deprived of use but retaining value would not be considered a taking. This contentious use/value aspect of takings law would be revisited five years later when the justices considered another challenge to TRPA's planning for the protection of Lake Tahoe. The

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81 *See id.* at 124.

82 *See id.* at 137. *See also* Lazarus, *supra* note 26, at 205.

83 *Lucas*, 505 U.S. at 1015.

84 *See Suitum*, 520 U.S. at 732. "[T]he uncontroverted evidence before the trial court is that [Ms. Suitum's] TDRs possess substantial market value — as high as $56,000. There is also uncontradicted evidence at trial that the land itself retained a market value of approximately $16,000 because neighbors would be interested in expanding the size of their lots surrounding their existing homes." Lazarus, *supra* note 26, at 202, *citing* Suitum v. TRPA, No CV-N-91-040-ECR (D. Nev. Filed Mar. 30, 1994).

85 *See* TRPA Code § 20.4.

86 *Penn Central*, 438 U.S. at 137; *See also* Lazarus, *supra* note 26, at 205.

87 This outcome was not happenstance. TRPA's legal team, especially Georgetown Law Professor Richard Lazarus, effectively minimized the precedential effect of an adverse ruling through forethought and strategy. *See* Lazarus, *supra* note 26, at 199-205.

moratorium case presented a situation where a regulation temporarily prohibits use but the affected property retains both present value and future use. In 2002, a majority of justices found that such a limited use prohibition does not automatically require compensation,[88] confining *Lucas* and elevating *Penn Central* in the process.

## IV. *TAHOE-SIERRA*: THE DISTRICT OF NEVADA

If TRPA has a nemesis, it is the property rights organization known as the Tahoe-Sierra Preservation Council ("TSPC").[89] The organization is made up of hundreds of present and former property owners in the Lake Tahoe. The parcels owned by TSPC members are in California and Nevada and have been designated at some time by TRPA as environmentally sensitive. Although SEZ parcels are well represented, TSPC also includes those beneath the IPES line (or with land classifications 1, 2, and 3 under the Bailey System). TSPC first sued TRPA and both states in 1984 seeking just compensation under the Takings Clause. California and Nevada quickly dismissed themselves because the Eleventh Amendment immunizes them from money damages.[90] TRPA was unable to extricate itself, as the Supreme Court in 1979 expressly concluded that TRPA does not share in the states' sovereign immunity.[91] In its amended pleadings, TSPC sought compensation from TRPA for the restrictions on development alleged to constitute a taking for three distinct time periods:

- *1981-1984*: when TRPA instituted a basin-wide development moratorium on sensitive parcels while it prepared a regional plan;
- *1984 -1987*: when development was restricted pursuant to a court-ordered injunction; and
- *After 1987*: challenging the development restrictions contained in the 1987 Regional Plan.

Years of litigation ensued, with three decisions by the Ninth Circuit on procedural aspects of the case, such as whether TSPC's causes of ac-

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88 *Tahoe-Sierra*, 535 U.S. 302, 122 S.Ct. 1465 (2002).

89 The Tahoe Sierra Preservation Council is "[d]edicated to preserving property rights . . . while preserving Lake Tahoe's spectacular beauty and unique qualities." Tahoe Sierra Preservation Council letterhead, on file with author.

90 *See* U.S. Const., Amend. XI; *Ex parte Young*, 209 U.S. 123 (1908).

91 Lake Country Estates, Inc. v. TRPA, 440 U.S. 391 (1979). It should be noted that the Supreme Court's conclusion that TRPA does not share in the states' sovereign immunity is based on an analysis of the 1969 Compact. *See id.* at 402. It is entirely possible that the Supreme Court would reach the opposite conclusion using the 1980 Compact, as the 1969 version set up a locally-dominated Governing Board while TRPA currently has a majority of statewide representatives. *See 1980 Compact*, Arts. III(a)(1)(B), (a)(2)(B).

tion were ripe for adjudication.[92] The liability phase was finally tried in 1998 before Judge Reed of the District of Nevada. TSPC mounted a "facial" challenge against the 1981 moratorium, 1984-1987 injunction, and 1987 Regional Plan, alleging that the "mere enactment of the regulations constituted a taking."[93] For this reason, TSPC did not present evidence as to the impact on individual property values – a decision that would prove to be ill-advised.[94] In early 1999, Judge Reed issued an opinion that found TRPA's regulation did effect a taking of the plaintiffs' property, but only during the 32-month planning moratorium.[95] The District Court's rationale for each time period is set out below.

### *A. The 1981-1984 Moratorium*

The District of Nevada held TRPA liable for a temporary categorical taking under *Lucas*. Although evidence established that TSPC properties "did retain some value" during the moratorium, Judge Reed nevertheless found that the TRPA moratorium operated to deprive plaintiffs of all economically viable use of their property.[96] The absence of a "competitive market" for un-buildable lots in the Tahoe Region during the moratorium compelled the finding that plaintiffs were denied economically viable use of their property for 32 months pursuant to Ninth Circuit precedent.[97] Although some uses were allowed during the moratorium, Judge Reed found it "doubtful" that they were economically viable.[98] Reed's opinion claimed to have been supported by the 1987 Supreme Court decision *First English Evangelical Lutheran Church v. County of Los Angeles*.[99] There the Court held that government cannot avoid takings liability by repealing a regulation found to require compensation; the remedy in such situations is to compensate property owners for the time that the regulation was in effect for the temporary taking.[100]

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92 *See* Tahoe-Sierra Pres. Council v. TRPA, 911 F.2d 1331 (9th Cir. 1990); Tahoe-Sierra Pres. Council v. TRPA, 938 F.2d 153 (9th Cir. 1991); Tahoe-Sierra Pres. Council v. TRPA, 34 F.3d 753 (9th Cir. 1994).

93 *Tahoe-Sierra*, 122 S.Ct. at 1476.

94 *See Tahoe-Sierra*, 34 F.Supp.2d at 1241 ("Since the burden is on the plaintiffs to show that a taking occurred (and since that burden is especially heavy in a facial challenge such as this), the fact that they agreed not to introduce this type of evidence works against them. The fact that it is a facial challenge does not mean that all evidence relating to individual plaintiffs is irrelevant at this stage.") It should be noted that, in a case involving hundreds of plaintiffs, providing plaintiff-specific economic impact evidence is no simple task.

95 Tahoe-Sierra v. TRPA, 34 F.Supp.2d 1226 (D. Nev. 1999).

96 *Id.* at 1242.

97 Del Monte Dunes v. City of Monterey, 95 F.3d 1422, 1432-33 (9th Cir. 1996).

98 *Tahoe-Sierra*, 34 F.Supp.2d at 1243.

99 *See* First English Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

100 *See id.*

Consequently, the District Court found that because a *Lucas* taking occurred between 1981 and 1984, TRPA was automatically obligated to compensate plaintiffs for the temporary inability to develop their property.

In his opinion, Judge Reed also conducted an alternate analysis. Assuming that the regulated property retained some economically viable use, the applicable framework would not have been *Lucas* but instead the *Penn Central* framework through which courts determine takings liability by balancing the following factors: (1) the economic impact of the regulation; (2) the extent of interference with reasonable, investment-backed expectations;[101] and (3) the character of government action.[102] Judge Reed found that each of these factors favored TRPA not being held liable. TSPC did not present any specific evidence that their properties were devalued as a result of the moratorium;[103] TRPA's evidence demonstrated that plaintiffs "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land" during the time period at issue;[104] and, finally, the character of TRPA's action strongly weighed against requiring compensation because the moratorium was a reasonable and commendable interim approach to combat the greatest threat to Lake Tahoe's water quality.[105] Nevertheless, Judge Reed felt compelled by *Lucas* and *First English* to find TRPA liable for a categorical temporary taking between 1981 and 1984.[106]

### *B. The 1984-1987 Injunction*

Judge Reed held that TRPA was not responsible for the development prohibition between 1984 and 1987 because the causation necessary

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101 The Supreme Court's 2001 regulatory takings decision dealt with this *Penn Central* factor. Palazzolo v. Rhode Island, 533 U.S. 606 (2001), rejected the government's position that that pre-acquisition notice of the challenged regulation automatically defeats a takings claim. Justice O'Connor wrote a separate concurrence explaining that notice is considered under *Penn Central*'s reasonable, investment-backed expectations factor. *Palazzolo*, 533 U.S. at 632 (O'Connor, J., concurring).

102 *See* Penn Central Transp. Corp v. City of New York, 438 U.S. 104, 124 (1978)

103 *See Tahoe-Sierra*, 34 F.Supp.2d at 1241.

104 *Id.*

105 *Id.* at 1241-1242. Judge Reed placed a disproportionate emphasis on the character of government action factor. *See id.* at 1242 ("Since the *Penn Central* test is essentially a balancing test . . . and since the interest in protecting Lake Tahoe is so strong, any test that takes that interest into account would result in victory for the defendants." [Citations omitted]) Judge Reed's attachment of greater significance to one of the three *Penn Central* factors does not seem consistent with Supreme Court's recent explanation that the balancing should take "all the relevant circumstances" into account. *See Tahoe-Sierra* 122 S.Ct. at 1486, citing *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring).

106 *See Tahoe-Sierra*, 34 F.Supp.2d at 1242-1243.

to find TRPA liable for a taking was lacking.[107] The harm to TSPC resulted from a court-ordered injunction (and was not attributable to actions of TRPA). TSPC alleged that TRPA was liable because the lawsuit and injunction were reasonably foreseeable consequences of the 1984 Plan. The District Court disagreed, as "the lack of a casual connection between the alleged wrongdoing and the purported harm compels the conclusion that TRPA may not be held liable for the effects of the injunction."[108] Further, TSPC's attempt to establish that TRPA was somehow responsible for the injunction was expressly rejected by Judge Reed:

> TRPA was reasonable and acted in good faith in attempting to comply with the Compact. There is no evidence whatsoever to support the plaintiffs' theory that TRPA secretly wanted an injunction against all construction in the Basin, and deliberately passed a deficient regional plan in order to provoke a lawsuit and, subsequently, an injunction.[109]

### *C. The 1987 Regional Plan*

TSPC amended its Complaint in 1991 to seek just compensation for the alleged taking effectuated by the development restrictions contained in TRPA's 1987 Plan. TRPA successfully dismissed the challenge to the 1987 Plan as being barred by the applicable statute of limitations.[110] Constitutional challenges – including takings – must be filed within one year in California and two years in Nevada.[111] TSPC has portrayed this ruling as being overly harsh, as though the 1987 Plan was not reachable due to a

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[107] *See id.* at 1245-1248.

[108] Tahoe-Sierra Pres. Council v. TRPA, 216 F.3d. 764, 785 (9th Cir. 2000) [hereinafter *Tahoe-Sierra*].

[109] *Tahoe-Sierra*, 34 F.Supp.2d at 1248.

[110] There is actually an entire saga concerning the "applicable" statute of limitations. TRPA initially moved to dismiss arguing that the cause of action was barred by the Compact's 60-day statute of limitations. 1980 Compact, Art. VI(j)(4). On appeal, the Ninth Circuit clarified that the appropriate statute of limitations was one year in California and two years in Nevada, because TSPC's takings challenge was brought pursuant to 42 U.S.C. § 1983. *See Tahoe-Sierra*, 34 F.3d at 753, 756. The Ninth Circuit then held that since TRPA had not pled any statute of limitations other than the 60-day period, TSPC's claim was timely. *See id.* On remand, Judge Reed ruled that because TRPA's Answer (filed subsequent to the Ninth Circuit's decision) contained the one-year/ two-year statute of limitations and TSPC's challenge to the 1987 Plan was not made until 1991, the cause of action was not timely. *See Tahoe-Sierra*, 992 F.Supp. at 1220-1221 (D. Nev. 1998). This holding was affirmed by the Ninth Circuit, which referred to its prior statute of limitations decision as "clearly erroneous." *Tahoe-Sierra*, 216 F.3d at 789.

[111] An allegation of infringement of a constitutional right must be brought pursuant to 42 U.S.C. § 1983. *See* Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992). Federal courts apply the state's statute of limitations for claims brought pursuant to 42 U.S.C. § 1983. *See* Wilson v. Garcia, 471 U.S. 261, 278 (1985). The statute of limitations for § 1983 claims is one year in California and two years in

procedural technicality. Although the statute of limitations does prevent TSPC from challenging the regulations currently in existence, TSPC actively participated in the consensus process that resulted in the 1987 Plan. In a point later noted by the Supreme Court, TSPC acknowledged its participation in its 1991 Amended Complaint:

> [T]hrough its authorized representatives, [TSPC] actively participated in the entire TRPA regional planning process leading to the adoption of the 1984 Regional Plan at issue in this action, and attended and expressed its views and concerns, orally and in writing, at each public hearing held by the Defendant TRPA in connection with the consideration of the 1984 Regional Plan at issue herein, as well as in connection with the adoption of Ordinance 81-5 and the Revised 1987 Regional Plan addressed herein.[112]

It remains unclear as to why TSPC did not timely challenge the development restrictions contained in the 1987 Plan. Minutes from the meetings leading up to its adoption reveal that the proposed SEZ prohibition was vigorously debated amongst the stakeholders, including TSPC.[113] Although TSPC vigorously objected the proposed SEZ regulations during the consensus process,[114] its complaint was not timely amended to challenge those restrictions after the 1987 Regional Plan was adopted.[115] TSPC was likely pleased with other aspects of the 1987 Plan, as the regulatory system endows all properties in the Tahoe Region with TDRs and provides for the development of all vacant parcels other than those designated as wholly SEZ. Many of the properties initially deemed as too sensitive for development have been already developed and others must wait for the IPES line to drop.[116] Perhaps, on balance, TSPC decided that it could live with the 1987 Plan, including the prohibition on SEZ development.

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Nevada. *See* Johnson v. California, 207 F.3d 650, 653 (9th Cir. 2000); Perez v. Seevers, 869 F.2d 425, 426 (9th Cir. 1989)

112 *Tahoe-Sierra*, 122 S.Ct. at 1489 n. 35, *citing* Joint Appendix at 24.

113 *See* Minutes, TRPA Consensus Building Workshops, October 3, 17, 23, 1985, April 4, 1986, on file at TRPA.

114 *See id.*

115 *See Tahoe-Sierra*, 992 F.Supp. at 1220-1221; *Tahoe-Sierra*, 216 F.3d at 789.

116 TSPC sued TRPA in 2000, seeking just compensation because the IPES line had not dropped in California. In its complaint, TSPC explained its expectancy that the line would have dropped already in California, as it has in Nevada. However, the number of environmentally sensitive parcels that had to be purchased for the IPES line to drop was set by TRPA in 1990. Judge Karlton of the Eastern District ruled for TRPA, finding TSPC's causes of action to be time-barred because its takings claim under IPES arose in 1990. *See Tahoe-Sierra*, No. CIV S-00-50 LKK DAD, July 28, 2000, Order Granting TRPA's Motion to Dismiss (E.D. Cal. 2000), on file at TRPA. This ruling is currently on appeal before the Ninth Circuit. *See also supra* note 47, *infra* note 163.

## V. *TAHOE-SIERRA*: THE NINTH CIRCUIT

The District Court was never able to conduct a trial on damages. Before a dollar value for which TRPA was liable could be determined, both TRPA and TSPC cross-appealed to the Ninth Circuit. TRPA sought to reverse Judge Reed's ruling regarding the moratorium and TSPC sought a reversal of the holding that TRPA was not liable for either the injunction or the 1987 Plan. Although TRPA appealed the District Court's ruling that the moratoria constituted a *Lucas* taking, TSPC did not appeal the alternate finding that under *Penn Central* TRPA would not have been liable. This tactical decision would prevent TSPC from challenging the District Court's *Penn Central* finding as the case progressed through the federal court system.[117]

### *A. The Reinhardt Opinion*

The Ninth Circuit handed TRPA an all-out victory in its decision rendered on June 15, 2000.[118] TSPC's challenges to the 1984-1987 injunction and the 1987 Regional Plan were dismissed on causation and statute of limitations grounds, respectively.[119] However, the finding that TRPA was liable during the 1981-1984 moratorium was reversed and TRPA held not liable for its 32-month development freeze. Although the affected properties were deprived of economically viable use during that timeframe, the moratorium did not effect a *Lucas* taking because the plaintiffs' property retained "future use ha[ving] a substantial present value."[120] Therefore, the TRPA moratorium presented a partial taking situation properly analyzed under *Penn Central*. Given the unchallenged District Court factor-balancing, the Ninth Circuit found that TRPA was not liable and dismissed TSPC's challenge in its entirety.

Writing for the three-judge panel, Judge Reinhardt rejected the District Court's moratorium analysis. The opinion criticized the lower court for misreading *First English* to find a categorical taking for a "temporal 'slice' of each fee."[121] The Ninth Circuit endorsed a broad conception of property rights by stating that the entire timeframe is to be considered in

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117 *See Tahoe-Sierra*, 122 S.Ct. at 1485 ("Recovery under a *Penn Central* analysis is also foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it.") It would have been extremely unlikely that TSPC would have prevailed under *Penn Central* given the discretion afforded to District Courts in matters of fact-finding and Judge Reed's conclusion that "all three *Penn Central* factors, at least to some extent, weigh[ ] against a finding that TRPA's actions constituted a partial taking". *Tahoe-Sierra*, 34 F.Supp.2d at 1242.

118 *See Tahoe-Sierra*, 216 F.3d 764.

119 *See id.* at 782-789.

120 *Id.* at 781.

121 *Id.* at 774.

analyzing a regulatory taking; the approach of severing temporal segments is only viable when determining compensation for physical takings.[122] Reinhardt praised the planning moratorium as an effective device that prevents deterioration and encourages community participation during the planning process.[123] Indeed, the opinion held that such temporary moratoria – including TRPA's ordinances restricting development on sensitive land until the adoption of the regional plan – do not constitute temporary *Lucas* takings for which just compensation is automatically required.

### *B. The Kozinski Dissent*

TSPC petitioned the Ninth Circuit for an *en banc* rehearing. Although the petition was denied, Judge Kozinski, joined by four other circuit judges, dissented from the denial and wrote a separate opinion harshly criticizing the decision allowed to stand.[124] According to Kozinski, the Supreme Court in *First English* unambiguously found that temporary prohibitions of use (including moratoria) are takings for which just compensation is constitutionally mandated,[125] that economically useless property may retain value or future use is not sufficient to avoid a taking, and that if government can circumvent liability by merely labeling use restrictions as temporary, the result would be "a sizeable loophole to the Takings Clause."[126] Kozinski concludes by chastising his colleagues for playing fast and loose with the Constitution and binding precedent to achieve a pre-determined outcome:

> The panel's desire to ease local governance does not justify approving means that violate rights secured by the Fifth Amendment as authoritatively interpreted by the Supreme Court.[127]

Judge Kozinski's dissent – dubbed his "petition for certiorari" – revealed a deep split within the Ninth Circuit. The majority of judges reject the reading of *First English* and *Lucas* to require automatic compensation for temporary use prohibitions such as TRPA's 32-month planning moratorium. A minority of judges, however, interpret *First English* as conclusively resolving the moratorium question and felt strongly that the Supreme Court would so hold were it presented with the issue.

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122 *See id.* at 779.

123 *See id.* at 777.

124 *See* Tahoe-Sierra Pres. Council v. TRPA, 228 F.3d 998, 999 (Kozinski, J., dissenting).

125 *See id.* at 1001 (Kozinski, J., dissenting) ("The panel does not deny that the moratorium here, like the regulation in *Lucas*, deprived the owners of the use of their property for its duration. But it ignores *First English*'s requirement that the owners be compensated for a temporary taking.")

126 *Id.* (Kozinski, J., dissenting).

127 *Id.* at 1003. (Kozinski, J., dissenting).

Further, Kozinski's dissent relies heavily on the theory that physical appropriations and regulatory takings are to be evaluated identically.[128] Ever since the advent of regulatory takings 80 years ago,[129] courts have struggled with the extent to which they are to be evaluated as their physical counterparts. The moratorium issue squarely presents this conflict because were the government to appropriate property for 32 months, compensation for the time of occupation would obviously be required. It remained to be seen whether the Supreme Court would agree with the Ninth Circuit that, in the context of temporary government action, physical appropriations are analyzed differently from regulatory takings.

## VI. *TAHOE-SIERRA*: THE UNITED STATES SUPREME COURT

The Supreme Court granted TSPC's writ of certiorari on the last day of its 2000-2001 season. Importantly, the Court focused the question presented by granting certiorari only with respect to:

> Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the takings clause of the United States Constitution.[130]

Consequently, the lower court rulings concerning the 1984-1987 injunction and 1987 Regional Plan remained intact and TRPA could not be found liable for those time periods.[131]

### *A. Briefing and Oral Argument*

On January 7, 2002, the Supreme Court heard oral arguments concerning the constitutionality of TRPA's planning moratorium. TRPA, joined by the Solicitor General,[132] stressed the reasonableness of analyz-

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[128] *See id.* at 1002 (Kozinski, J., dissenting) ("The panel opinion dismisses these [appropriation] cases because they involved physical takings, rather than regulatory ones. *See Tahoe-Sierra, 216 F.3d at 779* ("The fact that just compensation was required in these cases, however, has no bearing on the question before us."). But *First English* rejected that distinction and found that these cases provided "substantial guidance" for its holding that all temporary takings, including regulatory ones, required compensation. 482 U.S. at 318, 107 S.Ct. 2378. Again, the panel substitutes its own view of takings law for that of the Supreme Court.")

[129] *See Pennsylvania Coal*, 260 U.S. 393 (1922).

[130] Tahoe-Sierra Pres. Council v. TRPA, 533 U.S. 948, 121 S. Ct. 2589-2590 (2001).

[131] In an amazing display of audacity, TSPC ignored the question crafted by the Supreme Court. The TSPC brief explains that TRPA's "regulations plainly took the property's use and potential for *whatever period of time* the Court cares to examine between 1981 (when Ordinance 81-5 was adopted) through the present . . . ." Tahoe-Sierra Pres. Council v. TRPA, Brief for Petitioners at 18, on file at TRPA (emphasis added). During oral arguments, the Court reminded TSPC's attorney of the relevant timeframe under consideration. *See* 2002 U.S. TRANS LEXIS 2, *10.

[132] The United States wrote a strong brief on behalf of TRPA. *See* Tahoe-Sierra Pres. Council v. TRPA, Brief for the United States as Amicus Curiae Supporting Re-

ing moratoria using the *Penn Central* framework, the impropriety of severing property interests to create a *Lucas* taking, and the inapplicability of *First English*.[133] TSPC argued that any denial of economically viable use of property – irrespective of the duration or governmental purpose – automatically requires compensation pursuant to *Lucas* and *First English*.[134] TSPC revealed its extreme position in response to a hypothetical from the Court involving the World Trade Center. Were New York City to adopt a one year moratorium to decide what uses would be appropriate on the site, TSPC informed the Court that the property owner would have to be compensated.[135] After oral argument, the case was taken under submission for the justices to consider the issues raised by the parties, as well as the dozen amicus briefs filed.[136]

### *B. The Majority Opinion*

The Supreme Court announced its decision in *Tahoe-Sierra* on April 23, 2002, one day after Earth Day.[137] A six Justice majority[138] held that, because the constitutionality of planning moratoria are properly evaluated using *Penn Central* and not *Lucas*, TRPA need not compensate affected property owners for its 32-month development freeze on

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spondents, on file at TRPA. The main point of the United States' brief – that "moratoria should [not] be treated differently from ordinary permit delays" – made its way into the Supreme Court opinion. *Tahoe-Sierra*, 122 S.Ct. at 1487 n. 31. Further, Solicitor General Ted Olsen himself used ten minutes of TRPA's half hour to argue that the TRPA's moratorium was constitutionally sound, even squaring off with Justice Scalia in the most unexpected moment of the proceedings. *See* 2002 U.S. TRANS LEXIS 2, *41-*51. Theories abound as to why the conservative, pro-property rights Bush Administration would so actively support TRPA, from a genuine concern over the public fisc were local government required to compensate during moratoria to an exploited opportunity to "green" its image. Suffice it to say, TRPA was pleasantly surprised by this occurrence – a major turning point in the case.

133 *See* Tahoe-Sierra Pres. Council v. TRPA, Brief for Respondents, on file at TRPA. John G. Roberts, of Hogan & Hartson (Washington, D.C.), argued on behalf of TRPA.

134 *See* Tahoe-Sierra Pres. Council v. TRPA, Brief for Petitioners, on file at TRPA. Michael M. Berger, of Berger & Norton (Los Angeles, CA), argued on behalf of TSPC.

135 *See* 2002 U.S. TRANS LEXIS 2, *2-*3.

136 Amicus briefs were submitted in support of TRPA by: the United States; the State of Vermont (on behalf of over twenty states); the American Planning Association, the National Audubon Society (authored by John Echeverria); the National League of Cities, and *Amici* Scientists. Amicus briefs were submitted in support of TSPC by: Institute for Justice (co-authored by Richard Epstein); Pacific Legal Foundation; Atlantic Legal Foundation; Washington Legal Foundation; Defender of Property Rights; National Association of Home Builders; and the American Farm Bureau.

137 *See Tahoe-Sierra*, 535 U.S. 302, 122 S.Ct. 1465 (2002).

138 The six-three split was not entirely unanticipated, given the views of Justices Scalia and Thomas and Chief Justice Rehnquist. In July 2001, those hoping for a TRPA victory produced "rally caps" emblazoned with the desired outcome: "6-3."

environmentally sensitive lands. Written by Justice Stevens,[139] the majority opinion endorses moratoria as effective mechanisms that allow government to temporarily preserve the status quo while undertaking a comprehensive planning effort. By rejecting the District Court's alchemy of *Lucas* and *First English* to require that TRPA compensate property owners while it created a regional plan, the Supreme Court clarified the property interest considered in regulatory takings analyses. It is the multi-dimensional property right, including its temporal aspect, which is the appropriate focal point. This holding – beyond Lake Tahoe and even moratoria – represents a pro-government development in the evolution of the takings doctrine.

Justice Stevens criticized TSPC and the District Court for concluding that *Lucas* applied to TRPA's moratorium by creating a "complete elimination of value" for thirty-two months.[140] The re-formulation of property interests in this manner, called "conceptual severance," is inconsistent with the Supreme Court precedent mandating that takings analyses consider the "parcel as a whole."[141] The majority opinion effectively distinguishes *Lucas* as follows:

> [T]he District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.[142]

Using a holistic understanding of property rights, temporary prohibitions on use such as TRPA's moratorium do not implicate *Lucas* "because the property will recover value as soon as the prohibition is lifted."[143] In emphasizing that remaining value will avoid triggering *Lucas*, the Supreme Court departed from the use-focused *Lucas* analysis employed by the District Court.

The *Tahoe-Sierra* majority settled the debate over *First English*, clarifying that the precedent is merely one of remedy. Only if a taking has occurred and then the regulation is repealed must the government automatically compensate affected property owners for the time that the regulation was in effect.[144] *First English* does not bear on whether or not

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139 Perhaps the most liberal of the nine justices, TRPA was overjoyed to learn that he authored the majority opinion. Justice Stevens had made known his incomprehension of TSPC's position during oral arguments, asking whether a "curfew" would require compensation under such a theory. 2002 U.S. TRANS LEXIS 2, *50-*51.

140 *Tahoe-Sierra*, 122 S.Ct. at 1483, *citing Lucas*, 505 U.S. at 1019-1020 n.8.

141 *Tahoe-Sierra*, 122 S.Ct. at 1484.

142 *Id.* at 1483-1484 [citations omitted].

143 *Id.* at 1484.

144 *See Tahoe-Sierra*, 122 S.Ct. at 1478.

a taking has occurred, only the remedy once a taking is determined. In so holding, the Supreme Court laid to rest the misinterpretation that *First English* requires automatic compensation for temporary use prohibitions. *Penn Central* remains the proper framework for evaluating intentionally temporary regulations such as TRPA's moratorium because the "parcel as whole" includes a temporal component.[145] As *First English* itself acknowledges that ordinary permitting delays are not takings,[146] the Supreme Court concluded that: "our decision in *First English* surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating."[147]

Instead of advancing the *per se* rule advocated by TSPC, the Supreme Court confirmed that the *Penn Central* analysis is to be used in all but the rarest of regulatory takings challenges. This "default rule" and "polestar" provides courts will the flexibility necessary to conduct a "careful examination and weighing of all the relevant circumstances."[148] The *Penn Central* factor balancing by the District Court in 1999 favored TRPA given the pressing need for a moratorium on the development of environmentally sensitive lands, the temporary nature of the prohibition, and the unrealistic expectation that property owners could construct homes while a regional plan was being created.[149] Because TSPC did not appeal these findings and instead pressed only the *Lucas* theory of liability, the Supreme Court affirmed the Ninth Circuit's holding that the plaintiffs were not entitled to compensation for the 32-month moratorium TRPA instituted between 1981 and 1984.[150]

The *Tahoe-Sierra* majority considers and rejects the request to create a new *per se* rule requiring government to compensate those owners unable to use their property during a moratorium. TSPC and its amici had sought a bright-line categorical rule triggering an obligation to compensate for temporary development freezes, if not upon the enactment of the moratorium then if it lasts more than a specified amount of time (such as one year).[151] The Supreme Court, however, declined the oppor-

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145 *Id.* at 1483, *citing Penn Central*, 438 U.S. at 130-131.

146 *See* First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987) (acknowledging "the quite different question that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . .")

147 *Tahoe-Sierra*, 122 S.Ct. at 1482.

148 *Id.* at 1484, 1486, *citing* Palazzolo v. Rhode Island, 533 U.S. 606, 636, 633 (2001) (O'Connor, J., concurring).

149 *See Tahoe-Sierra*, 34 F.Supp.2d at 1242 (". . . thus, with all three *Penn Central* factors, at least to some extent, weighing against a finding that TRPA's action constituted a partial taking, we must clearly hold that anything less than a total denial of all economically viable use of the plaintiffs' property would not constitute a taking.")

150 *See Tahoe-Sierra*, 122 S.Ct. at 1490.

151 *See id.* at 1484 n.28.

tunity to create such a rule anticipated to "render routine government processes prohibitively expensive or encourage hasty decision-making."[152] Noting that several states have already enacted statutes "authorizing interim zoning ordinances with specific time limits," the majority felt that this "important change in the law should be the product of legislative rulemaking rather than adjudication."[153] In rejecting the invitation to impose a *per se* compensation requirement, the Supreme Court refused to "transform government regulation into a luxury few governments could afford."[154] With *Lucas* deemed inapplicable and the *Tahoe-Sierra* majority unwilling to create a new rule, *Penn Central* stands as the proper analytical framework for evaluating the constitutionality of moratoria.

### C. *The Dissenting Opinions*

Two of the three *Tahoe-Sierra* dissenters wrote separate opinions. Chief Justice Rehnquist felt that TRPA should be held liable for a prohibition on development that lasted nearly six years. Because the 1984-1987 injunction was caused by TRPA's inability to comply with the Compact, Rehnquist concludes that TRPA "was the 'moving force' behind petitioners' inability to develop its land from April 1984 through the enactment of the 1987 plan."[155] However, as noted by the majority, such a "novel theory of causation was not briefed, nor was it discussed during oral argument."[156] Justice Thomas' dissent advocated the application of *Lucas* to regulations prohibiting all productive uses of property, "regardless of whether the property so burdened retains theoretical useful life and value if, and when, the 'temporary' moratorium is lifted."[157] The majority, however, expressly rejected this concept of "temporal severance" in favor of a takings analysis that considers the "parcel as whole" in determining whether to apply Lucas or *Penn Central*.[158]

## VII. *TAHOE-SIERRA*: THE PRECEDENT

The *Tahoe-Sierra* decision will have far-reaching implications in the field of land use planning. The Supreme Court not only upheld TRPA's moratorium, but endorses the planning device as a means of achieving environmentally sound development. Planning agencies across the county are now aware that this powerful tool, if used responsibly, can preserve the status quo without triggering a constitutional duty to compensate affected property owners. If steps are taken to tailor the mora-

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152 *Id.* at 1485.
153 *Id.* at 1489 n.37, 1485.
154 *Id.* at 1479.
155 *Tahoe-Sierra*, 122 S.Ct. at 1491 (Rehnquist, C.J., dissenting).
156 *Id.* at 1474 n.8.
157 *Id.* at 1497 (Thomas, J., dissenting).
158 *Id.* at 1483.

torium, as did TRPA, a challenge should withstand a *Penn Central* analysis and takings liability will be avoided. The *Tahoe-Sierra* decision, however, has broader implications for attorneys bringing and defending takings cases. Although the moratoria ruling will facilitate rational planning nation-wide, even more far-reaching will be the majority's distinction between physical and regulatory takings, confinement of the *Lucas* precedent, and reaffirmation of the "parcel as a whole." These developments in Fifth Amendment jurisprudence enhance the ability of government to enact regulations without triggering an automatic requirement to compensate affected landowners.

### *A. The Constitutionality of Moratoria*

The majority of the Supreme Court strongly praised the planning moratorium as "an essential tool for successful development."[159] Moratoria "facilitat[e] informed decision making" and "protect[ ] the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."[160] Moreover, the proposition that moratoria render property valueless was rejected because "property values often will continue to increase despite a moratorium."[161] The Supreme Court described the adverse consequences of requiring automatic compensation as follows:

> [T]he financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.[162]

*Tahoe-Sierra* does not give planning agencies the ability to enact moratoria without having to compensate affected property owners.

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[159] *Id.* at 1487.

[160] *Id.* at 1487, 1489. Given the benefits accruing to the owners of affected properties during a moratorium, the Supreme Court found that "with a moratorium there is a clear '*reciprocity of advantage*.'" *Id.* at 1489, *citing Pennsylvania Coal*, 260 U.S. at 415 (emphasis added). This eighty-year old phrase has been repeatedly cited in cases throughout the history of regulatory takings and has been the subject of much academic discourse. It is the author's opinion that the extent to which the government allocates benefits and burdens through regulation should be considered as part of the "character of government action" factor in the *Penn Central* analysis. Likewise, the author believes that the character factor also includes a consideration of whether the regulation at issue does or "does not substantially advance legitimate state interests". Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[161] *Id.* at 1489.

[162] *Id.* at 1488.

Steps must be taken to advance the likelihood that temporary development freezes will withstand a takings challenge under a *Penn Central* analysis. Through appropriate planning, government can sway two *Penn Central* factors in its favor. First, the character of government action is strongest where the scope of a moratorium is tied to specific findings warranting its imposition. TRPA was successful because its temporary prohibition on the development of environmentally sensitive lands directly advanced TRPA's goal of preventing the degradation of Lake Tahoe. Second, the economic impact can be minimized by having the moratorium last only as long as necessary.[163] Although the Supreme Court in *Tahoe-Sierra* indicated that moratoria lasting over one year would be subject to heightened scrutiny,[164] TRPA's 32-month duration was upheld as appropriate given the mammoth task of creating environmental thresholds and enacting a regional plan for Tahoe. By tailoring moratoria in scope and duration in such a manner, government can increase its chances of prevailing in the necessarily imprecise and *ad hoc* undertaking that is the *Penn Central* regulatory takings analysis.

### *B. Advancing the Regulatory Takings Doctrine*

*Tahoe-Sierra* advances the takings analysis in several related ways, the result of which will likely be fewer instances in which the government is constitutionally mandated to compensate owners of regulated property. First, the Court drew a sharp distinction between physical appropriations and regulatory takings. Next the Majority addressed *Lucas*, the situation in which a regulation is so extreme that the property owner

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163 The duration of a use-prohibition is highly relevant in evaluating the "economic impact of the regulation" *Penn Central* factor. *Tahoe-Sierra*, 122 S.Ct. at 1489 ("the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim"). In some situations, the duration will not be immediately known, as with TRPA's moratorium that ended upon an event (plan adoption) and not a date certain. Similarly, properties beneath the IPES line are not presently developable, but must wait until a sufficient, pre-determined number of sensitive lots are purchased. There is tension between the *Tahoe-Sierra* directive that duration is a key *Penn Central* consideration and the statute of limitations requiring plaintiffs to promptly assert takings claims. At the September 2002 oral arguments for the TSPC's IPES challenge, Ninth Circuit justices were presented with a lower court holding that the lawsuit was barred by the statute of limitations even though plaintiffs did not know precisely how long it would be until their properties could be developed. Because the number of sensitive parcels needed to be purchased and retired was known in 1990, the Eastern District concluded that TSPC's cause of action accrued in 1990 and its 2000 lawsuit was therefore barred by the statute of limitations. *See Tahoe-Sierra*, No. CIV S-00-50 LKK DAD, July 28, 2000, Order Granting TRPA's Motion to Dismiss at 14 (E.D. Cal. 2000), on file at TRPA. TRPA is hopeful that the dismissal will be affirmed on appeal. *See supra* notes 47, 116.

164 *See Tahoe-Sierra*, 122 S.Ct. at 1489 ("It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism.")

must be compensated as if his property were being physically occupied (*i.e.* without regard to the government's purpose for the regulation).[165] The *Tahoe-Sierra* majority confined *Lucas* by failing to implicate the precedent where regulated property is rendered temporarily useless but retains future use and present value. Finally, by reaffirming the "parcel-as-a whole" rule, the High Court ensures that the multi-factored *Penn Central* framework will be used to evaluate all but the rarest of regulatory takings challenges.

1. Distinguishing Physical Appropriations From Regulatory Takings

Property rights advocates have long sought to conflate the constitutional analyses for regulatory takings and physical appropriations, thereby increasing their ability to obtain compensation. The *Tahoe-Sierra* majority purported to settle this lingering aspect of Fifth Amendment jurisprudence by recognizing the "longstanding" and "fundamental distinction" between physical and regulatory takings.[166] When government physically appropriates property, there arises a "categorical duty to compensate the former owners."[167] Regulatory takings, "by contrast, do[ ] not give the government any right to use the property nor . . . dispossess the owner or affect her right to exclude others."[168] Moreover, because each regulatory taking situation is unique and involves "adjusting the benefits and burdens of economic life to promote the common good," it is "inappropriate" to apply the categorical rule requiring compensation for physical appropriations to the regulatory takings analysis.[169] Although there are obvious differences between regulation and occupa-

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165 Although the character of government action is irrelevant under *Lucas*, it is an open question as to whether analysis considers the reasonable, investment-backed expectations of the property owner. There is currently a split of opinion on this matter in the D.C. Circuit Court of Appeals. *Compare* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (concluding that expectations are relevant in the *Lucas* analysis) *with* Palm Beach Isles Assoc. v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (rejecting the *Good* analysis and holding that expectations are not relevant in *Lucas*). Were the issue before the present Supreme Court, the outcome would be difficult to predict. However, given Justice Kennedy's separate concurrence in *Lucas* which stresses the expectations of the landowner, *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring), it is not unlikely that *Lucas* will be revisited and clarified to require consideration of the property owner's reasonable, investment backed expectations. Such an outcome is preferred because otherwise speculators can purchase heavily regulated property for depressed prices and prevail under a *Lucas* theory, thereby obtaining a windfall at the expense of government. *See* Echeverria, *supra* note 6, at 11243-44. Further, *Tahoe-Sierra*'s sharp distinction between physical and regulatory takings removes the doctrinal underpinning necessary to argue that reasonable, investment-backed expectations are not relevant in a *Lucas* analysis. *See id.* at 11249-50.

166 *Tahoe-Sierra*, 122 S.Ct. at 1479, 1480.

167 *Id.* at 1478.

168 *Id.* at 1480 n.19.

169 *Id.* at 1480, *citing Penn Central*, 438 U.S. at 124; 1468.

tion, the *Tahoe-Sierra* majority has been criticized for overstating the distinction and ignoring years of precedent that sought to conflate the two types of takings in certain situations.[170] Nevertheless, the sharp distinction drawn will provide less opportunity for property owners to obtain compensation for devaluation attributable to regulation.

2. Confining *Lucas* and Elevating *Penn Central*

*Lucas* presents the "extraordinary circumstance" where a regulation operates to render property devoid of economically viable use.[171] Regulations resulting in less than a 100% diminution in value are evaluated under the multi-factor balancing of *Penn Central*.[172] When the *Lucas* analytical framework is implicated, compensation can be automatically required without regard for the character of government action.[173] Consequently, since it was decided, the property rights community has attempted to expand the situations in which *Lucas* is implicated. In *Tahoe-Sierra*, the Supreme Court dealt this movement a serious setback by shifting the *Lucas* "total loss" inquiry away from use and towards value.[174] A leading takings scholar remarks that: "[i]t is difficult to see how the Supreme Court could have read *Lucas* any more narrowly, at least without expressly overruling the decision. After *Tahoe-Sierra*, few–if any–regulations will rise to the level of a *Lucas* taking "[175]

TSPC argued that *Lucas* is implicated given the use prohibition during the 32-month moratorium. The Supreme Court disagreed, finding the precedent to be inapplicable because the properties retained value: "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[176] In so holding, the Supreme Court significantly curtailed *Lucas'* applicability because regulated property will almost always retain some value – as evidenced by the sale of

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170 *See* Andrea L. Peterson, *The U.S. Supreme Court Tahoe* Decision, Litigating Regulatory Takings Claims, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE (Berkeley, CA, Oct. 10-11 2002), on file with author. *See also* Echeverria, *supra* note 6, at 11243.

171 *Lucas*, 505 U.S. at 1017.

172 *See id.* at 1019 n.8.

173 Other than to ask whether the regulation at issue prohibits a use already impermissible under "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029.

174 *Lucas*, 505 U.S. at 1019 n.8.

175 Echeverria, *supra* note 6, at 11244. Mr. Echeverria, Executive Director of the Georgetown Environmental Law & Policy Institute, posits whether "the Court's confinement of the *Lucas* test to practical irrelevance may set the stage for the Court's eventual repudiation of *Lucas*" and forecasts that "*Lucas* may soon become a dead letter in law as in fact." *Id.* at 11245.

176 *Tahoe-Sierra*, 122 S.Ct. at 1484.

environmentally sensitive parcels in Tahoe during TRPA's moratorium,[177] and the *Suitum* lower court finding that SEZ properties retain value even aside from TDRs.[178] Although *Lucas* itself qualifies its applicability to the "extraordinary circumstance,"[179] *Tahoe-Sierra* demonstrates an unwillingness to expand the precedent beyond the extremely unlikely situation in which regulated property is rendered completely valueless.

By confining *Lucas*, the *Tahoe-Sierra* majority elevates *Penn Central* to the forefront of takings litigation. The majority praises the fact-specific *Penn Central* balancing test for providing the flexibility necessary to determine whether a particular regulation requires compensation. Unlike *Lucas*, *Penn Central* considers all aspects of the regulation at issue: its economic impact; the expectations of the landowner; and the government's motivation. *Tahoe-Sierra* holds that the inquiry as to whether the regulation at issue (TRPA's moratorium) goes too far is just not capable of a bright line rule[180] because government's modern day efforts to protect the environment are necessarily complicated, scientific, and fact-specific. *Penn Central* is not without its disadvantages, namely the lack of predictability and enormous cost to litigate. One law professor has already predicted that government will be at least as adversely affected as large property owners by the uncertainty and expense of litigating under *Penn Central* in the wake of *Tahoe-Sierra.*[181]

### 3. Reaffirming the "Parcel as a Whole" and Rejecting Conceptual Severance

The property interest considered in the takings analysis can be outcome-determinative. For instance, a homeowner challenging a county setback as a taking will prevail if the setback area alone is analyzed but will lose if the entire parcel is considered. This "denominator" issue, al-

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177 *See Tahoe-Sierra*, 34 F.Supp.2d at 1243 (Judge Reed recounting testimony from an appraiser that un-buildable lots in the Tahoe Region were sold during the moratorium).

178 *Suitum*, 520 U.S. at 732.

179 *Lucas*, 505 U.S. at 1017.

180 The Supreme Court characterized TSPC's proposed categorical rule as "simply 'too blunt an instrument'" for identifying those moratoria which require compensation. *Tahoe-Sierra*, 122 S.Ct. at 1489 *citing Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). *See also* Echeverria, *supra* note 6, at 11245 ("After an experimental effort to establish clear, prescriptive rules for regulatory takings claims, a majority of the Supreme Court has apparently decided to abandon the project.")

181 "Although the increased litigation costs may favor the government over small property owners who do not have the resources to maintain a costly lawsuit, the increased expense concomitantly may favor large property owners over the government." Barton H. Thompson, Jr., *Learning to Love Penn Central: The Lessons of Tahoe-Sierra Preservation Council*, Litigating Regulatory Takings Claims, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE (Berkeley, CA, Oct. 10-11 2002) at 6, on file with author.

ways a sticking point in the field of regulatory takings, became critical after *Lucas* was decided. Property rights advocates attempt to narrow the relevant property interest, thereby increasing their ability to obtain compensation. Conversely, government seeks to enlarge the denominator to avoid a determination of liability. In 1978, the Supreme Court was presented with a request to consider only on the allegedly "taken" airspace above Grand Central Terminal in New York City.[182] The Court declined to vertically sever the property interest in that situation as follows:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government has effected a taking, this Court focuses rather . . . [on] THE PARCEL AS A WHOLE . . . .[183]

*Tahoe-Sierra* presents the parcel as a whole/ denominator issue in the temporal context. The District Court was convinced by TSPC to "effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria."[184] However, the Supreme Court found TSPC's "'conceptual severance' argument [to be] unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on the 'parcel as a whole.'"[185] The approach of "defining the property interest being challenged in terms of the very regulation being challenged" was dismissed by the High Court as disingenuous, "circular," and impermissible.[186] This aspect of the holding sends a clear signal that courts are to use a multi-dimensional conception of property rights when evaluating takings claims; it is improper to separate a particular property interest as the inquiry's focus. Although owners of regulated property and their attorneys will likely continue to develop clever theories for obtaining just compensation, *Tahoe-Sierra*'s parcel as a whole clarification substantially reduces the possibility of such recovery.

## VIII. CONCLUSION

The United States Supreme Court has been very kind to Lake Tahoe of late. In the last five years, the Court granted certiorari on two takings challenges involving important planning devices and unresolved aspects of Fifth Amendment jurisprudence: TDRs in *Suitum* and more recently moratoria in *Tahoe-Sierra*. Although a majority of justices in *Suitum* ruled against TRPA and only on procedural grounds, the case is impor-

182 *See Penn Central*, 438 U.S. 104.
183 *Id.* at 130-131 (emphasis added).
184 *Id.* at 1483.
185 *Id., quoting Penn Central*, 438 U.S. at 130-131.
186 *Id.* at 1483.

tant for what was not decided. The Court refused to automatically require compensation where regulated property retaining present value cannot be developed. This outcome, advocated by three concurring justices, would have created bad precedent because the takings inquiry requires a consideration of all relevant concerns that this approach does not address. The present value of the regulated property – including TDRs – should be considered under *Penn Central*'s "economic impact of the regulation" factor,[187] and may prevent a finding of takings liability when balanced against the remaining considerations. Moreover, by making the subjective concept of use the focal point for the takings analysis, the concurrence's view would have injected more confusion in the already chaotic takings doctrine.

In contrast to its outcome in *Suitum*, the High Court made great law in its April 2002 *Tahoe-Sierra* decision. A majority of the Justices forcefully upheld TRPA's planning moratorium and endorsed the device to achieve sound land use planning. The Court found that regulations temporarily prohibiting use, but leaving property with present value and future use, do not categorically trigger a constitutional obligation to compensate; they are instead to be evaluated by balancing the *Penn Central* factors. This flexible analysis includes an examination into why and how the government has chosen to regulate the environment and the resultant benefits flowing to the affected property owners, thereby enabling government to establish that, on balance, the regulation at issue does not go "too far."[188] The *Tahoe-Sierra* majority also goes beyond the moratoria question presented and clarifies several critical aspects of takings law in a manner that will enable government to plan efficiently without having to compensate landowners.

The Supreme Court is to be commended for creating new precedent that will facilitate environmental protection well beyond the Sierra Nevada mountain range. Although Lake Tahoe figures prominently in *Tahoe-Sierra*, it is just one of many natural resources around the country that will benefit from this landmark ruling.[189]

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187 *See Penn Central*, 438 U.S. at 137. *See also* Lazarus, *supra* note 26, at 205.

188 *Pennsylvania Coal*, 260 U.S. at 415.

189 "Passage of time is required before a Supreme Court decision achieves landmark status. But *Tahoe-Sierra* appears to be a good candidate to become a landmark because it may turn out to mark the limits of the expansion of regulatory takings doctrine." Echeverria, *supra* note 6, at 11252.