CHAPTER 10

LORETTO AND PHYSICAL OCCUPATIONS

I. Introduction

Although only a small fraction of inverse condemnation claims involve allegations of government-authorized physical occupations or invasions, this category of cases warrants careful consideration for two reasons. First, if a court finds that a physical occupation has occurred, it often also finds a taking. Accordingly, government counsel should try, where possible, to avoid a finding that a government has permanently occupied private property. Second, physical occupation takings doctrine helps explain judicial treatment

of required dedications and impact fees, the category of cases that occupies Chapter 11.

This chapter begins with an examination of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and subsequent Supreme Court cases that define the *Loretto per se* takings rule for permanent physical occupations. It then turns to the most frequently posed questions in physical occupation takings law, including:

- How long must an occupation last to be deemed permanent?
- Can rent control and mobile home regulation ever be oppressive enough to be deemed a physical occupation?
- Are airplane overflights and spillover smells and odors occupations?
- When is the government liable for the actions of others?
- Is the taking of money ever considered a *Loretto*-type taking?

The chapter ends with a discussion of damages, or the lack thereof, in physical occupation takings cases. This discussion illustrates how several high-profile developer victories in physical occupation takings cases, including *Loretto*, have proved hollow as the lower court on remand has ruled that no just compensation is due.

II. *Loretto* and its Supreme Court Progeny

The Supreme Court has always been less tolerant of physical occupations than regulatory impositions. The Court found a taking based on a government-authorized occupation of property 50 years

before the Court declared that a regulation could be a taking.[133] And, in the 127 years since the first successful takings case, the Supreme Court has found takings in numerous physical invasion cases, *see Loretto*, 458 U.S. at 426-27 (listing cases), but precious few regulatory takings cases.

The Supreme Court formalized the distinction between physical and regulatory takings in *Loretto*. Four years after articulating its parcel-as-a-whole, multi-factored test for regulatory takings in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (*see* Chapter 2 for an overview of the *Penn Central* test), the *Loretto* Court established a bright-line rule for physical takings.

A. *Loretto v. Teleprompter Manhattan CATV*

Loretto owned an apartment building in Manhattan. She objected to a New York state law compelling her to maintain boxes and cables owned by Teleprompter Manhattan CATV ("Teleprompter") on her property. Ms. Loretto sued alleging that the New York statute took her property by permitting a forced physical occupation of her apartment building. The question Loretto ultimately presented to the Supreme Court was whether a "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property . . . ." *Loretto*, 458 U.S. at 421.

The Court found a taking. Reviewing a century of physical occupation takings cases, the Court concluded that "when the physical intrusion reaches the extreme form of a permanent physical occupation . . . this Court has invariably found a taking." *Id.* at 426-27. Drawing on this precedent, the Court concluded that in permanent occupation cases, neither the multi-factored test nor the

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[133] *Compare* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1872) (finding that a government action that flooded 640 acres of Pumpelly's land constituted a physical occupation by the government and, therefore, ruling that a taking occurred), *with* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (finding that a statute that restricted coal mining made it commercially impractical for Mahon to mine his coal and, therefore, had the same effect as destroying or appropriating the coal).

parcel-as-a-whole rule of *Penn Central* applies. Instead, permanent physical invasions are takings to the extent of the invasion "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id.* at 430.

The *Loretto* Court found irrelevant that the party invading Ms. Loretto's land was a cable company, not the government. The Court declared that a permanent physical occupation is a taking "without regard to whether the State, or instead a party authorized by the State, is the occupant." *Id.* at 433 n.9. The government is thus liable for government-authorized occupations even if the actual occupying party is the general public, a cable company, or a non-person, such as floodwaters.

The *Loretto* Court described its ruling as "very narrow." *Id.* at 441. The Court noted that it had often upheld substantial regulation of an owner's use of property, but declared that a physical occupation is "qualitatively more severe than a regulation of the use of property." *Id.* at 436. The Court also distinguished between "cases involving a permanent physical invasion, on the one hand, and cases involving a more temporary invasion . . . ." *Id.* at 428. The Court explained that "[t]emporary limitations are subject to a more complex balancing process to determine whether they are a taking." *Id.* at 435 n.12.

Finally, the *Loretto* Court distinguished government regulations that require a landlord to "provide utility connections, mailboxes, smoke detectors, fire extinguishers and the like in a common area of a building." *Id.* at 440. Such mandatory appurtenances are not takings as long as the landlord owns them and can control their installation. *See id.* at 440 n.19. Indeed, the Court suggested that the state of New York could have required landlords to provide cable hookups at the landlord's expense because, under that type of regulatory obligation, the landlord would own the equipment and have the right to dictate its placement, manner, and use. *See id.*

B. Refining *Loretto*

In several cases since *Loretto*, the Supreme Court has made important refinements to the doctrine applicable to permanent physical occupations.

1. Intermittent Invasions

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Supreme Court expanded the notion of a "permanent occupation" to include repeated and permanent, even if intermittent, physical invasions. *Nollan* is best known for establishing an "essential nexus" test for evaluating dedications of land demanded as a condition of receiving a development permit. *See* Chapter 11. *Nollan* is relevant here because the permit condition at issue in *Nollan* was an easement of lateral passage across the Nollans' beachfront lot. In evaluating the Nollans' claim, the Court started by declaring that the easement, if not made a condition of a development permit, would be a *Loretto*-type *per se* taking. *See id.* at 831-32. The Court held that "a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832.

To reach the conclusion that a continuous right to pass across land is a *per se* taking, the *Nollan* Court had to distinguish two pre-*Loretto* cases. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court had applied *Penn Central*'s multi-factored test to intermittent invasions. The Court had found a taking in *Kaiser*, in which a marina owner was forced to allow public navigation through a waterway the marina owner had created on his property. The Court had found no taking in *PruneYard*, in which a shopping center owner was forced to permit leafleting on its property during business hours. The *Nollan* Court stated rather cryptically that the *Penn Central* test was properly

applied in *Kaiser* because the case was "affected by traditional doctrines regarding navigational servitudes." *Nollan*, 483 U.S. at 832 n.1. The *Nollan* Court distinguished *PruneYard* as a *Penn Central* case rather than a *Loretto* case because "the owner had already opened his property to the general public, and . . . permanent access was not required." *Id.* Neither case, the *Nollan* Court explained, involved "classic right-of-way easements," permitting a continuous right to cross land. *Id.* After *Nollan*, such right-of-way easements, if forced by the government, are *per se* takings.[134]

2. Compelled Occupations

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), and the earlier *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), the Court ruled that government-authorized physical occupations are takings only if forced upon a property owner. The Yees owned a number of mobile home parks in Escondido, California. They challenged Escondido's mobile home rent control law by alleging that the law, coupled with a California law restricting their ability to terminate the tenancy of a mobile home owner, forced them to rent their land indefinitely to tenants at a below market rate. This, they alleged, was equivalent to a permanent physical occupation of their property.

A unanimous Supreme Court in *Yee* ruled that a *Loretto*-type taking had not occurred. The Court found it critical that the Yees had invited the mobile home tenants onto their property and could terminate their tenancy by changing the use of the property. *See Yee*, 503 U.S. at 527-29. In the Court's words: "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.'" *Yee*, 503 U.S. at 527 (quoting *Florida Power*, 480 U.S. at 252). According to the *Yee* Court, "required acquiescence" is absent if

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[134] To be clear, *Nollan* is an expansion of *Loretto* because *Loretto* characterized the intermittent invasion at issue in *Kaiser* as falling outside the *per se* rule. *Nollan* brought permanent, intermittent invasions within *Loretto*'s rule.

(1) the property owner initiated the specific occupation in question (*i.e.* they had initially invited the tenants onto their property) and (2) the government does not prohibit the property owner from terminating the occupation by changing the use of the property. *See Yee*, 503 U.S. at 527-29.

The distinction the Court draws between forced and unforced occupations is a subtle one, and government counsel asserting that an occupation is not forced should be cognizant of the Court's treatment of similar arguments made by the defendants in *Loretto* and *Nollan*. In *Loretto*, the Court rejected Teleprompter's argument that the landowner could avoid having the cable attached to her building by ceasing to rent the buildings to tenants. *See* 458 U.S. at 439 n.17. The Court ruled that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* The key distinction between *Loretto* and *Yee* is that the Yees had invited the tenants onto their property, whereas Ms. Loretto had not invited or acquiesced to the cable boxes. Combined, *Loretto* and *Yee* stand for the proposition that where the challenged occupation is by an uninvited non-tenant (like the cable operators in *Loretto*), the ability to avoid the occupation by evicting one's tenants does not defeat the takings claim; but where the challenged occupation is by an invited tenant (like the mobile home owners in *Yee*), the ability to evict defeats any contention that the occupation is compelled by the government.

The Supreme Court took yet a third approach in *Nollan* and in the subsequent companion case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Nollan* and *Dolan* both involved permanent physical occupations imposed as a condition of receiving government permits. The government argued that the dedication requirement was voluntary: the landowner could be free of the condition simply by withdrawing the permit application. The Court in *Nollan* and *Dolan* rejected the government's argument that there could be no taking because the claimant could avoid the occupation by not seeking the permit. *See Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831. However, the Court also declined to find that permit dedication

conditions were *per se* takings under *Loretto*. *See Dolan*, 512 U.S. at 384-85; *Nollan*, 483 U.S. at 384. Instead, the Court in *Nollan* and *Dolan* relied on the doctrine of unconstitutional conditions and found that the government may demand land or acquiescence to permanent physical occupations as a permit condition only if the dedication is both related and roughly proportional to the needs that will be created by the proposed development. *See Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 837. *Nollan* and *Dolan* are discussed in detail in Chapter 11.

3. Background-Principles Defense

Finally, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court recognized an important second defense to *Loretto*'s *per se* rule. The *Lucas* Court declared that it "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Id.* at 1028-29. Thus, the background-principles defense outlined in detail in Chapter 5 applies with equal force to permanent physical invasions.[135] Where background principles establish a right by the government to occupy a portion of a landowner's property, no taking occurs.[136]

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[135] Background principles are statutory or common-law restrictions and obligations that were in effect at the time of the claimant's purchase of the property. *See* Chapter 5.

[136] *See* Hendler v. United States, 36 Fed. Cl. 574, 586 n.14 (1996) (stating that background principles "applied in this case would obviate the need for compensation even under the physical taking theory"), *supplemented by*, 38 Fed. Cl. 611 (1997), *aff'd*,175 F.3d 1374 (Fed. Cir. 1999); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) (ruling that the background-principles defense defeats a challenge to the city's placement of support fill on owner's property). *But see* Preseault v. United States, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (*en banc* plurality) (finding that background principles of federal law are not a defense to a claim of permanent physical occupation).

III. Line Drawing Problems

A. Overview

Not surprisingly, developer lawyers have embraced *Loretto*'s bright-line rule. In case after case, they have sought to convince courts to expand *Loretto*'s rule beyond the narrow confines of permanent physical occupations. In a few cases, they have succeeded in broadening *Loretto*'s application. In most cases, courts have kept *Loretto* within bounds. In this section, we discuss the lines that courts have drawn between takings cases that fall within *Loretto*'s *per se* rule, and cases that do not.

We note an anomaly. According to Supreme Court precedent, physical occupations and invasions that do not rise to the level of a permanent physical occupation should be analyzed under *Penn Central*'s multi-factored test. *See Loretto*, 458 U.S. at 435 n.12 (holding that "temporary limitations are subject to a more complex balancing process"). Under *Penn Central*, temporary occupations and infrequent invasions will rarely have the economic impact on the parcel as a whole needed to establish a regulatory taking. *See* Chapters 6 and 7. Thus, reading *Loretto* and *Penn Central* together, one would assume that temporary occupations and occasional invasions would rarely be declared takings.

That is not a particularly accurate picture of reality. Courts find physical takings in temporary occupation and intermittent invasion cases with some frequency. They have done so by stretching the definition of "permanent" to include lengthy occupations and intermittent invasions. *See* discussions of *Nollan* above and *Hendler* below. Or they apply pre-*Loretto*, pre-*Penn Central* tests to specific categories of cases. Thus, they find a taking for flooding and government overflights when the interference with property is substantial, with little regard to whether these invasions are properly deemed takings under either *Loretto* or *Penn Central*.

Government counsel should argue forcefully that *Loretto*, *Lucas*, and *Penn Central* are the only tests for takings liability. Where a

regulation neither compels a permanent occupation of property as required under *Loretto*, nor has the economic impact required under *Lucas* or *Penn Central*, a court should not find a taking. At the same time, counsel should be aware that, in practice, courts addressing physical invasions and occupations frequently ignore recent developments in takings law and rule based on older precedents addressing the specific type of physical occupation or invasion at issue. For example, as discussed below, courts typically examine cases involving airplane overflights under the analysis in *United States v. Causby*, 328 U.S. 257 (1946) and intermittent flooding under cases including *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

B. How Long is Permanent?

The issue of how long a physical occupation must last in order to be deemed a taking has received surprisingly little judicial attention over the years, and courts that have addressed the issue have been all over the map. The majority in *Loretto*, for example, distinguished between temporary and permanent occupations, and described a permanent occupation as an occupation that "forever denies the owner any power to control the use of the property." 458 U.S. at 436. The dissent pointed out, however, that the regulation compelling the owner to submit to occupation by cable television equipment lasts only as long as the property remains in residential use and a cable company wishes to service the building: "This is far from 'permanent.'" *Id.* at 448 (Blackmun, J., dissenting).

This sparring over how long is long enough in physical occupation cases pre-dates *Loretto*. A series of wartime occupation cases suggests that when a physical occupation ousts a landowner from control of his entire parcel, even a relatively short occupation will be compensable. Most directly on point is *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), in which the government seized and operated a coal mine for five and one-half months in order to prevent a national strike by miners. A unanimous Court had little trouble

concluding that this occupation was a taking even though the occupation lasted a relatively brief period.

The flooding cases, on the other hand, suggest that to be considered permanent, an occupation must indeed be forever, or close to it. Courts have found a taking only when the government has subjected the land to "intermittent but inevitably recurring overflows." *United States v. Cress*, 243 U.S. 316, 328 (1917).[137]

More recently, two federal courts have proposed radically different definitions of "permanent" in the context of monitoring wells installed by the government to track the migration of pollution from neighboring waste sites. The Federal Circuit in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), ruled that "'permanent' does not mean forever or anything like it." *Id.* at 1376. Instead, the court ruled that "permanent" means "a term of finite duration," generally an estate for years, although, the court added, "the term can be for less than a year." *Id.* Moreover, the court defined permanent by reference to the term "temporary," which it defined as a "transient and relatively inconsequential" invasion that can properly be viewed as a "common law trespass." *Id.* at 1377.

In sharp contrast, a federal district court in *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority*, 983 F. Supp. 319 (1997), disparaged *Hendler*'s definition of permanent, finding it "contorted" and "in clear conflict with Supreme Court precedent, particularly Loretto." *Id.* at 327-28. Instead, the court adopted a dictionary definition of permanent: "intended to exist or function for a long, indefinite period without regard to unforeseeable conditions." *Id.* at 328 (quoting RANDOM HOUSE

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[137] *See also* Sanguinetti v. United States, 264 U.S. 146, 149 (1924) ("[I]n order to create an enforceable liability against the Government, it is, at least, necessary that the overflow . . . constitute an actual, permanent invasion of the land amounting to an appropriation of and not merely an injury to the property."). *Compare* Hendricks v. United States, 14 Cl. Ct. 143, 153 (1987) (finding no taking where "the supersaturation problem experienced in 1981 and 1983 was of a temporary nature and has been resolved") *with* Spaeth v. Plymouth, 344 N.W.2d 815, 822 (Minn. 1984) (finding a taking where "the evidence shows . . . a portion of Spaeth's property has generally remained flooded for approximately three years" and "[i]t also appears that the situation will continue . . . .").

DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed. 1979)); *see also Southview Assocs., Ltd. v. Bongartz*, 980 F.2d. 84, 93 (2d Cir. 1992) (quoting *Loretto*, 458 U.S. at 435, for the proposition that an occupation must "forever deny the owner any power to control the use of the property").

The cases suggest that courts use the length of the occupation as just one factor in judging whether a physical occupation is sufficiently akin to an expropriation to be deemed a taking. Where an occupation is complete as in *Pewee Coal*, courts sometimes find a taking and award compensation even if the ouster lasts only a relatively short period of time. Where the invasion is minor or intermittent, most courts (excluding perhaps the Federal Circuit) will demand that the invasion be lengthy and likely to continue for the foreseeable future.

C. Can Rent Control and Mobile Home Regulation Ever Constitute a Physical Taking?

The Supreme Court's opinion in *Yee* makes it very difficult for a landowner to bring a *Loretto*-type takings challenge to a rent control statute. In most cases these claimants will have invited the tenants onto the property and will have the option of terminating the use. Thus, their takings claims will be foreclosed by *Yee*'s requirement that occupations be "forced." However, *Yee* leaves open the possibility of a physical occupation takings claim for a rent control statute in two instances: (1) where tenants are forced upon a non-landlord, and (2) where a landlord cannot terminate an existing tenancy. *See Yee*, 503 U.S. at 528. Fortunately for government counsel, the few courts that have interpreted *Yee*'s exceptions to date have read these exceptions quite narrowly.

For example, in *Greystone Hotel Co. v. City of New York*, 13 F. Supp. 2d 524 (S.D.N.Y. 1998), *aff'd*, No. 98-9116, 1999 U.S. App. LEXIS 14960 (2d Cir. June 23, 1999), the court rejected a physical occupation takings claim challenging a New York law that required owners of certain New York hotels to grant a lease of at least six

months to any existing hotel guest that requests one and deemed anyone with a lease with a term of six months or more a "permanent tenant" subject to rent control. The statute thus allowed any guest accepted at such a hotel for a single night to become a rent-controlled tenant. The court recognized *Yee*'s potential exception where tenants are forced on a landlord, but ruled that the "forced conversion from renting to transients [for short terms] on the one hand, and leasing to permanent tenants on the other, is not a physical taking." *Id.* at 527.[138]

The federal district court in *Adamson Companies v. Malibu*, 854 F. Supp. 1476 (C.D. Cal. 1994), was equally aggressive in rejecting a physical invasion takings claim premised on the difficulty of converting property to an alternative use. The *Adamson* court recognized that "the rent control ordinance taken together with the zoning ordinance makes it virtually impossible for the [mobile home] park owners to change the use of the park property." *Id.* at 1484. The court nonetheless decided that a physical taking had not occurred. Because the landowner had invited the use, the court declared that the property owner could not establish a facial physical taking no matter how "tight the gauntlet." *Id.* at 1500.[139]

D. Are Government-Authorized Overflights, Odors, and Smoke Takings?

The Supreme Court distinguishes overflights, odors, and smoke from government invasions that actually touch the land. As a general

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[138] *See also* Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626 (N.Y. 1993) (finding no physical occupation when the government requires an owner who has voluntarily rented housing to continue renting to "family members" succeeding the tenant). *But cf.* Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1063 (N.Y. 1989) (finding, before *Yee*, that a New York law under which "owners are forced to accept the occupation of their properties by persons not already in residence" constituted a physical invasion).

[139] *See also* Mobile Home Village, Inc. v. Jackson, 634 A.2d 533 (N.J. Super. Ct. App. Div. 1993) (holding that there is no physical invasion taking where "the statutes and ordinance do not on their face preclude plaintiff from discontinuing use of the land as a mobile home park . . . .").

rule, overflights, odors, and smells are takings only if they uniquely and significantly interfere with the use of the subject property.

The Supreme Court's opinion in *Causby* established two rules for overflight cases that appear to have survived *Loretto* and *Penn Central* largely intact. The first rule is that low and frequent overflights can be so invasive that they become the functional equivalent of a physical occupation. *See Causby*, 328 U.S. at 265 ("The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself."). The second rule is that overflights that are neither low nor frequent are not takings. As the Supreme Court declared in *Causby*: "Flights over private land are not takings, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266. This aspect of *Causby* has produced the general rule that flights above 500 feet are not takings. *See Argent v. United States*, 124 F.3d 1277, 1281 (Fed. Cir. 1997) ("Subsequent federal cases set a rule, applied more or less in mechanical fashion, that the United States might be liable for flights below 500 feet in noncongested areas (or 1000 feet in congested areas), but that flights at higher altitudes did not interfere with the landowner's use of the surface.").

Richards v. Washington Terminal Company, 233 U.S. 546 (1914), established a similar test for smoke, vibrations, and noises that spill over onto private property from government operations. In *Richards*, the plaintiff sought compensation for the impact on his property from the operations of a railroad. The Court ruled that, in general, there could be no recovery for "noises and vibrations incident to the running of trains, the necessary emissions of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad." *Id.* at 554. The Court awarded compensation, however, for harm attributable to a tunnel fan that blew exhaust fumes from a railroad tunnel directly onto the plaintiff's property. The Court found the injury from the fan aimed at plaintiff's property was "so direct and peculiar and substantial a burden upon plaintiff's property" as to constitute a taking. *Id.*

E. When is the Government Liable for the Actions of Others?

The government can be liable for an occupation even if the actual occupying party is floodwaters, the general public, or a cable company.[140] However, the party occupying the property must be subject to the government's control, and the government-authorized action must be the cause of the alleged damage. *See YMCA v. United States*, 395 U.S. 85, 93 (1969) ("[I]n any case where government action is causally related to private misconduct which leads to property damage — a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment.").

Questions of government authorization have arisen frequently in cases where government-protected wildlife invades private property and destroys livestock. Landowners have alleged that these government-protected species are "governmental agents." *Christy v. Hodel*, 857 F.2d 1324, 1334 (9th Cir. 1988). Courts have uniformly rejected this argument. *See id.* at 1334-36.[141] As the Ninth Circuit declared in *Christy*, "[t]he federal government does not 'own' the wild animals it protects, nor does the government control the conduct of such animals." *Id.* at 1335.[142]

Causation questions frequently arise in flooding cases, particularly where the flooding results from government action to

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[140] *See Nollan*, 483 U.S. 825 (finding a taking where the general public was the occupying party); *Loretto*, 458 U.S. at 435 n.9 (finding a taking where a cable company was the occupying party); *Pumpelly*, 80 U.S. (13 Wall.) at 177-78 (finding a taking where the occupying party was floodwater).

[141] *See also* Mountain States Legal Foundation v. Hodel, 799 F.2d 1423, 1428-29 (10th Cir. 1986); Moerman v. California, 21 Cal. Rptr. 2d 329 (Ct. App. 1993).

[142] *See also Moerman*, 21 Cal. Rptr. 2d at 334 (ruling that, even where the government reintroduces a species to an area, "elk are not instrumentalities of the state nor are they controlled by the state . . ."); Douglas v. Seacoast Products, Inc. 431 U.S. 265, 284 (1977) ("[I]t is pure fantasy to talk of 'owning' wild fish, birds or animals.").

address on-going natural flooding. In such cases, the plaintiff bears the burden to prove that the damages in question were the "direct and necessary result" of the government action. *Sanguinetti*, 264 U.S. at 150.[143] This burden is fairly difficult for property owners to carry. In *United States v. Sponenbarger*, 308 U.S. 256 (1939), for example, the Supreme Court ruled that the landowner had not proven causation even upon a demonstration that a broad-based flood control measure may "result in an increase in the volume or velocity of otherwise inevitably destructive floods." *Id.* at 266.

F. When is a Taking of Money a Taking?

Takings claims challenging government-imposed monetary obligations have become more frequent and important over the last few years. Indeed, both takings cases the Supreme Court reviewed in 1998 involved money rather than real estate. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). We discuss monetary takings cases here because claimants frequently cast such claims as *Loretto*-type takings. We will return to the issue in Chapter 11, where we discuss takings claims challenging impact fees.

Claimants in money takings cases typically assert that the money in question has been actually expropriated by the government and, thus, the *Loretto per se* rule should apply. The Supreme Court has rejected this argument, finding that monetary takings are not "a permanent physical occupation . . . of the kind that we have viewed as a *per se* taking." *Eastern Enters.*, 524 U.S. at 530.[144]

The leading case is *Sperry Corp. v. United States*, 493 U.S. 52 (1989). In *Sperry*, the government deducted one and one-half

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[143] *See also* Owen v. United States, 20 Cl. Ct. 574, 583 (1990) ("[T]he issue is whether plaintiff has demonstrated that, but for the dredging in 1976 and 1977, the property would have been undamaged.").

[144] *See also* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222-23 (1986); Concrete Pipe and Prods. of Cal. v. Construction Laborers Pension Trust, 508 U.S. 602, 643-44 (1993).

percent of awards made by the Iran-United States Claims Tribunal in favor of American claimants to help pay the costs of operating the Tribunal. *See id.* at 58-59. Sperry claimed that the dedication was "akin to a 'permanent physical occupation' of its property and therefore was a *per se* taking . . . ." *Id.* at 62 n.9. The Court rejected the argument, concluding:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.

Id. In the Court's recent decision in *Eastern Enterprises*, five justices appeared willing to go one step further and rule that the Takings Clause does not apply at all to a government-imposed monetary liability.[145]

On the other hand, in *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155 (1980) and *Phillips*, 524 U.S. 156, the Court appears to have carved out a small exception to the general rule that monetary charges are not takings. Both *Webb*'s and *Phillips*

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[145] *See Eastern Enters.*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part) (stating that the Takings Clause is inapplicable where "[t]he law simply imposes an obligation to perform an act, the payment of benefits"); *id.* at 554 (Breyer, J. dissenting, joined by Stevens, Souter and Ginsburg, JJ.) ("[T]he 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property."); *see also* Unity Real Estate v. Hudson, 178 F.3d 649, 674 (3d Cir. 1999) ("Five justices, however, rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever constitute a taking."), *cert. denied*, 120 S. Ct. 396 (1999). *See also* Chapter 8.

addressed state statutes that appropriated for the government the interest income on principal held in government created accounts. *Webb's* held that "earnings of a fund are . . . property just as the fund itself is property" and found a taking even though the interest taken was less than 6% of the amount deposited in the government account. *Webb's*, 449 U.S. at 164. A narrow 5-4 majority in *Phillips* re-affirmed *Webb's* holding and described the regulatory program in *Webb's* as a "confiscatory regulation (as opposed to those regulating the use of property)." *See Phillips*, 524 U.S. at 167.[146] *Webb's* and *Phillips* suggest that where the government takes for itself a specific, identifiable fund of private money, the Court might analyze the case as an actual expropriation of property and a *Loretto*-like *per se* takings rule might apply.

IV. Damages for Permanent Physical Occupations

Many commentators have savaged the Supreme Court for insisting in *Loretto* that any permanent physical occupation constitutes a taking. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 603 (1988) ("This obsession with permanent physical invasions of even the most de minimis variety borders on fetishism."). Putting aside the wisdom of the *Loretto* rule, the Court's ruling that even small occupations can be takings has frequently led to empty victories for property owners. In several prominent cases, including *Loretto* on remand, courts have found that the property owner is not entitled to any compensation for the taking.

In *Loretto* on remand, the Appellate Division of the Supreme Court of New York ruled that New York Executive Law § 828, which

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[146] The holding of the *Phillips* case was limited to the ruling that, under Texas law, interest generated by funds held in Interest on Lawyers Trust Accounts (IOLTA) is the property of the owner of the principal. The Court expressed no view as to whether this interest had been taken by the state or as to the proper amount of just compensation, if any. *See* 524 U.S. at 171; *see also id.* (Souter J. dissenting) (taking the majority to task for resolving an issue that "may ultimately turn out to have no significance in resolving the real issue raised in this case . . .").

typically provided landlords with compensation of $1, was a means for Ms. Loretto to obtain just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983). Ms. Loretto, however, chose not to file a claim to recover her $1. Instead, she filed a claim for the recovery of her attorneys' fees. The court then ruled that because Ms. Loretto had not applied for compensation under the New York Law, she had not prevailed in her takings claims for purposes of an award of attorneys' fees under 28 U.S.C. § 1988. *Loretto v. Group W Cable*, 522 N.Y.S.2d 543 (1987). Thus, after more than a decade of litigation and a Supreme Court ruling in her favor, Ms. Loretto was found to have suffered a dollar's worth of harm and her lawyers received no attorneys' fees from the government.

The Federal Circuit reached a similar result in *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991) ("*Hendler I*"). As discussed above, the Federal Circuit declared in *Hendler I* that monitoring wells installed by the government on property neighboring a Superfund site were permanent physical occupations within the meaning of *Loretto*. *See id.* at 1378. On remand, the Court of Federal Claims ruled that the monitoring wells reduced the value of Hendler's property by up to $14,500. *See Hendler v. United States*, 38 Fed. Cl. 611, 618 (1997), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999). However, the court also ruled that: (1) the government's actions in investigating the contamination under Hendler's property specially benefited Hendler because he would have been required to monitor the ground water in any event to use or sell his property, (2) the special benefits must be deducted from any compensation award, and (3) the special benefits far outweighed the cost of the occupation. *See id.* 626-27. The Federal Circuit affirmed. *See Hendler*, 175 F.3d 1374. Again, after more than a decade of litigation, the courts declared that Mr. Hendler had suffered no cognizable damages.

These cases make Justice Blackmun's concluding remark in dissent in *Loretto* seem prophetic: "If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional

claim of little moment." *Loretto*, 458 U.S. at 456 n.12 (Blackmun, J., dissenting). They also illustrate the importance of aggressively litigating the question of what is just compensation, an issue discussed in detail in Chapter 13.