COMMENTARY

BY DAVID G. MANDELBAUM
Special to the Law Weekly
MANDELBAUMD@GTLAW.COM

ENVIRONMENTAL LAW

'Horne' and Environmental Law: The Case of the Taken Raisins

On June 22, the U.S. Supreme Court decided a takings case, *Horne v. Department of Agriculture*, 135 S. Ct. 1039 (2015). *Horne* was easy to overlook, followed as it was over the following seven days by *King v. Burwell*, No. 14-114 (Affordable Care Act), *Obergefell v. Hodges*, No. 14-556 (same-sex marriage), *Michigan v. Environmental Protection Agency*, No. 14-46 (Mercury Air Toxics Standards) and *Arizona Legislature v. Arizona Redistricting Commission*, No. 13-1314 (nonpartisan redistricting). And, in the scheme of things, takings jurisprudence may not turn out to matter as much as any of those. Nevertheless, *Horne*, in which the majority found the federal price-support program for California raisins to work as an uncompensated taking, presents some issues of which environmental practitioners may wish to take note.

Horne involves the price-support scheme for California raisins. (Those old enough to remember the 1980s advertising campaign now have Marvin Gaye playing in their heads, and I can say from personal experience that he will be hard to turn off even as you parse the Fifth Amendment.) Each year, the Department of Agriculture sets a percentage of the raisins actually produced that have to be reserved for the government. The percentage changes year-to-year. The government then gives the raisins away, sells them for export, or does something else with them so they do not increase the supply of raisins on the private market. In this way, the department depresses supply and maintains the market price of those raisins actually sold. If the government receives revenue for the reserved raisins in excess of the government's costs, the growers or the handlers—a form of middlemen—receive it.

The Hornes grew raisins and also acted as a handler. In certain years at the beginning of the last decade, Marvin Horne refused to allow the government to take away the reserved raisins, even when the government sent trucks to pick them up. The Hornes were assessed a civil penalty equal to the value of the undelivered reserved raisins ($480,000) plus a further penalty of $200,000. The Hornes defended against the penalty assessment on the ground that the marketing order effected an uncompensated taking prohibited by the Fifth Amendment. Chief Justice John G. Roberts wrote for himself, and Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr. agreed. Indeed, Justices Ruth Bader Ginsburg, Stephen G. Breyer and Elena Kagan agreed that the marketing order was a constitutional taking, but would have remanded for a determination whether its price-support effect amounted to an adequate compensation. Only Justice Sonia Sotomayor saw no problem with the reserved raisin scheme.

> 'Horne' raises the prospect that many things we thought were 'regulatory' may in fact be physical takings.

Environmental lawyers often think about regulatory takings. So, in *Koontz v. St. John's Water Management District*, 133 S. Ct. 2586 (2013), the court analyzed a requirement that a landowner either transfer or impose a restrictive covenant on wetlands as a condition to obtaining development approval from the water management district. The court treated that requirement as a condition of a regulatory approval that only requires compensation if it lacks either "nexus" or "rough proportionality" to the impacts of the proposed development. This is the standard set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and the court held that the water management district failed to meet it.

Similarly, a limitation on the ability to mine coal to avoid subsidence went "too far," and effected an uncompensated taking, in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). But, on the other hand, a prohibition on the construction of an office tower over Grand Central Station in New York was not a regulatory taking because it left some value in the land, in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978). Indeed, in the Pennsylvania courts, the designation of an area as unsuitable for surface mining does not constitute an uncompensated taking because mining in an unsuitable area would constitute a public nuisance, as in *Machipongo Land & Coal v. Commonwealth*, 799 A.2d 751 (2002).

But *Horne* takes the raisin marketing order out of the whole regulatory taking analysis by noting that the marketing order demanded an actual physical taking. The government would take the reserved raisins away. To be sure, raisins are personal, not real, property, but that makes no difference. Indeed, the court points to the origins of the takings clause in the Revolutionary War practice of commandeering blankets, food and horses.

The court analogizes the raisin case to *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982), in which a New York City ordinance requiring property owners to allow television cables to cross or enter their properties was held to be a taking requiring compensation. *Loretto* was held to be a physical taking case, and so too with the reserved raisins. Indeed, the court does not even cite *Koontz*.

By reorienting the analysis from regulatory takings to confiscatory takings, even in a case that "feels" regulatory, *Horne* raises the prospect that many things we thought were "regulatory" may in fact be physical takings.

Consider all the instances in which environmental programs require property to be transferred or restricted. For example, the federal hazardous waste regulations require a "notification" of the post-closure use restrictions to be recorded in the land records for any closed treatment, storage and disposal facilities. Perhaps that is not a taking because it is a "notification" and because it is a reasonable condition of the regulatory approval to conduct hazardous-waste-management activities at all.

In *Horne*, the court dismissed any analogy to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), which held that the government did not take chemical manufacturers' trade secrets by requiring them to be disclosed when marketing regulated chemicals. The chemical companies there received a "valuable government benefit"—permission to sell dangerous chemicals. The *Horne* court distinguished selling raisins as a more normal activity, raisins not being hazardous but, instead, a "healthy snack." Perhaps the requirement on the owner of a hazardous-waste-management facility to restrict the property is like the regulated chemicals and not like the raisins.

And that rationale may also work for those obligated to place notice of historic hazardous-waste activities in land records pursuant to Section 405 of the Solid Waste Management Act. It seems strained, however, when applied to the obligation to give notice of any hazardous substance disposal pursuant to Section 512(b) of the Hazardous Sites Cleanup Act. If one has "knowledge" that someone in the past has disposed of a "hazardous substance" in any amount or concentration on one's property, the language of the statute—which cannot really mean what it says—calls for one to "acknowledge" the disposal in the deed. That seems like a more normal condition, perhaps closer to raisin sales than hazardous-chemical sales. Perhaps landowner liability for the condition of land means that one has no right not to record the acknowledgment.

But what if achieving water-quality standards require controls on nonpoint sources of water pollution? For example, what if riparian buffers are required to meet the Chesapeake Bay total maximum daily load? Does the state have to pay for all of them under *Horne*?

Recall that the federal government typically has the option not to take a step that might be a taking requiring compensation. However, the state and its subdivisions may not always have that option under the Environmental Rights Amendment to the Pennsylvania Constitution.

Perhaps *Horne* will mean nothing for environmental practice. But, as always when the court announces a new limitation on government power, the new case presents litigation opportunities. •

David G. Mandelbaum is national co-chair of the environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. He teaches "Oil and Gas Law" and "Environmental Litigation: Superfund" in rotation at Temple University's Beasley School of Law, and serves as vice chair of the Pennsylvania Statewide Water Resources Committee.