

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TAHOE-SIERRA PRESERVATION :
4 COUNCIL, INC., ET AL., :
5 Petitioners :

6 v. : No. 00-1167

7 TAHOE REGIONAL PLANNING AGENCY, :
8 ET AL. :

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10 Washington, D.C.
11 Monday, January 7, 2002

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:03 a.m.

15 APPEARANCES:

16 MICHAEL M. BERGER, ESQ., Santa Monica, California; on
17 behalf of the Petitioners.
18 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of
19 the Respondents.
20 THEODORE B. OLSON, ESQ., Solicitor General, Department of
21 Justice, Washington, D.C.; on behalf of the United
22 States, as amicus curiae, supporting the Respondents.

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(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-1167, Tahoe-Sierra Preservation Council v. The Tahoe Regional Planning Agency.

Mr. Berger.

ORAL ARGUMENT OF MICHAEL M. BERGER

ON BEHALF OF THE PETITIONERS

MR. BERGER: Mr. Chief Justice, and may it please the Court:

There are three important things that should be kept in mind while we're addressing the issue this morning. First, the Tahoe Regional Planning Agency totally prohibited a select group of individual landowners scattered around Lake Tahoe from making any use whatever of their land. These prohibitions were never designed as the kind of planning time-out touted by TRPA and its amici. Rather, they were amendments --

QUESTION: Well, what about a temporary order that says, gee, we're required by State law to develop a plan and it's going to take us a few months and, pending that, you can't develop? Now, does that invoke immediately some per se taking rule?

MR. BERGER: It does if it's a flat prohibition of use, Your Honor, and if there is --

1 QUESTION: A flat prohibition that says, while
2 we're developing this plan, which we think won't take
3 long, you can't go ahead with your development?

4 MR. BERGER: Justice O'Connor, I do believe that
5 if it is a total prohibition on use, and there is no use
6 being made of the property at the time, that it's part of
7 the public project to have this freeze on use, and it's
8 the public that ought to be paying for that project, not
9 the individual landowners who are frozen out.

10 QUESTION: Suppose that -- we'll have to play
11 with the facts a little bit, it's a hypothetical case, but
12 that within a month from now the World Trade Center is
13 ready to be constructed and New York says -- and the owner
14 wants to rebuild highrises for office only, and the city
15 says, wait a minute, this is so important to the whole
16 city, we need a year to think about it, a year in addition
17 to the usual zoning process. A taking?

18 MR. BERGER: I think if they forbid the entire
19 use of the property and don't allow any applications for
20 use to be made, don't allow the owner to do anything --

21 QUESTION: Well, they could use it for a parking
22 lot.

23 MR. BERGER: If there is some reasonable,
24 economically viable, productive use that can be made of
25 the property at the time, then I don't believe we have a

1 per se taking.

2 QUESTION: Well, I guess my question -- and I
3 know you had a more general introduction before I
4 interrupted you, is the use of a moratorium a standard
5 instrument of zoning policy, or is it very rare? I
6 couldn't find anything in the briefs on this.

7 MR. BERGER: It has, I believe, become much more
8 rare these days. There's an awful lot more planning going
9 on. Agencies are doing a better job of planning, and they
10 find the need for this kind of a total prohibition on
11 development to be made.

12 QUESTION: My impression is that most of these
13 moratoriums, or moratoria, whatever they're called, would
14 not be total. I mean, if you're considering altering a
15 rural zoning scheme that now doesn't have any limit on
16 number of residencies per acre, and you're thinking of,
17 say, no more than one house on every 3 acres, the only --
18 and that's what you're thinking about, the only moratorium
19 you would have to impose would be no more -- until we make
20 up our mind, no more than one house on every 3 acres. It
21 wouldn't say, nobody does anything while we're sucking our
22 thumb on this question, right?

23 MR. BERGER: That's correct, Justice Scalia --

24 QUESTION: And --

25 MR. BERGER: -- and I think that's the more

1 typical kind of moratorium, and the kind that most of the
2 amici on the agency's side have been talking about.

3 QUESTION: There was one Minnesota moratorium
4 that was -- seemed somewhat like this that had been
5 sustained by, I think the Minnesota appellate court.

6 MR. BERGER: There was one, Your Honor, and I
7 would submit that that court erred. It happens. Lower
8 courts do that sometimes.

9 (Laughter.)

10 MR. BERGER: And we believe that --

11 QUESTION: So we notice.

12 (Laughter.)

13 MR. BERGER: And we believe that that simply is
14 not an appropriate precedent for this Court to follow.

15 QUESTION: Why, why is it -- I guess this is
16 going to be your basic point. Why is it the case -- let's
17 take not this moratorium, but let's take a moratorium that
18 lasts for a year, and after that time everyone believes
19 the board will allow certain kinds of development. Other
20 things being equal, that year of no use would probably
21 have reduced the value of the land by 5, 10 percent. Now,
22 so why, since that's the effect of the moratorium I'm
23 imagining, should the public have to give compensation for
24 that small diminution in value?

25 MR. BERGER: Because it's not the diminution in

1 value we're talking about here, Your Honor. It's the
2 total elimination of the ability to make use of the
3 property, and in all of this Court's cases you have talked
4 about denial of economically productive use of land, and
5 what we're doing here, and what you're talking about in
6 your hypothetical, Justice Breyer, is taking away the
7 right to use that land.

8 It's as if I took away your car for a year and I
9 parked it in the garage and I kept good care of it, and I
10 returned it to you at the end of the year with no
11 diminution in value whatsoever, or perhaps the 5 percent
12 that Your Honor hypothesized. You still would have been
13 without the use of that car for a year, and I think that
14 you would be entitled to compensation for the fact that I
15 deprived you of the use of that car.

16 QUESTION: Well, certainly if the respondent
17 here had simply said, we're going to need your property
18 for 3 years, and so we're going to take a leasehold
19 interest for 3 years, the respondent would have had to
20 compensate for that.

21 MR. BERGER: Chief Justice, I couldn't agree
22 with that more, and I believe that that is in fact what
23 we're dealing with here.

24 QUESTION: No, but you're -- it seems to me
25 you're not dealing with that here, because in that

1 hypothetical the person, the third party in fact takes the
2 property in the sense of using it for that party's own
3 benefit. Here, no one, the Tahoe Regional Planning
4 Authority isn't using the property for its benefit. It's
5 saying that during this period of time there are some
6 things that you can't do.

7 MR. BERGER: That's true, Justice Souter, but
8 frankly I don't see the difference between them, because
9 the Government --

10 QUESTION: Well, one difference is that the
11 person taking in the one hypothetical gets a considerable
12 personal value, i.e., the use of a car, or the use of
13 property for a period of time. There's no such fact in
14 evidence here.

15 MR. BERGER: Absolutely true, but this Court's
16 jurisprudence has always examined cases like this from the
17 impact on the property owner, not from what the Government
18 gains by the taking. Justice Holmes said that in the
19 Boston Chamber of Commerce case a century ago.

20 QUESTION: Isn't your argument, and wasn't your
21 answer to Justice Breyer's question in effect to invoke
22 the kind of standard language which has come out of the
23 Lucas case? In other words, it is preventing all use of
24 the property, or all economically productive use of the
25 property, and yet Lucas garaged that phrase in the

1 circumstance in which the denial of economic use was
2 assumed to be permanent.

3 Here, we're dealing with a situation -- Justice
4 Breyer's question dealt with a situation in which the
5 deprivation is assumed to be temporary, so that it does
6 make sense in his hypothetical to say, well, it reduces
7 the value of the property during the interim period maybe
8 by 10 percent. That is a very different economic fact
9 from an indefinite, permanent deprivation which would
10 reduce the economic value of the property down to
11 something close to zero, and doesn't that distinction have
12 to be recognized, and isn't that the reason why the Lucas
13 formula simply cannot be used uncritically in this
14 circumstance?

15 MR. BERGER: Justice Souter, I believe that that
16 distinction gets recognized at the valuation phase, not at
17 the liability phase. In other words, taking for a small
18 period of time, or for less than the full life of the
19 property, would be compensated less than taking the full
20 fee interest.

21 QUESTION: Yes, but what you're really saying
22 is, if the -- I think, that if in Justice Breyer's
23 hypothetical there is a diminution in the value for this
24 period of 10 percent, that you've got to compensate for
25 the full 10 percent, and it seems to me that our cases are

1 pretty clear in saying, that's not how you measure the
2 compensation obligation. That's the -- that's an example
3 of taking, you know, the one stick out of the bundle and
4 saying because you can't use that one, you've got to
5 compensate 100 percent for that one, but I think our cases
6 rule that out, don't they?

7 MR. BERGER: Actually, your cases in quite a
8 number of different circumstances say that if you do take
9 one important stick out of the bundle, you may well have
10 taken the property --

11 QUESTION: Permanently. Permanently.

12 MR. BERGER: Well, except in First English, Your
13 Honor, where this Court expressly said, and examined all
14 the cases, that temporary takings are constitutionally no
15 different than permanent takings.

16 QUESTION: Well, except that that gets to the
17 argument that the other side makes throughout here, that
18 the assumption of that statement was that we had a taking
19 in the first place, whereas the issue in this case is
20 whether we do have a taking.

21 MR. BERGER: Well, that's correct, and what
22 we're talking about here is a deprivation of all use.
23 That's why we have a pretty clean case for the Court to
24 deal with here.

25 QUESTION: It's a deprivation of all use if you

1 fit it into Lucas.

2 Lucas was a case that did not involve a
3 permanent taking, so that it seems to me your first
4 argument has got to be not that the Lucas formula can
5 apply here, but that the Lucas formula should apply here
6 as opposed to this Penn Central formula. You've got to do
7 that in order to get into First English.

8 MR. BERGER: I agree with that completely, but I
9 think that what we're dealing with, if you examine the
10 facts of the case, is that from the time that these
11 ordinances were enacted in 1981 until whatever end point
12 you want to look at, there was a total deprivation of use.

13 QUESTION: Well, Mr. Berger, you may well have
14 been able to prevail under the Penn Central approach, I
15 assume, viewed in its entirety over this period of time,
16 but that was waived. Am I correct in that?

17 MR. BERGER: We did not present a Penn Central
18 case, that's correct.

19 QUESTION: And all you want is this pure and
20 simple per se taking, as applied to, as it comes to us,
21 what is it, a 3-year period?

22 MR. BERGER: Well, there was this 3-year period
23 chopped out at the beginning of the time.

24 QUESTION: And that's what we're focused on here
25 as the case actually comes to us?

1 MR. BERGER: That appears to be what the Court
2 is interested in, as the Court reframed the question.

3 QUESTION: May I ask you this question, Mr.
4 Berger? Just looking at temporary takings, and just
5 looking at the liability stage as opposed to the valuation
6 stage, is there a distinction in your view between a
7 regulatory taking and a physical taking?

8 MR. BERGER: I don't believe so, Justice
9 Stevens. I think that this Court did deal with that in
10 the First English case, and it explained that physical
11 takings and regulatory takings are judged by the same
12 constitutional standards.

13 QUESTION: So that in your view -- of course,
14 the physical taking, even for 10 minutes, would be a
15 taking. There's no doubt about that. But your view is,
16 even if the regulation prohibits all use of a piece of
17 property, an automobile, whatever it may be, for 10 or 15
18 minutes, there is a taking. The damages may be
19 infinitesimal, but there's always -- past the liability
20 stage.

21 MR. BERGER: If there is a total prohibition of
22 use --

23 QUESTION: For 10 minutes.

24 MR. BERGER: -- there is liability. Now --

25 QUESTION: So --

1 QUESTION: Mr. Berger, can you reconcile the
2 different approach that this Court has said goes for
3 spatial separation, like the air space in Penn Central,
4 and time segregation? It seems to me that if the one --
5 if Penn Central is the regime for splitting off the air
6 rights, it should also be the regime for splitting off a
7 discrete period of time.

8 MR. BERGER: Your Honor, this Court and other
9 courts have always dealt with the time value of property,
10 if I may, differently than they have in these spatial
11 terms. The fact is, leasehold interests, future interests
12 have always been recognized as independent items of
13 property that are independently protected by the
14 Constitution.

15 If you had a piece of property that had a
16 landlord and a tenant and a lender and some remainder
17 person --

18 QUESTION: But these are all physical takings.

19 MR. BERGER: -- with all interests, and it was
20 condemned, all of them would be entitled to compensation.

21 QUESTION: But that's --

22 QUESTION: These are all physical takings cases.

23 MR. BERGER: And this Court has said in First
24 English that there is no difference constitutionally,
25 Justice Stevens, between the physical takings and the

1 regulatory takings.

2 QUESTION: Suppose I --

3 QUESTION: What do you do about the fact that
4 there is a regulatory taking of sorts whenever you have a
5 permit system, let's say the normal zoning regime in which
6 you cannot construct any building on your acreage without
7 first applying and getting the approval of the zoning
8 agency?

9 MR. BERGER: Justice Scalia --

10 QUESTION: During that period, there's been a
11 total taking. You cannot do anything with that property
12 until you get the building approved.

13 MR. BERGER: Clearly you cannot do anything
14 until you've gotten the property approved, but it seems to
15 me that there is a fundamental difference between a
16 landowner working through a system whose end product is,
17 at least theoretically and probably very likely, the
18 issuance of a permit to go ahead and develop something
19 that is economically productive on that land as opposed to
20 being stuck in a system where you're forbidden --

21 QUESTION: But that would have been during that
22 interval of time it meets your test. Nothing can be done
23 until the permit issues, so a fortiori, under your theory,
24 compensation due.

25 MR. BERGER: I don't believe so, Justice

1 O'Connor, because --

2 QUESTION: Well, that's what it sounds like.

3 Now, what about your basic zoning law? I'm
4 going to, as a city, limit the use of this property to one
5 house per acre. You can't have unlimited apartments or
6 commercial property owner. Now, for the enactment of
7 that, is there a taking immediately?

8 MR. BERGER: No, Your Honor.

9 QUESTION: Well, you're permanently deprived of
10 the use of it for commercial purposes.

11 MR. BERGER: Yes, Your Honor, but you are not
12 totally deprived of the use of it.

13 QUESTION: But can we get back to the basic
14 question that Justice Scalia asked, and Justice O'Connor
15 asked it as well. I want your answer. Why is it that a
16 delay for purposes of ordinary zoning, which, let's
17 assume, prohibits you from any use of the property, is not
18 a taking?

19 MR. BERGER: Because you are there in a process
20 working toward the actual development of the process, of
21 the property, pardon me, in contrast to being in a
22 situation like these people are, where there is no process
23 for development. There is instead the desire --

24 QUESTION: Let's assume that the Tahoe Regional
25 Planning Agency thought, in good faith, that there would

1 be some development allowed, but they needed a year to
2 think about it. My -- that's the same as the World Trade
3 Center hypothetical. We know something very valuable is
4 going to be built, but you say it's a taking, and I don't
5 understand the difference between that and the regular
6 zoning procedure.

7 MR. BERGER: The difference is that in the
8 second situation there is a conscious and total
9 prohibition on use, and that's the purpose of the
10 regulation, is to prohibit the use. In the former
11 situation, where you're applying for a permit, the purpose
12 of the regulation is not to prohibit use but, in fact, to
13 enable use.

14 QUESTION: Well then, it seems to me you have to
15 change your answer about the World Trade Center
16 hypothetical, where you say there's going to be a very
17 valuable use, we just don't know what it is, but we need a
18 year to think about it, in addition to the normal -- and
19 you told me that was taking, but now your rationale seems
20 to me to back away from that.

21 MR. BERGER: If they are in a process where
22 there will be development at the end, then I believe that
23 there is not an automatic per se taking, but it seems to
24 me that what we're dealing with, if we've got a total use
25 prohibition, we do have a taking. It's a question of

1 time.

2 QUESTION: But Mr. Berger, your -- it seems to
3 me your deciding whether the temporary taking is --
4 whether the temporary interference is a taking or not
5 depends on what's going to happen after the temporary
6 period expires, because in one situation you think, well,
7 they know they're going to get something valuable out of
8 it, in the other they don't, but that means that the test
9 for the temporary period turns entirely on an evaluation
10 of the future.

11 MR. BERGER: Well, if I made it sound that way,
12 Justice Stevens, I apologize. I -- what I'm saying is
13 that you have two different schemes set up. One is a
14 process leading toward development. The other is a
15 process of total blockage, and where the intent of the
16 Government is simply to block the use of property. We're
17 not looking at the future --

18 QUESTION: Well, you're not suggesting they're
19 doing it just for the sole purpose of blocking the use.
20 Don't they have some ultimate goal in sight here?

21 MR. BERGER: Sometimes they may. Sometimes they
22 don't.

23 QUESTION: But your -- you rest on the
24 hypothesis that they are just interested in a total
25 blockage for a temporary period of time, and they don't

1 care what happens later.

2 MR. BERGER: But that is the fact that we're
3 dealing with. We're dealing with --

4 QUESTION: They don't have any interest in
5 protecting the lake?

6 MR. BERGER: We have no question about their
7 ability to protect the lake. The question is how they do
8 that, and what they've decided to do in order to protect
9 the lake is to prohibit these people from making any use
10 of their land.

11 QUESTION: But it seems to me in effect -- maybe
12 this is a variant on Justice Stevens' question -- that
13 you're saying, what's really wrong here is that this is
14 not done in good faith, that this is not done, let's say,
15 in the case of the period of time necessary to get
16 permits, with an actual development in mind. This is
17 called a moratorium, but they mean something more than
18 just moratorium, they just mean stop, period, and it
19 sounds to me as though you're making it turn on whether
20 it's good faith or bad faith.

21 MR. BERGER: Oh, I don't think it needs to. I
22 think, in fact, in this case, when they put this
23 moratorium in the context not of -- they don't even call
24 it a moratorium. They did this as amendments to their
25 Water Quality Act. What they said was, these properties

1 need to be kept frozen in order to protect the clarity of
2 Lake Tahoe.

3 QUESTION: And your argument in effect contrasts
4 that with an existing permit system whereby if you comply
5 with certain requirements you will ultimately end up with
6 a permit, the purpose of which is to make sure you do
7 comply with the requirements.

8 MR. BERGER: Exactly, Chief Justice.

9 QUESTION: But you still have -- I mean, in the
10 one case the regulating agency has said, you can't do
11 anything with your land while we're thinking about the
12 scheme we're going to adopt, and in the other case the
13 agency has said, just as categorically, you can't do
14 anything with your land while we consider your
15 application. In both cases they're, for a later
16 regulatory purpose they're both saying, you can't do
17 anything with your land.

18 MR. BERGER: Justice Scalia, in a sense that is
19 certainly true, but in the case of the processing of a
20 permit application, we know that there is permitted use.
21 It's there. It's in the books.

22 QUESTION: Not during the pendency. Not while
23 the application is pending.

24 MR. BERGER: The regulations of the agency say
25 that for this property there is permitted use. The

1 question is how you make that use, and under what
2 conditions and circumstances, not whether there will be
3 use at all, where you have in the second situation a total
4 prohibition on use and we don't know what's going to
5 happen at the end of that total prohibition on use.

6 The key to it may be this case itself, where the
7 light at the end of the tunnel that they keep touting as
8 the saving grace of this kind of a regulatory regime
9 turned out to be no light at all. There was a complete
10 continuation of the use prohibition when this temporary
11 so-called period ended.

12 QUESTION: Well, under your theory it would seem
13 that -- suppose that a building catches fire and is
14 substantially destroyed by fire, and the fire department
15 comes, and the police department, and they block it off
16 for a period of time, no use while this is investigated,
17 none, property owner can do nothing, can't enter it,
18 you're out of there. I guess the city or the governing
19 jurisdiction would have to pay the property owner.

20 MR. BERGER: I don't think at that point, Your
21 Honor, that that would be a taking.

22 QUESTION: But it fits squarely within your
23 argument.

24 MR. BERGER: No, I think that in that case, Your
25 Honor, you would at least be entitled to perhaps some

1 nuisance examination. You've got a wrecked building that
2 is a hazard, and at least the Government would have the
3 ability to order the property cleaned up before anything
4 else could be done with it, and I think in those
5 circumstances --

6 QUESTION: But that seems to make the question
7 whether there's a taking turn on the nature of the motive
8 of the -- underlying the regulation or the prohibition,
9 and I thought your position was, regardless of the good
10 faith and the great public interest in doing it, the State
11 has to pay when it does this.

12 MR. BERGER: Your Honor, I think we all have to
13 live with what this Court called the nuisance exception
14 when it decided the Lucas case, and that there are some
15 things that the Government can do that prohibit all use
16 that are not compensatory.

17 QUESTION: Are you satisfied with the standard
18 that says, every Government regulation is a candidate for
19 a taking, just as every speech act is a First Amendment
20 candidate, but it's actually a taking in this area only
21 when the impact of the Government regulation is not part
22 of a reasonable process looking towards a reasonable form
23 of regulated development?

24 MR. BERGER: I think I could accept that,
25 Justice Breyer.

1 QUESTION: Well, if that's so, they're going to
2 say they win, because they're going to say, of course,
3 this was an effort, reasonably, to regulate Lake Tahoe
4 over a period of time. It's very complicated, it didn't
5 last -- it lasted a long time, but no more than necessary.

6 MR. BERGER: Oh, I would disagree with that
7 characterization. This was not an effort to regulate Lake
8 Tahoe. This was an effort to prevent the use of these
9 properties. Certainly they --

10 QUESTION: But that's a reasonableness
11 calculation, and that's the Penn Central aspect rather
12 than the more categorical approach that you're urging upon
13 us, I should think.

14 MR. BERGER: Your Honor, if they had come up
15 with a nuanced, subtle regulation that had something to it
16 other than the meat ax approach that the agency took in
17 this case, I think you would have a Penn Central-type
18 analysis, but what we've got in this case is not anything
19 subtle at all. We've got a complete, easy, quick
20 prohibition, and --

21 QUESTION: What is the status today? What is
22 it, 22 years later?

23 MR. BERGER: We're 22 years later.

24 QUESTION: What's the status today of the
25 properties affected by this suit?

1 MR. BERGER: The clients that I represent are
2 still, for the most part, unable to do anything. There is
3 the new plan put in in 1987, which this Court looked at in
4 the Suitum case, and some of the people, those in the
5 position of Mrs. Suitum, in the stream environment zones,
6 are still totally prohibited from using their land. Most
7 of the people are still totally prohibited from using
8 their land.

9 A large number of them have sold their land to
10 Government agencies that were buying them up at bargain
11 basement prices, at nothing approaching what would, an
12 appraiser would call fair market value, but the value of
13 land that couldn't be developed, in order to mitigate
14 their losses, and as the court approved in the Del Monte
15 Dunes case, what they'd like to do is to make themselves
16 whole.

17 QUESTION: Well, is it your position that all of
18 the properties involved in this petition are, today, still
19 totally deprived of any use whatever?

20 MR. BERGER: I believe, Justice O'Connor, there
21 may be a handful of them that under the 1987 plan, and the
22 regulations that came under that in 1989, were finally
23 released and allowed to do something, but it's only a
24 small number, and for the most part these properties are
25 still unused and unusable.

1 QUESTION: Is it your position that the
2 application of the Penn Central approach would not result
3 in appropriate compensation determinations at the end of
4 the day?

5 MR. BERGER: I don't know that, Your Honor. As
6 a pragmatic matter, doing a Penn Central approach on a
7 case that involves hundreds and hundreds of individual
8 properties would have been a nightmarish litigation that
9 only the wealthiest of landowners would be able to afford
10 and, particularly in light of the clear prohibition of use
11 that they decided that they needed, we thought that it
12 made more sense to do a Lucas-type approach than a Penn
13 Central approach in this case.

14 QUESTION: May I just ask this one question?
15 With regard to those who have subsequently been permitted
16 to develop their land, it's your view that you're
17 nevertheless entitled to a takings compensation for the
18 period which the moratorium was in effect?

19 MR. BERGER: Yes --

20 QUESTION: Yes.

21 MR. BERGER: -- Justice Stevens, that's true.

22 I'd like to reserve the rest of my time, Mr.
23 Chief Justice, if I may.

24 QUESTION: Very well, Mr. Berger.

25 Mr. Roberts.

1 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

2 ON BEHALF OF THE RESPONDENTS

3 MR. ROBERTS: Thank you, Mr. Chief Justice, and
4 may it please the Court:

5 Petitioners' only takings claim before the court
6 of appeals and his only -- their only takings claim before
7 this Court is a facial per se claim. That means that
8 their contention is that the mere enactment of the
9 temporary moratorium in this case effected a taking with
10 respect to every parcel to which it applied -- that's the
11 facial aspect -- without any consideration of the reasons
12 for the moratorium. That's the per se aspect. And what
13 is more, that bold claim is limited at this point to the
14 temporary moratorium in effect from August '81 until April
15 1984.

16 QUESTION: Mr. Roberts, you described it as a
17 bold claim. Supposing it had gone on for 10 years.

18 MR. ROBERTS: In 10 --

19 QUESTION: Would it be still bold?

20 MR. ROBERTS: On the facial aspect I think so,
21 Your Honor. I think doing the Penn Central analysis and
22 not the Lucas analysis, so long as it's not a permanent
23 deprivation abuse.

24 Now, certainly a 10-year claim would have a much
25 harder row to hoe against a takings challenge, but I would

1 like to know the impact on the property's value, why the
2 10 years was necessary, if it was, the sorts of things
3 that are factored under Penn Central.

4 QUESTION: Well, you could do a Penn Central --
5 you could have done Penn Central in Lucas. I mean, Penn
6 Central is wonderful. We could apply it to everything,
7 but as Mr. Berger pointed out, that's a terribly
8 complicated analysis, enormously expensive for property
9 owners to have to go through, which is why you have cases
10 like Lucas.

11 MR. ROBERTS: This Court said Lucas applied only
12 in the rare circumstance, a total ban on economic
13 reproductive use.

14 QUESTION: Suppose I take a 3-year leasehold,
15 right. The Government comes in and says, we're taking
16 this property for 3 years, not a permanent taking, just a
17 3-year taking.

18 MR. ROBERTS: That --

19 QUESTION: We do a Penn Central analysis of
20 that?

21 MR. ROBERTS: Oh, no. If the Government
22 condemns a leasehold, that's a taking, and compensation is
23 due.

24 QUESTION: All right, suppose in this case that
25 one of these barred owners leased the property to someone

1 who's going to put a mobile home on it for a year, the
2 moratorium comes in effect, assume the mobile home can't
3 be -- is that a taking of the leasehold, of the
4 lessee's --

5 MR. ROBERTS: No.

6 QUESTION: -- interest?

7 MR. ROBERTS: No. You don't sever up the
8 property interest and -- so that it corresponds to the
9 extent of the regulation and then say --

10 QUESTION: You're taking from the lessee.
11 That's all he's got.

12 MR. ROBERTS: Well, the right at issue here is
13 the right to build residences, to develop the property.

14 QUESTION: No. My hypothetical is that it
15 applies to a mobile home and the guy who leases for -- the
16 lot for a year, and then TRPA says you can't put the
17 mobile home on there for a year. They take this entire
18 leasehold. Compensable?

19 MR. ROBERTS: It would first of all be under the
20 Penn Central analysis, and the economic impact --

21 QUESTION: Why, if it's a total taking?

22 QUESTION: General Motors certainly didn't do
23 Penn Central.

24 MR. ROBERTS: No, but the other -- the
25 distinction is the one this Court talked about in Loretto,

1 between -- you mentioned the World War II condemnation
2 cases. The Pee Wee Coal case, the Government came in and
3 occupied the coal mine to prevent a strike. That was a
4 taking. In Central Eureka they said, you cannot use the
5 gold mine, and this Court said, that's different, that's
6 not a taking.

7 That's the type of distinction that we're
8 talking about here between physical appropriation or,
9 extended to Lucas, a ban on total economic use, and the
10 temporary regulation that's at issue here. Because the
11 regulation is temporary, the land retains economic value.

12 QUESTION: I'm still not sure of your answer.
13 Your answer is that in my hypothetical about the 1-year
14 lease that's taken from the lessee, it has to be a Penn
15 Central analysis because?

16 MR. ROBERTS: Because you're starting out with a
17 property -- presumably the regulation applies to the
18 property generally, and it just so happens that this one
19 parcel has been severed out into a leasehold, and in doing
20 that, that is a question that has to be addressed before
21 you get to the analysis, should you sever out the affected
22 property interest to a leasehold.

23 QUESTION: But you could have made that same
24 argument in General Motors, and I think the Government
25 did, that you shouldn't just treat it as a leasehold,

1 you've got to value the whole property. The court says
2 no, there was a leasehold in effect, that's what the
3 Government took, that's what the Government has to pay
4 for.

5 MR. ROBERTS: But if -- if this Court is -- in
6 its past takings cases, when it's been presented with a
7 regulation that applies to a discrete property interest,
8 it hasn't said, well, let's redefine the effective
9 property interests to that. It didn't do it in Penn
10 Central, it didn't do it in Keystone Bituminous, and it
11 didn't do it in the construction laborers case.

12 The way the property was held by the petitioners
13 in this case is fee simple. This regulation applied to
14 fee simple property. It did not affect the value anywhere
15 near the extent that the regulation in Lucas did.

16 QUESTION: No, but just to make it clear, in my
17 hypothetical -- I know it didn't happen, but in my
18 hypothetical, no recovery because?

19 MR. ROBERTS: No, I'm not sure it's no recovery,
20 but I am sure that it's still evaluated under Penn
21 Central, because --

22 QUESTION: But Mr. Roberts, if you evaluate it
23 under Penn Central, would it be legitimate to evaluate it
24 this way. I've assumed it would be, but maybe I'm wrong.
25 Assume that the leasehold is not physically taken, so that

1 the Government doesn't substitute itself for the trailer
2 owner and use the property. It's strictly a prohibition
3 of use. I assumed that under Penn Central the lessee
4 would have his claim against the lessor because the lessor
5 was not delivering. The lessor would not have a claim for
6 a permanent deprivation here because there, with respect
7 to the lessor there would only be the temporary taking.

8 MR. ROBERTS: Well --

9 QUESTION: So that the lessee would probably
10 come out okay against a different party. The lessor would
11 be in the same position that the lessor would be in if
12 there had never been a lease. Is that the way it would
13 work?

14 MR. ROBERTS: Well, presumably the impact of
15 regulation would be something that would be addressed in
16 the lease agreement itself.

17 QUESTION: Yes.

18 MR. ROBERTS: I mean, if they were leasing it to
19 build a mobile home and it turns out they can't, who bears
20 the responsibility for that, again a matter between the
21 lessor and the lessee.

22 The important point is that the, what the
23 petitioners are arguing for is an extension of the Lucas
24 rule which applied in a, as the Court said, the rare
25 circumstance in which all economic use is prohibited, and

1 the Court emphasized in Lucas that that had the
2 consequence of rendering the property valueless. This is
3 how the Court phrased the question presented in Lucas,
4 whether the act's dramatic effect on the economic value of
5 Lucas' lot accomplished a taking.

6 Well, here, there is no dramatic effect on the
7 economic value of the affected lots, because we're talking
8 about temporary regulation for a limited time.

9 QUESTION: Well, but does --

10 QUESTION: Well, in light of what's happened, we
11 know it's been 22 years, and presumably many of these
12 properties will never be allowed to be developed. Is
13 there no end in sight? Can we not look at that as a
14 taking?

15 MR. ROBERTS: First, Your Honor, my
16 understanding of the record is quite different from my
17 brother's. If you look at the pretrial order, Exhibit A,
18 pretrial order filed July 17, 1998, it describes the
19 situations with respect to each of the properties. Most
20 of them have been sold long ago. Of those that are not
21 sold, two-thirds have a score that makes them buildable
22 under the '87 plan, so two-thirds of the petitioners who
23 still own property can build on those lots according to
24 the record in this case, and that is just petitioners'
25 allegations.

1 QUESTION: When you say sold, do you mean at the
2 bargain price that Mr. Berger referred to, sold to --

3 MR. ROBERTS: Sold typically to the Government
4 buy-out agencies, I wouldn't say at a bargain price.

5 QUESTION: Sold to the Government agencies who
6 will do with it just exactly what is achieved by the
7 Government's not taking position of it, that is, nothing.
8 I find this distinction between whether the Government
9 takes possession of the land versus whether the Government
10 doesn't take possession of the land quite unrealistic --

11 MR. ROBERTS: Well --

12 QUESTION: -- where you're talking about a
13 Government that wants to assure that the land lies fallow.
14 The Government achieves entirely what it wants by simply
15 saying, nobody shall do anything with the land. That --
16 why should the Government condemn the land? It doesn't
17 have to.

18 MR. ROBERTS: That's not, of course, what we're
19 talking about here. What we're talking about here is a
20 time-out for a limited period while the agency carries out
21 its responsibility to determine what can be done with the
22 land.

23 QUESTION: All right, so how does he prove that?
24 What about the one-third who could never build?

25 MR. ROBERTS: Well --

1 QUESTION: What happens to them? What is your
2 view of the correct thing he should have done? Is a
3 person who never is allowed to build, and never can use
4 the property at all, simply out of luck, if what they say
5 is we're having a 10-year, a 30-year procedure of 3-year
6 moratoriums, 10 at a time or something like that? How is
7 it supposed to work, in your opinion?

8 MR. ROBERTS: Well, the first thing I'd say is,
9 you bring an as-applied claim and not a facial claim. The
10 facial claim is the mere enactment of this temporary
11 moratorium effective taking. Well then, don't talk to me
12 about what happened 15 years later, if the mere enactment
13 of the temporary moratorium is your complaint. That's a
14 different case, and he brought that case, and it was
15 thrown out because it was too late.

16 There were challenges brought to the '84 plan,
17 there were challenges brought to the '87 plan. Those
18 challenges failed, and now the effort is to link those
19 challenges up to what's left, the little tail on the dog
20 of this temporary moratorium that started the process.

21 QUESTION: How does an as-applied challenge go?
22 What if you make an as-applied challenge. What would you
23 have to prove? Would you have to prove that any
24 intelligent agency could make up its mind and, you know,
25 either fish or cut bait within a year? Suppose --

1 MR. ROBERTS: If the as-applied challenge is to
2 the temporary moratorium?

3 QUESTION: Yes.

4 MR. ROBERTS: Well, you go through the Penn
5 Central factors, and if it's taking too long, that's
6 certainly something pertinent on the character of the
7 Government action. That's what other courts have looked
8 to.

9 QUESTION: No, no, but it goes beyond Penn
10 Central if you're no -- if it is no longer an honest
11 moratorium to decide what you're going to do with the
12 land, then you're out of Penn Central. Then it's just a
13 taking. You're kidding us. You only need a year to
14 decide what you want to do. You've imposed a moratorium
15 for 5 years. Why should I have to go through Penn
16 Central? Four of those years is just prohibiting me from
17 using my land with no other governmental purpose in mind
18 except the prohibition.

19 MR. ROBERTS: And that's one of those things
20 that they would have to show. Here, of course, the
21 district court found that the planning effort was
22 undertaken as speedily as possible.

23 QUESTION: But you acknowledge that if, in an
24 as-applied challenge, there's a showing that the agency
25 does not need 3 years or 5 years or whatever, that the

1 thing could reasonably have been done in 1 year,
2 everything beyond the 1 year is then a taking?

3 MR. ROBERTS: No. You have to go through the
4 other factors. This is not a per se analysis.

5 QUESTION: Why?

6 MR. ROBERTS: The other factors include the
7 impact on the property. You're claiming a taking. What
8 was the effect on your property?

9 QUESTION: Well, what if -- let's take a
10 hypothesis where the moratorium is 10 years. Now, you
11 still go through this thing that you're talking about? It
12 cannot be long enough ever to be a per se taking?

13 MR. ROBERTS: Well, even the court of appeals
14 recognized that the moratorium is long enough so that the
15 present value of the uses that might be allowed is de
16 minimis, then perhaps the categorical rule would apply,
17 and 10 years seems like it's going to be too long for the
18 Government to figure out and carry out its
19 responsibilities and planning, but I wouldn't say that we
20 try to find a point in time at which suddenly we shift
21 from the accepted Penn Central analysis to the Lucas per
22 se analysis.

23 QUESTION: Well, but yet you agree that shift
24 has to take place somewhere along the continuum of time.

25 MR. ROBERTS: I guess what I'm saying is at some

1 point calling something a temporary moratorium is a misuse
2 of the label. If it's 30 years, that's too long.

3 Now, the best that Justice Holmes could do was
4 say that when it goes too far it becomes a taking, and I
5 may not be able to do much better, but the Penn Central
6 factors allow consideration of things like, what is the
7 need for it? The need may not be sufficiently compelling
8 to justify a moratorium of 2 years, or the need may be
9 sufficiently compelling to justify a longer moratorium.
10 What was the impact on your -- the property?

11 Keep in mind, the petitioners submitted no
12 evidence of impact on value. We have no idea from the
13 record what the impact of the temporary moratorium was,
14 other than the evidence that we submitted which shows that
15 properties were sold for significant amounts of value
16 during the period of the temporary moratorium, which makes
17 sense.

18 A temporary ban on development doesn't render
19 property valueless. If you have two parcels of property,
20 one subject to a permanent ban on use, and the other
21 subject to a temporary ban, it is true, as some of the
22 amici say, the permanent ban could be made temporary and
23 the temporary ban could be made permanent, but you're not
24 going to pay the same price for both of those parcels of
25 property. The one that's subject to the temporary ban is

1 going to have a higher market value, reflecting the fact
2 that future uses are available, or will be available or
3 not, depending on the plan that's ultimately adopted.

4 QUESTION: I suppose that depends on how much
5 any prospective buyer would believe that the temporary ban
6 is really temporary, or how much they believe that it's
7 going to be strung out and extended, and if worst comes to
8 worse, and the Government can't pick it up at bargain
9 prices it will pay compensation to get rid of the land.

10 I --

11 MR. ROBERTS: And that's like the petitioners'
12 effort to link their lost challenges to the permanent land
13 use plan to their challenge to the temporary moratorium.

14 QUESTION: Mr. --

15 MR. ROBERTS: The district court --

16 QUESTION: Excuse me. Had you finished your
17 answer?

18 MR. ROBERTS: I was just going to say that the
19 district court in this case specifically found that the
20 agency acted in good faith throughout, so the idea that
21 the temporary moratorium to allow planning to take place
22 was some kind of a sham for a permanent --

23 QUESTION: Well, but it also found there was a
24 total deprivation of use for X amount of time.

25 MR. ROBERTS: Only looked at from that period.

1 Only looked at for the 32-month period, and our submission
2 is that that's the improper way to carve up the property
3 interest and say, oh, it's a total taking, because we're
4 going to only look at the property that was taken.

5 QUESTION: Mr. Roberts, in answer to one of
6 Justice O'Connor's questions about a hypothetical fire
7 damage case Mr. Berger referred to the nuisance exception
8 as possibly taking the case out of the whole takings area.
9 At what point in what procedure would the possible
10 availability of the nuisance defense arise or be
11 considered with respect to polluting Lake Tahoe?

12 MR. ROBERTS: Well, we raised the claim before
13 the court of appeals that one reason there was no taking,
14 even if Lucas applied, was because of the nuisance, et
15 cetera. The Court didn't find it necessary to reach that
16 issue.

17 QUESTION: I see.

18 QUESTION: And so the district court said there
19 wasn't -- that a nuisance hadn't been made out. The
20 district court said that, didn't it?

21 MR. ROBERTS: That's right, and we appealed
22 that, and the court of appeals didn't find --

23 QUESTION: And what was your argument to the
24 court of appeals, that this was a nuisance exception?

25 MR. ROBERTS: That given the impact on the lake

1 of development, that it fell within the California and
2 Nevada nuisance requirements.

3 QUESTION: That it all should be a park.

4 MR. ROBERTS: Not that it should all be a park,
5 but that further development would threaten the serious
6 and, in fact, irreparable harm to the lake. That's the
7 basis for the Government action in this case that the
8 petitioners have never challenged.

9 But I want to emphasize in concluding that it's
10 important to remember that the issue is not whether a
11 total ban on use for this period effects a taking. The
12 issue is whether a temporary moratorium from August of '81
13 to April of '84 for the purpose of carrying out the
14 responsibility of undertaking planning with respect to
15 these lots is on its face with respect to every lot that
16 it applied to a per se taking without regard to the
17 reason.

18 QUESTION: Phrased that way, it's quite clearly
19 in your favor, but I think they're seeing this as a group
20 of landowners thinking from the beginning, whatever the
21 justification for this, and the justification is
22 excellent, saving Lake Tahoe, it's going to end up that we
23 won't be able to use our land for anything, and we've been
24 able to tell you that from day one, so we brought a case
25 right off the bat that we knew that was going to happen,

1 and then year after year went by when people told us,
2 maybe you'll be able to build, maybe you won't, which
3 really wasn't so, we knew we wouldn't, and then it ended
4 up that we couldn't, all right.

5 Now, what are we supposed to say to them?
6 Aren't they supposed to have some remedy at law? And
7 that's I think why he wanted to hear all his questions,
8 not just one, and there is that lurking in this case, and
9 I'm not totally sure how to deal with it.

10 MR. ROBERTS: Well, first of all they waited
11 until the '84 plan took effect to file their lawsuit.
12 That suggests to me the gripe was with the permanent ban,
13 not so much the temporary moratorium.

14 Second of all, the supposition in your question
15 makes this not a facial challenge. In other words, it's
16 not the mere enactment. It's because we know what's
17 really going on here. That's an as-applied challenge,
18 that's not a facial challenge, so the landowners in your
19 case said, as, in fact, some have, bring an as-applied
20 challenge saying, as applied to me this is a taking.

21 QUESTION: So do you agree that a temporary
22 moratorium that ripens into a permanent ban is a taking?

23 I mean, you know, let's assume that I sold the
24 property during the temporary moratorium which later
25 ripens into a total ban, and I claim that I should have

1 been compensated for those 3 years that I owned the
2 property without any ability to do -- does that constitute
3 a taking?

4 MR. ROBERTS: I think the period in which the
5 agency's justification is, we need a time-out to undertake
6 planning so that we're not locking the barn door after the
7 horse escapes, should be evaluated separately from the
8 period in which the agency says, this is the land use
9 plan, and if you've got a gripe with us you can challenge
10 that. Those are two separate periods. The character of
11 the Government action is different in those two periods.

12 QUESTION: Okay, let's assume that they are
13 analyzed separately, and it is found that for the period
14 Justice Scalia is talking about the Government really was
15 not acting in good faith. Its plan, its intent right from
16 that moment on, from the first day on, was to ban all
17 development whatsoever. In that case, does he have a
18 claim for a complete taking during the 3-year period?

19 MR. ROBERTS: Oh, certainly, yes.

20 QUESTION: Okay.

21 MR. ROBERTS: Yes. I don't think it's a facial
22 claim, because it depends on more than looking
23 specifically at the face of the ordinance.

24 QUESTION: So it's a question basically of good
25 faith and intent --

1 MR. ROBERTS: And here the --

2 QUESTION: -- and understanding what they're
3 doing.

4 MR. ROBERTS: The district court at petition
5 appendix at page 69 said the agency acted in complete good
6 faith, and completed its responsibilities as quickly as
7 could be expected.

8 Thank you, Your Honor.

9 QUESTION: If the court of appeals opinion is
10 just simply affirmed just as is, weren't we wasting our
11 time in First English?

12 MR. ROBERTS: Oh, no. First English didn't
13 address the question of when a temporary regulation can
14 become a taking. It said that if you have a temporary
15 taking, and it assumed arguendo that there was a taking
16 for a temporary period, compensation is required, and we
17 don't dispute that at all.

18 QUESTION: Yes, but as -- assume the court of
19 appeals opinion is the law. First English wasn't a
20 taking. That's your whole point.

21 MR. ROBERTS: Well, that's what the California
22 State courts determined on remand when they were addressed
23 with the question.

24 QUESTION: No, no, just talk about Federal law.
25 You're saying that First English could not have been a

1 taking, so we were just waiting our time up here.

2 MR. ROBERTS: Oh, no, no, not at all. First
3 English could have been a taking. It would have required
4 an evaluation under, again, Penn Central, not Lucas, to
5 determine whether the regulation at issue there, both the
6 temporary and permanent, and both were at issue at
7 different points in First English, constituted a taking.

8 But once you assume that that was a taking, and
9 you assume the results of that analysis, then it is a
10 taking. Compensation is required.

11 QUESTION: Thank you, Mr. Roberts.

12 MR. ROBERTS: Thank you, Your Honor.

13 QUESTION: General Olson, we'll hear from you.

14 ORAL ARGUMENT OF THEODORE B. OLSON

15 FOR THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENTS

17 GENERAL OLSON: Mr. Chief Justice, and may it
18 please the Court:

19 The colloquy so far today seems to me to
20 illustrate the wisdom of Justice O'Connor's comment in her
21 concurring opinion in the Palazzolo case last June that
22 the Court should avoid per se rules in the area of
23 regulatory taking.

24 Petitioners knew per se rule of takings
25 jurisprudence, taken to its logical end, would make every

1 freeze in the status quo, however brief, during a
2 permitting, planning, or rezoning process equivalent to a
3 condemnation, to use their words --

4 QUESTION: I don't understand it that way,
5 General Olson. I thought Mr. Berger separated out, or at
6 least certainly tried to separate out the normal zoning
7 process where you're working towards a permit and a permit
8 is realistically possible at the end of the road.

9 GENERAL OLSON: It seems to me that's a very
10 difficult distinction for him to make, because it requires
11 an analysis of the nature of the Government's interest in
12 each particular permitting process. We know that they can
13 be short, we know that they can be long, we know that they
14 can be comprehensive.

15 QUESTION: I don't think that's necessarily
16 true. I think you can segregate, at least to my
17 satisfaction, the idea of a zoning requirement in
18 existence -- you have to file for a permit -- and
19 basically to show that you comply with the zoning
20 requirements. In other words, if you're going to have
21 zoning at all, a permit process is almost necessary as
22 opposed to a moratorium which doesn't say, you know, look,
23 we're going to look over your application and decide
24 whether you can build. It simply says no, you can't
25 build.

1 GENERAL OLSON: Well, what we would submit is
2 that that zoning permitting process is part of the
3 background principles of land use, land regulation, just
4 as temporary moratoria have always been, that when there's
5 rezoning process, a process referred to by this court in
6 the First English case, that process may have to come to a
7 halt.

8 The purpose for the temporary moratoria here was
9 to allow the agency to develop a sensible plan and, as Mr.
10 Roberts has already noted by reference to the record,
11 there's no indication that it was not in good faith. The
12 length of the period, 32 months, was held by the district
13 court to be a reasonable time to accomplish the
14 objectives. The purpose of the plan, as acknowledged by
15 the petitioners themselves, is that the purpose for the
16 plan was to prevent the degradation of the lake and they
17 indicated that a slowdown -- in their brief, they
18 mentioned in their brief that a slowdown in building
19 permits was an appropriate governmental response to that
20 measure.

21 Now, in each instance the question is going to
22 be, how long did it take, was it in good faith, what was
23 the Government up to? Here, the Government was attempting
24 to preserve the value that Mr. Berger's clients wanted.
25 They themselves purchased their property and planned to

1 build a home on it because of the pristine quality of the
2 lake. They make the argument in their brief that it was
3 being degraded, that something had to be done about it. A
4 limit on development they say -- I think it's on page 3 of
5 their brief -- was the logical objective to solve,
6 approach to solve that particular problem.

7 So what Lake Tahoe, the regional board that
8 we're dealing with here today, was doing was saying, wait
9 a minute, before we destroy the lake let's stop, let's
10 have a process in which we evaluate how to solve the
11 problem that every landowner around the lake, including
12 the petitioners, want to have solved.

13 QUESTION: Well, that's extraordinary. You
14 refer to it, General Olson, as just a traditional
15 moratorium. I don't think this is a traditional
16 moratorium at all. I think it's quite extraordinary to
17 just say, you know, a time out, nobody does anything with
18 this land. I just don't think that that's the normal kind
19 of moratorium. Nobody does anything beyond the limited
20 use that we anticipate we will ultimately impose. It's
21 very rare that you impose a complete prohibition of use,
22 because that's a condemnation.

23 GENERAL OLSON: It may be unusual, but it is not
24 so rare. In fact, page 5 of the petitioners' brief refers
25 to the two --

1 QUESTION: Two cases, as I recall, that
2 involve -- total, right, yes.

3 GENERAL OLSON: Two instances, and the first one
4 that they refer to is to aid the preparation of a
5 comprehensive plan by precluding developers from obtaining
6 permits that conflict with the plan being drafted. That
7 is precisely almost the same words that were used by the
8 legislator in connection with the compact that suggested
9 that there ought to be a moratorium. This is the compact
10 itself in the 1980 amendments. It specifically said that
11 it was necessary temporarily to halt works of development
12 in the region which might otherwise absorb the entire
13 capability of the region for further development or direct
14 it out of harmony with the ultimate plan.

15 Now, if there is some challenge to the good
16 faith of what was going on here, that is not this case.
17 If there's some challenge to what happened afterwards -- I
18 think the questions Justice Stevens asked point out that,
19 well, if there was something that was done improperly to
20 take these people's property with respect to what happened
21 afterwards, or how far it went, or how it affected a
22 particular property owner, that is the Penn Central test.

23 Now, for tactical reasons, the property owners
24 in this case decided not to pursue a Penn Central case.
25 We heard here today that because it would be too expensive

1 and too complicated for any individual property owner to
2 bring that case. Well, that is going to be the case every
3 time anybody challenges Government action as a taking of a
4 piece of property.

5 These property owners decided to pool their
6 interest and decide not to show what the Government's
7 interest was, the degree of invasion in individual
8 property rights, how much it hurt, whether or not it was
9 in good faith and so forth, so they eschewed tactically
10 all of those considerations.

11 Now, instead --

12 QUESTION: With some reason, because they
13 couldn't use their property at all -- at all.

14 GENERAL OLSON: They couldn't use their property
15 at all as far as this case was concerned, and the question
16 presented in this case, for a limited period of time while
17 a Government agency was acting to address the problem that
18 they acknowledge, because they acknowledge that continued
19 development along the lines that was occurring at the time
20 this moratorium was adopted was degrading the lake and
21 destroying their property.

22 QUESTION: That's fine, and that's a general
23 social problem for which the entire society should pay.

24 GENERAL OLSON: Well --

25 QUESTION: If, indeed, you do need that time to

1 figure out what to do with the lake, why should some
2 individuals bear the burden of that necessary pause to
3 consider what to do?

4 GENERAL OLSON: I submit it's the teaching of
5 this Court that not every delay, not every intrusion on
6 the use of property, not every incursion on property
7 rights constitutes a taking under the Fifth Amendment.

8 QUESTION: I understand that, but these aren't
9 the only people who are using Lake Tahoe. They're
10 preserving Lake Tahoe for all of the citizens of that
11 State and for citizens of other States, for that matter.

12 GENERAL OLSON: Well, Justice --

13 QUESTION: And yet they're saying, since we need
14 time to think about this, we are preventing total, total,
15 all the use of your land for 3 years.

16 GENERAL OLSON: Well --

17 QUESTION: I don't see that it seems to me fair
18 that these people should bear the whole brunt of the
19 moratorium.

20 GENERAL OLSON: They haven't established that
21 they have bore the whole brunt. They haven't established
22 the degree to which their individual property rights were
23 violated, or the extent of their intrusion. They haven't
24 done all of the things that this Court --

25 QUESTION: They've certainly established a

1 common situation. That is, every one of them, presumably,
2 was prevented from using the property for 3 years.

3 GENERAL OLSON: Because the use of that
4 property, as they acknowledge, would have destroyed the
5 very property rights that they're here seeking to
6 vindicate, and what we're saying is that in many different
7 situations the Government might have lots of reasons,
8 local governments, State governments, Federal Governments,
9 to cause a pause in the development.

10 Now, what --

11 QUESTION: I agree with that, and that's what
12 worries me.

13 GENERAL OLSON: That's right, and --

14 QUESTION: That's exactly what worries me.

15 GENERAL OLSON: And that's why this Court in the
16 Penn Central case gave an opportunity to use a reasoned
17 decisionmaking to solve the problem, to find out how far
18 is too far. To ask that very question that Justice Holmes
19 did is to entertain the answer. We need to know how -- in
20 order to determine how far is too far, this Court has said
21 repeatedly we need to look at the circumstances.

22 What -- the rule that petitioners are proposing
23 interdicts that judicial fact-finding, reasoned
24 decisionmaking process. What it also does is cause the
25 permitting agency, the Lake Tahoe Regional Planning Board,

1 to try to do this on a permit-by-permit, quasi-
2 adjudicative process, as opposed to what they did do, as
3 instructed by Congress, a legislative process in which
4 things would stop, reasoned decisionmaking would take
5 place --

6 QUESTION: Well, no one is challenging their
7 authority in the sense of acting for the Government, but
8 the fact that they were instructed to do it by Congress
9 doesn't make it any more or any less of a taking.

10 GENERAL OLSON: Well, I understand that,
11 Mr. Chief Justice, but what I'm saying is that the
12 Government agencies that looked at this problem decided
13 that it had to be solved in a global way. This was
14 Government acting in a way we want it to act, in a
15 legislative process with transparency to look at the whole
16 problem and, if there had been a taking because it was too
17 long, or too much of an intrusion, there is a remedy under
18 the Fifth Amendment and it's described, how you get to
19 that remedy is described in this Court's jurisprudence in
20 the Penn Central case. The petitioners here sought not to
21 pursue that remedy.

22 QUESTION: May I ask, do you understand your
23 opponent to be arguing that a curfew would be a taking?

24 GENERAL OLSON: A taking -- well, a curfew --

25 QUESTION: I remember in Honolulu during the war

1 you couldn't go out after certain hours of the night, and
2 so the property was totally useless when the curfew --
3 would that be a taking under --

4 GENERAL OLSON: Well, I think that they're
5 arguing that any momentary suspension of the use of
6 property would be a taking.

7 QUESTION: So it would be.

8 QUESTION: Thirteenth Amendment.

9 Mr. Berger, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF MICHAEL M. BERGER

11 ON BEHALF OF THE PETITIONERS

12 MR. BERGER: Thank you, Your Honor. Let me
13 touch briefly on a couple of things, if I might.

14 First, General Olson talked about this Court's
15 cases that generally have built on the question of, we
16 can't tell how far the regulation goes until we know how
17 far they went. Well, that's true, and in this case we
18 know precisely how far they went. They totally prohibited
19 the use of all of the property owners who are here in
20 front of this Court, and it's that question that we're
21 here to answer. When we know how far they went, we don't
22 need to get into any detailed, factual investigation of
23 other circumstances.

24 Justice Kennedy asked about the First English
25 case, and whether the Court wasted its time there if the

1 Ninth Circuit's opinion in this case is simply affirmed,
2 and I would have to conclude that that is indeed what
3 happened. The clear message of merely affirming what the
4 Ninth Circuit did in this case would be to tell all the
5 lower courts that they need to pay no attention to First
6 English, because this Court laid out a lot of clear
7 messages in the First English decision that the Ninth
8 Circuit paid no attention to, and --

9 QUESTION: But it also said we merely hold --
10 this is from First English, stating the holding. We
11 merely hold that where the Government's activities have
12 already worked a taking of all use of property, no
13 subsequent action by the Government can relieve it of the
14 duty to provide compensation for the period during which
15 the taking was effective.

16 MR. BERGER: Absolutely, Justice Ginsburg, that
17 is true, and -- but what the Court said in First English
18 was that we're limiting, you were limiting the case to
19 what you called the facts presented in that case, and the
20 facts presented in that case were a temporary moratorium
21 for about the same length of time as the one that we're
22 dealing with here, which froze all use of that property
23 and, in fact, in my belief had a better justification for
24 it, because it had a health and safety justification,
25 which this one doesn't.

1 As you, justice Ginsburg, pointed out, the trial
2 court examined at great length the question of whether
3 these people were creating a nuisance and concluded that
4 there was no nuisance created here. As much as he was
5 concerned about the fact that continued development around
6 Lake Tahoe might change the color of the lake, there was
7 no health problem with changing the color of the lake.
8 There was no safety problem with changing the color of the
9 lake. We would all be the poorer, I think --

10 QUESTION: But that question was not resolved on
11 appeal.

12 MR. BERGER: That's correct, the court of
13 appeals did not deal with that question, only the district
14 court did, and its analysis is there for you to look at.

15 The 1980 compact amendments that the two
16 legislatures and Congress went through are interesting in
17 this case, because while they, in fact, said there was a
18 need for a moratorium, but the moratorium that the
19 legislators and Congress agreed to was not the one that
20 TRPA enacted here. They said, what we need is a cap on
21 the number of building permits that are issued, and that's
22 in the record here, too, and they said we're going to
23 limit the number of building permits that each city and
24 county can issue to the number that they issued in 1978.

25 The first thing that TRPA did after that was

1 enacted was to say, we need to rearrange that, and we're
2 going to say, you can issue those permits, but you can't
3 issue any of them to these people. These people are
4 totally frozen out, and they're being frozen out as part
5 of a major public project so that we can clarify the
6 waters in Lake Tahoe, and it just seems to us that where
7 you have these people who are being asked to make this
8 sacrifice on behalf of the greater public good, either of
9 the people who already own homes around Lake Tahoe, and
10 whose lands therefore gets more valuable, or on behalf of
11 the rest of us who don't own homes up there but who might
12 like to vacation there so that we can also enjoy the
13 beauties of Lake Tahoe, that those people shouldn't be
14 left flapping in the breeze with no compensation for the
15 fact that they're the ones that have been asked to pay for
16 this project.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Berger.

18 The case is submitted.

19 (Whereupon, at 12:03 p.m., the case in the
20 above-entitled matter was submitted.)

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