SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, FEBRUARY 3, 2015

PERSPECTIVE

# A taking of raisins is still a taking

By Jennifer F. Thompson

The U.S. Supreme Court recently granted certiorari in *Horne v. U.S. Department of Agriculture*, a case challenging a depression-era agricultural "marketing order" requiring California raisin producers to turn over a percentage of their crop to a Raisin Administrative Committee, every year, in order to sell the remainder of their crop on the open market.

The 9th U.S. Circuit Court of Appeals held the scheme, which in 2002 required longtime-Fresno farmers Melvin and Laura Horne to give up 47 percent of their raisins, was not a taking. Now, the high court looks set to overturn that ruling. In the process, it may draw some important lines in Fifth Amendment takings jurisprudence or, at the very least, bring clarity to a notoriously inscrutable area of the law.

Under the Agricultural Marketing Agreement Act of 1937, the USDA has authority to regulate the sale of certain agricultural products, including through the use of "marketing orders." The marketing order specific to California-grown raisins directs the Raisin Administrative Committee, a branch of the USDA, to establish a yearly raisin tonnage "reserve requirement" — a percentage of farmers' crops they must turn over to the committee. Failure to comply results in fines and penalties.

The program's purpose is to stabilize raisin prices by limiting supply on the domestic market. The committee may give away the reserve raisins to whomever it likes, or sell them for export. When it sells raisins, it uses the income to cover its own costs, and then to provide export subsidies. If there is any money left over (often there is not), it is given to the farmers.

If this case sounds familiar, that's likely due to its tortured procedural history, which includes a prior trip to the Supreme Court. In 2002 and 2003, the committee set the yearly tonnage reserve requirement at 47 percent and 30 percent of farmers' yields, respectively. The Hornes decided they'd had enough and refused to surrender their raisins. The USDA then instituted enforcement proceedings against them and imposed nearly $700,000 in fines against the couple, including both civil penalties and the monetary value of the withheld raisins.

The Hornes appealed those penalties and brought a takings claim through the agency's administrative appeals process and then in federal court. The 9th Circuit initially affirmed the penalty and held that the marketing order was not a taking of private property. But on a petition for rehearing, the 9th Circuit ruled, for the first time, that the federal district court never had jurisdiction over the Hornes' takings claim. It reasoned that the Hornes could not raise their takings claim as a defense to the USDA's administrative enforcement proceeding. Rather, they needed to pay the fine and then file a separate action in the Court of Federal Claims, under the Tucker Act, to recover the money. Only in that venue, held the 9th Circuit, could their takings claim be adjudicated.

In 2013, the Supreme Court reversed this ruling, finding that the federal district court had jurisdiction and that the Hornes had properly pled their takings claim there. It remanded for a hearing on the merits of that claim.

Perhaps unsurprisingly, on remand the 9th Circuit once again found no taking. It reasoned that confiscation of the Horne's raisins under the marketing order did not violate the Fifth Amendment because it was a mere "use restriction" on the Hornes' choice to "voluntarily ... send their raisins into the stream of commerce" and therefore, there was no "forced seizure of the Hornes' crops" — only a "condition on the Hornes' use of their crops."

In reaching that conclusion, the court refused to apply a categorical, or per se analysis to the takings claim. Supreme Court precedent holds that a physical invasion, or seizure of private property — even if very small in scope — is a per se taking. But the 9th Circuit distinguished that line of cases, saying they only applied to real property, not personal property, like raisins. The court also found it significant that the Hornes technically retained a small residual interest in the reserve tonnage raisins that could, theoretically, bring them a small amount of income. That fact contributed to the court's refusal to apply a per se test.

Instead of applying a categorical, physical invasion, rule, the 9th Circuit concluded the Hornes' claim was governed by Supreme Court precedent dealing with "exactions cases" — challenges to the constitutionality of conditions attached to land use permits. In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court held that permit conditions requiring the surrender of property are only valid where those conditions mitigate, both in nature and extent, for the specific negative impacts of a property owner's proposed development project. Anything else is an unconstitutional condition. The court later affirmed, in *Koontz v. St. Johns River Water Management District*, that the same standard applies to demands for money in exchange for a permit.

The 9th Circuit's resort to those cases in *Horne* seems odd, since *Horne* is not a land use exaction dispute. But just as curious was the court's application of the standards mandated by *Nollan* and progeny. First, the *Horne* panel described the right to use one's property as a "government benefit" triggered by a property owner's free choice — the implication being that since there is a "benefit" being meted out with a string attached, the unconstitutional cases apply. But no court has ever held that the right to sell one's property on the open market is a benefit; to the contrary, courts have affirmed that the right to sell property is a fundamental aspect of ownership.

Second, the panel ignored that *Nollan* and *Dolan* are heightened standards of scrutiny that require the government to show that permit conditions requiring the surrender of property are constitutional because they directly mitigate for specific negative impacts of a property owner's proposed project. Rather than analyze whether the USDA met that burden, the 9th Circuit simply noted that the marketing order seemed to achieve its purpose in stabilizing raisin prices.

When the Hornes asked the Supreme Court to review the 9th Circuit's decision once more, it agreed. It is now set to consider the dispute on the merits. The specific questions before the court are: (1) whether a categorical takings analysis applies to real, as well as personal property; (2) whether a property owner's potential, contingent interest in property surrendered to the government defeats a takings claim; and (3) whether a government mandate to give up property is merely a "condition" on permission to engage in commerce.

The potential implications are legion. If the 9th Circuit is right that government may condition a person's ability to engage in commerce on his surrender of property, where does that end? May the government, for example, require Apple to surrender a certain number of iPads every year to stabilize the electronics market, as a condition of it selling the remainder of its iPad stock? Existing precedent says "no" — a requirement to cede property to the government is a per se taking, no matter whether that requirement arises in the context of commercial or personal transactions. Hopefully the Supreme Court will affirm that precedent and hold a taking of raisins just as unconstitutional as a taking of a right of way on land. But we'll have to wait and see.

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