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An Agricultural Law Research Article

**Will the Takings Clause Eclipse Idaho's  
Right-To-Burn Act**

by

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# WILL THE TAKINGS CLAUSE ECLIPSE IDAHO'S RIGHT-TO-BURN ACT?

## COMMENT

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## I. INTRODUCTION

One early September morning, Marsha Mason awoke in her Rathdrum, Idaho home and set off for work at Granny's Pantry café. Soon after her arrival, however, Marsha was sent home because she was coughing and wheezing. Three years earlier Marsha was diagnosed with mild asthma, which worsened after she developed allergies

to smoke and dust.<sup>1</sup> Unbeknownst to her, just miles away bluegrass farmers would soon set fire to 632 acres of their fields.<sup>2</sup> And another 5,995 acres would also be set ablaze, just fifty miles south.<sup>3</sup> Tragically, Ms. Mason's asthma took her life in the early hours following the day's field burning. Her death certificate would list two causes of death: a severe asthma attack and severe air pollution caused by field burning.<sup>4</sup> "The finding may well mark the first time that a coroner in this country has directly linked a death to air pollution in more than 40 years."<sup>5</sup>

The consequences of Ms. Mason's situation may have been unique, but many people in Idaho suffer maladies similar to those that took Ms. Mason's life. Roughly 150,000 Idaho residents suffer from some form of chronic bronchitis or asthma,<sup>6</sup> and portions of northern Idaho have some of the highest asthma mortality rates in the nation.<sup>7</sup> Unfortunately, such respiratory illnesses can be exacerbated by the smoke and dust produced by agricultural field burning.<sup>8</sup>

Following Ms. Mason's death, a campaign of litigation ensued against the farmers who utilize field burning practices in the inland Northwest. The leading case in that battle, *Moon v. North Idaho Farmers Ass'n*, was brought by eight northern Idaho residents who suffer from varying respiratory ailments.<sup>9</sup> This case has epitomized the clash between what the farmers contend is a necessary agricultural practice and what some residents contend is an interference with property and liberty rights.

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1. David Whitman, *Fields of Fire*, U.S. NEWS & WORLD REP., Sept. 3, 2001, at 2; Benjamin Shors, *Growers Face Wrongful Death Suit*, SPOKESMAN-REV., OCT. 8, 2002, at A1 (finding that Marsha Mason also suffered from diabetes and cancer).

2. Whitman, *supra* note 1.

3. *Id.*

4. *Id.* at 1 (quoting Marsha Mason's death certificate which also read: "VICTIM WITH KNOWN ASTHMA SUBJECTED TO INTENSE AIR POLLUTION FROM WHEAT FIELD BURNING").

5. *Id.*

6. AMERICAN LUNG ASSOCIATION, ESTIMATED PREVALENCE AND INCIDENCE OF LUNG DISEASE BY LUNG ASSOCIATION TERRITORY 15 (2003), available at <http://www.lungusa.org/data/ep/EstimatedPrev03.pdf>.

7. Whitman, *supra* note 1, at 2 ("Kootenai and adjoining Bonner County have an estimated 14,000 residents who suffer from asthma or chronic bronchitis, and the two collectively have one of the nation's highest mortality rates.")

8. DIVISION OF HEALTH, IDAHO DEPARTMENT OF HEALTH AND WELFARE, 2003 IDAHO STATEWIDE ASTHMA PLAN 3 (2003), available at [http://www2.state.id.us/dhw/asthma/2003\\_asthma\\_plan/2003\\_asthma\\_plan.pdf](http://www2.state.id.us/dhw/asthma/2003_asthma_plan/2003_asthma_plan.pdf) (stating that environmental particulates including smoke and air pollution can trigger asthma symptoms or attacks).

9. Memorandum Opinion and Order Denying Defendants' Motions to Dismiss at 1, *Moon v. N. Idaho Farmers Ass'n*, No. CV-2002-3890, 2002 WL 32102995 (Idaho 1st Dist. Ct. Nov. 19, 2002) [hereinafter Motion to Dismiss].

In order to explain the players involved and the interests at stake, Part II describes the context out of which this legal dispute arose. The United States Environmental Protection Agency ("EPA"), for example, has expensed a great amount of resources guiding the development of Idaho's smoke management regulations in an attempt to alleviate public health concerns. In addition, Idaho's Legislature has crafted a string of legislation attempting to manage the detrimental effects of burning, while protecting affected agricultural economies.

That legislation was drafted in reaction to preliminary opinions handed down by the court in *Moon*. Traditionally, the common law provided remedies to those affected by the objectionable acts of their neighbors. While nuisance allowed landowners to recover for unreasonable interferences with the use and enjoyment of their land,<sup>10</sup> trespass protected a landowner's right to exclusive possession. Part III describes how Idaho's attempts to immunize farmers from these potential remedies were rejected by the court in *Moon*, culminating in the decision upon which this Comment will focus. The court ultimately held that such tort immunity would result in a Fifth Amendment taking without compensation.<sup>11</sup>

Part IV analyzes the immunity legislation under the available Fifth Amendment Takings theories. This Comment first concludes that Idaho's Right-to-Burn Act has not authorized a facially unconstitutional taking of private property. Second, this Comment also concludes that plaintiffs in particular suffered neither a compensable physical invasion nor injuries different in kind from those of the public at large sufficient to find a taking of their individual parcels. Ultimately, this Comment concludes that this is a legislative matter warranting considerable attention, as plaintiffs' injuries need to be addressed more thoroughly.

## II. HISTORICAL CONTEXT

Agriculture plays an important role in the economic landscape of the State of Idaho. It is a mostly rural state,<sup>12</sup> which relies heavily

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10. *McNichols v. J.R. Simplot Co.*, 74 Idaho 321, 325, 262 P.2d 1012, 1014 (1953).

11. Memorandum Decision and Order Granting Plaintiffs' Motion to Declare HB 391 Unconstitutional, *Moon v. N. Idaho Farmers Ass'n*, No. CV-2002-3890, 2003 WL 21640506 (Idaho 1st Dist. Ct. June 4, 2003) [hereinafter Motion to Declare Unconstitutional].

12. NATURAL RESOURCES CONSERVATION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, IDAHO - BROAD LAND COVER/USE, at <http://www.id.nrcs.usda.gov/technical/nri/broad.html> (last visited Jan. 15, 2004) (estimating that 2.1 percent

upon agrarian industries to sustain its small communities. For example, bluegrass seed farming produces \$45 million for rural northern Idaho economies,<sup>13</sup> acting as one of, if not the, largest employer in those localities.<sup>14</sup> Idaho farming also acts as a major commodities producer on a national scale, generating "half of the U.S. bluegrass seed crop, a fifth of which is exported,"<sup>15</sup> and acting as the eighth largest wheat exporter in the nation.<sup>16</sup>

Northern Idaho grass seed and wheat farmers have used agricultural field burning as an effective means of clearing crop residue for over twenty years.<sup>17</sup> Burning helps to control pests and weeds without using pesticides or herbicides.<sup>18</sup> It is also used to clear soil for replanting wheat,<sup>19</sup> and has proven to be a highly cost effective means of promoting crop sustainability in blue grass seed farming. "Bluegrass fields can remain productive and profitable as long as 10 years with conventional practices that include burning. Without burning, bluegrass fields may yield only three annual crops before replanting is needed."<sup>20</sup>

Unfortunately, this productivity does not come without a price. The smoke and soot associated with burning often travels into populated areas causing a public nuisance and potential health hazard. The problem is particularly evident in the northern Idaho Panhandle region, where Idaho's Department of Environmental Quality handles hundreds of complaints during the field burning season.<sup>21</sup> An EPA report summarized the health concerns presented by the public:

While some are upset with the nuisance odor and haze, most people say that they or a family member experience health problems associated with the smoke. Reported symptoms include trouble with breathing, sore throat, coughing, wheezing, stinging eyes, and headaches. Some say they have to increase

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of non-federal Idaho lands were urbanized according to 1997 Census of Agriculture figures).

13. Bill Loftus, *Research Will Help Clear the Field Burning Air*, 149 AGKNOWLEDGE, Oct. 2002, at 1.

14. Linda Clovis, *Seed-Field Burning*, GROUNDS MAINTENANCE, Aug. 1, 1997, available at [http://grounds-mag.com/ar/grounds\\_maintenance\\_seedfield\\_burning/](http://grounds-mag.com/ar/grounds_maintenance_seedfield_burning/).

15. Loftus, *supra* note 13.

16. Idaho Wheat Commission, *Wheat Facts*, at <http://www.idahowheat.org/info/wheatfacts.asp> (last visited Apr. 7, 2004).

17. IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, 2001 NORTH IDAHO VOLUNTARY FIELD BURNING SMOKE MANAGEMENT PLAN 1 (2001).

18. Clovis, *supra* note 14.

19. SCOTT E. DOWNEY & DONALD M. MARTIN, U.S. E.P.A., AGRICULTURAL BURNING STAKEHOLDER FORUMS: PUTTING THE PIECES TOGETHER 3 (2001).

20. Loftus, *supra* note 13.

21. DOWNEY & MARTIN, *supra* note 19, at 5.

their medication use during the burn season or make additional trips to the doctor or hospital. Others say their lives are disrupted physically, emotionally and financially due to increased illness, medical costs, work and school absences, and limits on normal daily activities. Some report feeling trapped in their homes during smoke intrusions or having to leave the area during the day or for an entire burn season. Others say their social events have to be cancelled or that their business is suffering economically.<sup>22</sup>

#### A. Regulation of Agricultural Field Burning

The campaign aimed at ending field burning has targeted farmers not only in Idaho, but throughout the Northwest. The Oregon Legislature responded in 1991, drastically restricting field burning in the Willamette Valley.<sup>23</sup> The State of Washington followed suit: first, by effectively eliminating burning by grass seed farmers,<sup>24</sup> and second, by negotiating an agreement that will reduce burning by wheat farmers to at least half of 1998 baseline figures by 2006.<sup>25</sup>

When the protests turned to Idaho, the State responded in the same manner that it approaches most environmental issues—compromise. Recognizing the importance of both farming economics and public health, Idaho's Legislature authorized continued field burning throughout the state as long as it is done in accordance with Idaho Department of Agriculture regulations.<sup>26</sup> Northern Idaho field burners face stricter limitations, being allowed to burn only during a 45-day window and only on days designated as being conducive for adequate smoke dispersion pursuant to smoke management plans.<sup>27</sup>

The Legislature's efforts did not please everyone. For instance, the Regional Director of the EPA penned a letter to the State criticiz-

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22. *Id.*

23. OR. REV. STAT. § 468A.555 (2001) ("The Legislative Assembly declares it to be the public policy of this state to reduce the practice of open field burning.")

24. Jani Gilbert, *Ecology Ends Most Grass—Seed Field Burning in Washington State*, DEPARTMENT OF ECOLOGY NEWS RELEASE, May 22, 1998, at <http://www.ecy.wa.gov/.news/1998news/98-083.html>; see also WASH. ADMIN. CODE § 173-430-045 (2003) (Washington Department of Ecology Director officially certified mechanical residue removal as a reasonable alternative to field burning for grass seed farming.).

25. Jani Gilbert, *Ecology Dept. Denies SOS Request to Revise Wheat-Burning Regulation*, DEPARTMENT OF ECOLOGY NEWS RELEASE, Jan. 12, 2001, at <http://www.ecy.wa.gov/news/2001news/2001-011.html>. This was accomplished via a 1999 agreement among the Department of Ecology, the state Department of Agriculture, and the Washington Association of Wheat Growers. *Id.*

26. IDAHO CODE § 22-4803(1) (Michie Supp. 2003).

27. *Id.* § 22-4803(3); see also IDAHO CODE § 22-4803(2)(a) (Michie Supp. 2003).

ing the adequacy of its plan in protecting public health. The letter called for several improvements including

increasing Idaho's staffing level in order to better develop and implement the statewide field burning program, enhancing technical resources and the decision-making structure to ensure more credible and science-based smoke management decisions, reducing unauthorized burning through additional compliance and enforcement tools, improving information available to the public on daily burning activities, and pursuing opportunities to reduce smoke emissions through financial incentives to growers and adoption of alternatives to burning.<sup>28</sup>

While EPA does not directly regulate agricultural field burnings, it can affect change and progress through other means. National Ambient Air Quality Standards do not adequately address the air quality issues related to agricultural field burning because they are based on twenty-four hour cumulative readings,<sup>29</sup> which result in a dilution of the short-term (hourly) particulate spikes that occur during field burning. Nevertheless, EPA's emergency powers under the Clean Air Act provide it with broad authority to prevent "imminent and substantial endangerment to public health or welfare . . ." <sup>30</sup> With this arrow in its quiver, EPA has been able to compel the adoption of more aggressive approaches to managing the field burning problem.

The citizens of the inland Northwest have also acted on their own behalf, filing several lawsuits against the farmers seeking to halt the practice.<sup>31</sup> This Comment will focus on the Fifth Amendment Takings theories brought in *Moon v. North Idaho Farmers Ass'n*.

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28. Letter from L. John Iani, Regional Administrator, United States Environmental Protection Agency Region 10, to Patrick A. Takasugi, Director, Idaho State Department of Agriculture 1 (Jan. 21, 2003), available at [http://yosemite.epa.gov/R10/AIRPAGE.NSF/7594bda73086704a88256d7f00743067/0636f2e7bf9a0b9c88256dc1007bc195/\\$FILE/ISDA%20Ag%20Burning%2001-21-03.pdf](http://yosemite.epa.gov/R10/AIRPAGE.NSF/7594bda73086704a88256d7f00743067/0636f2e7bf9a0b9c88256dc1007bc195/$FILE/ISDA%20Ag%20Burning%2001-21-03.pdf).

29. National Primary and Secondary Ambient Air Quality Standards for PM<sub>10</sub>, 40 C.F.R. § 50.6 (2003).

30. Emergency Powers, Clean Air Act, 42 U.S.C. § 7603 (2001).

[T]he Administrator, upon receipt of evidence that a pollution source or combination of sources . . . is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit . . . to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary.

*Id.*

31. This includes a wrongful death suit by the family of Marsha Mason, whose story was told earlier.

## B. Right-to-Farm Legislation

Common law nuisance actions brought against farmers are not a new development on the American legal landscape. Rather, they are a byproduct of a continuing movement in landownership and population dispersion. Urban persons who move to rural areas in order get away from the noises, smells, and pollution of the cities are often surprised to find that the country has its own noises, smells, and pollution.<sup>32</sup> Feeling robbed of their expectations, some newly rural residents have brought suit against farmers claiming that their agricultural practices are a nuisance to their ideal country lives.<sup>33</sup> These suits and other ordinances aimed at restricting agricultural activity, however, can have a dramatic effect on the nature of the community.<sup>34</sup>

Local governments have responded by statutorily protecting the resident farmers from the type of "coming to the nuisance" liability that has been created by sprawl. Accordingly, pro-agriculture right-to-farm acts have been enacted in some form in every state in the nation.<sup>35</sup> Idaho's right-to-farm act is typical in that it immunizes established farmers from nuisance liability brought by new area residents.<sup>36</sup> Right-to-farm acts have been effective in that they "provide some sense of security to farmers making investments in improving and expanding their farming regulations. The laws also alert and place on notice those non-farm owners who move into agricultural areas that use of their property may be subject to the rights of the nearby pre-existing farm operations."<sup>37</sup>

Field burning, however, has provided a unique problem for right-to-farm protectionists in Idaho. The focus of Idaho's right-to-farm act, immunity from "coming to the nuisance" liability, does not address the potential liability created by field burning since the resulting smoke and soot may affect a geographically wide scope of potential

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32. For example, the grinding of agricultural machinery, the stench produced by farm animals, and the spraying of pesticides and insecticides.

33. Thomas G. Fisher, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97 (1983).

34. *Id.* (explaining that such suits "often hinder agricultural operations and encourage farmers to sell farmland to developers").

35. Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited after Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 127 (2000).

36. It accomplishes this by declaring that an agricultural operation that has been in operation for more than one year shall not be considered a nuisance thereafter as long as it was not a nuisance when the operation began. See IDAHO CODE § 22-4503 (Michie 2001).

37. Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 104 (1998).

claimants, some of which are longtime residents that have not “come to the nuisance.”

Without complete right-to-farm protection, farmers had relied upon another section of the Idaho Code that provides that “[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance.”<sup>38</sup> Having authority to burn crop residue under Idaho Code section 22-4803, farmers felt secure in their immunity from nuisance actions. Their reliance would be shattered following an opinion by the First District Court of Idaho in *Moon v. North Idaho Farmers Ass’n*. What followed was a tennis match between the court and the legislature as the two tried to articulate the rights of the farmers to burn. Part III discusses the legal battle that ensued and the legislature’s responses.

### III. MOON v. NORTH IDAHO FARMERS ASS’N: THE LEGAL BATTLE OVER THE RIGHT TO BURN

The First District Court of Idaho recently handed down a series of controversial rulings in the pending case of *Moon*, which ultimately concluded that the Idaho Legislature’s attempts at immunizing the farmers from nuisance and trespass liability were unconstitutional. This Comment will focus on the court’s determination that House Bill 391 amounted to a Fifth Amendment Takings Clause violation.

#### A. Preliminary Procedure

In 2002, plaintiffs in *Moon* brought suit against seventy-eight grass seed farmers in northern Idaho in connection with the farmers’ field burning practices.<sup>39</sup> The plaintiffs consist of eight individuals from northern Idaho and Montana either who themselves have, or who represent minor children who have, chronic pulmonary disorders “such as asthma, bronchitis, cystic fibrosis and/or cardiac conditions.”<sup>40</sup> Plaintiffs allege that the farmers’ burning practices aggravate their conditions forcing them to remain confined in their homes and in some situations leave the area completely during burning episodes.<sup>41</sup> Plaintiffs claim that the field burning amounts to nuisance, trespass, strict liability, civil conspiracy, and uncompensated Fifth Amendment Takings Clause liability.<sup>42</sup>

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38. IDAHO CODE § 52-108 (Michie 2000).

39. Class Action Complaint, *Moon v. N. Idaho Farmers Ass’n* (Idaho 1st Dist. Ct. June 10, 2002) (No. CV-2002-3890) [hereinafter Complaint].

40. Motion to Dismiss, *supra* note 9, at 1.

41. Complaint, *supra* note 39, at 3–10.

42. *Id.* at 47–55.

Defendants' preliminary motions to dismiss were all denied.<sup>43</sup> In particular, the court denied the defendants' claim that Idaho Code section 52-108 barred the plaintiffs' nuisance claims since Idaho's right-to-farm act<sup>44</sup> expressly authorizes field burning.<sup>45</sup> Idaho Code section 52-108 states: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The court, however, concluded that "Idaho Code § 52-108 applies only to public nuisances, and thus . . . citizens' private nuisance claims are not barred."<sup>46</sup>

Following its rulings, the Court later granted the plaintiffs' motion for preliminary injunction in which "[t]he act sought to be restrained [was] preventing particulate matter from grass field burning from these defendant farmers from reaching levels which, while perhaps below regulated levels, are still hazardous to the health of these citizen plaintiffs."<sup>47</sup> The specific terms of the injunction prohibited the individual farmers from burning for the remainder of the year unless 1) the individual baled all the loose straw and residue before burning, and 2) the farmers collectively placed a \$100,000 cash bond with the county court clerk.<sup>48</sup>

In response to the court's rulings, the Idaho Legislature quickly came to the defense of the farmers,<sup>49</sup> and on April 23, 2003, Idaho Governor Dirk Kempthorne signed into law House Bill 391.<sup>50</sup> House Bill 391 ["Idaho's Right-to-Burn Act"] created Idaho Code section 22-4803A, which expressly provided farmers immunity from *all* nuisance and trespass claims relating to authorized field burning. Idaho Code section 22-4803A(6) reads: "Crop residue burning conducted in accor-

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43. Motion to Dismiss, *supra* note 9, at \*4, \*17 (finding first that the federal Clean Air Act preempted only federal tort claims and not state claims, see 42 U.S.C. §§ 7401-7671(q) (2000), and second, that the defendants' failed to prove that plaintiffs had not suffered a trespass as a matter of law).

44. IDAHO CODE § 22-4803(1) (Michie Supp. 2003) ("The open burning of crop residue grown in agricultural fields shall be an allowable form of open burning . . .").

45. Motion to Dismiss, *supra* note 9, at \*6.

46. *Id.* at \*6, \*8. The court's justification rested primarily in concerns over constitutional interpretation and the "great principle of common law" . . . that one may not use their property to injure others, even if authorized by statute." *Id.* at \*6-\*7.

47. Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction, Moon v. N. Idaho Farmers Ass'n, No. CV-2002-3890, 2002 WL 32129530 at \*12 (Idaho 1st Dist. Ct. Nov. 30, 2002) [hereinafter Preliminary Injunction].

48. *Id.* at \*13.

49. Section 5 of House Bill 391 contained "an emergency clause, causing the statute to take effect on its passage and approval, rather than on the ordinary effective date of July 1 following the legislative session." Motion to Declare Unconstitutional, *supra* note 11, at \*2.

50. H.B. 391, 57th Leg., 1st Reg. Sess. (Idaho 2003).

dance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute a trespass."<sup>51</sup>

### B. Fifth Amendment Taking Decision

The court then declared Idaho's newly enacted Right-to-Burn Act unconstitutional, however, holding that it amounted to a Fifth Amendment taking without compensation. Both the federal and Idaho constitutions provide that private property shall not "be taken for public use, without just compensation."<sup>52</sup> According to the court, Idaho's Right-to-Burn Act effectively took the plaintiffs' right to exclusive use and enjoyment of their property and transferred it to the defendant farmers and then refused plaintiffs all avenues of redress.<sup>53</sup> The court stated:

Defendants right to burn and create smoke which goes upon plaintiffs' land is a nuisance, and a right to maintain a nuisance is an easement, and defendants cannot have that easement without paying for it. The immunity provision of Idaho Code § 22-4308A(6) precludes defendant from ever paying for that easement, thus, defendants have taken plaintiffs' property without just compensation.<sup>54</sup>

The practical effect of the court's decision is that farmers who burn their crops, even those who do so under the statutory guidelines, do so risking possible private nuisance and trespass liability. For the decision in *Moon* resurrects the opportunity for private causes of action against farmers who burn their croplands, specifically in the First District of Idaho.

This is not the end of the story, however, for several things have occurred since the First District Court's constitutionality decision in June of 2003. First, the case was transferred to the Sixth District in Pocatello.<sup>55</sup> Second, the initial preliminary injunction was superseded by a Writ of Prohibition issued by the Idaho Supreme Court, which

51. IDAHO CODE § 22-4803A(6) (Michie Supp. 2003).

52. U.S. CONST. amend. V; *see also* IDAHO CONST. art. I, § 14 ("Private property may be taken for public use, but not until a just compensation . . . shall be paid therefor.").

53. Motion to Declare Unconstitutional, *supra* note 11.

54. *Id.* at \*4-\*5.

55. Defendants joined additional field burning farmers to the suit and under Idaho Rules of Civil Procedure, the new parties were entitled to a peremptory challenge of the judge without having to demonstrate cause. *See* IDAHO R. CIV. P. 40(d)(1)(A). The First District judge stepped aside and the case was transferred to Idaho's Sixth District in Pocatello because another northern Idaho judge was not available to hear the case. Karen Dorn Steele, *Pocatello Judge Assigned Field-Burning Case; Southern Idaho Jurist Chosen 'Because He's Available'*, SPOKESMAN-REV., June 24, 2003, at B2.

found that the District Court had exceeded its jurisdiction in several respects.<sup>56</sup> Third, the Idaho Supreme Court has granted defendants' motion for permissive appeal on the First District's ruling on the constitutionality of Idaho's Right-to-Burn Act.<sup>57</sup>

This Comment will discuss the Fifth Amendment Takings Clause issue that will go before Idaho's Supreme Court,<sup>58</sup> with the purpose of showing that Idaho's Right-to-Burn Act should be upheld under the Constitution as a legitimate exercise of the legislature's police power rather than a taking.

#### IV. DOES IDAHO'S RIGHT-TO-BURN ACT VIOLATE THE FIFTH AMENDMENT'S TAKINGS CLAUSE?

Federal, state, and local governments have the power of eminent domain—the power to take title to property against the owner's will for public use. This power to force transfers of property is inherent in the sovereign.<sup>59</sup> The Fifth Amendment of the Constitution, however, places limits on that power, providing that “private property [shall not] be taken for public use, without just compensation.”<sup>60</sup> While the Fifth Amendment's limitation is expressly applicable only to the federal government, it has been held to extend to the States as well through the Fourteenth Amendment.<sup>61</sup>

The argument raised in *Moon* and upheld in the First District's decision, is that the immunity provisions of Idaho's Right-to-Burn Act result in an exertion of the State's power of eminent domain. The legal theory presented is that these statutes act to reallocate property rights among individuals by limiting a person's ability to defend that property interest in court. The question before the court becomes

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56. Order Granting Petition for Writ of Prohibition, *Moon v. N. Idaho Farmers Ass'n*, (Idaho 1st Dist. Ct. 2002) (No. 28889), available at <http://www2.state.id.us/judicial/28889ord.htm>.

57. Order, *Moon v. N. Idaho Farmers Ass'n*, (Idaho 1st Dist. Ct. 2003) (No. 99494).

58. Oral arguments are scheduled for May 6, 2004. Order Granting Motion for Expedited Hearing, *Moon v. N. Idaho Farmers Ass'n*, (Idaho 1st Dist. Ct. 2004) (Nos. 29896–901), available at <http://www.isc.idaho.gov/opinions/29896.pdf>.

59. *United States v. Carmack*, 329 U.S. 230, 241–42 (1946) (“This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power.”).

60. U.S. CONST. amend. V; see also *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (“The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”).

61. *Bloom v. Illinois*, 391 U.S. 194, 195 (1968).

"whether such adjustments are a legitimate exercise of the state's police power by the legislature or whether they are a taking."<sup>62</sup>

To completely answer the taking question, several important issues must be resolved: First, do plaintiffs have at risk an interest that can be properly considered constitutionally protectible "property"? Second, if so, does the denial of a nuisance or trespass action amount to a constitutional "taking"? Third, if so, was the State's exercise of its power of eminent domain in pursuit of a legitimate "public use"? This Comment focuses on the first two of these three questions.<sup>63</sup>

### A. Property

The Fifth Amendment protects persons from the uncompensated taking of "life, liberty, and property." "Property" has not, however, been completely defined, leaving open the question of what exactly the Fifth Amendment will protect. Initially the definition only encompassed physicalities, but the scope of the properties recognized in takings jurisprudence has slowly evolved to include much more.<sup>64</sup>

This issue becomes particularly interesting in the realm of right-to-farm legislation where the property expressly being taken is not the land itself but rather the landowner's right to bring an action in defense of an interest in their land. "A cause of action has long been recognized as a species of property [right] protected by the United States Constitution,"<sup>65</sup> and "specifically, several decisions have indicated that the right to bring a nuisance action is a type of property right that can be protected."<sup>66</sup> Addressing that issue, the Supreme Court in *Richards v. Washington Terminal Co.* stated that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking."<sup>67</sup> Accordingly, the ques-

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62. Hamilton, *supra* note 37, at 103, 113.

63. Following the United States Supreme Court's decision in *Hawaii Housing Authority v. Midkiff*, review of a legislature's determination of what constitutes a legitimate public use is "an extremely narrow' one," since "in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." 467 U.S. 229, 240, 244 (1984). "[T]he Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use [when, and only when,] the use be palpably without reasonable foundation." *Id.* at 241.

64. William C. Robinson, *Right-to-Farm Statute Runs a 'Foul' with the Fifth Amendment's Taking Clause*, 7 MO. ENVTL. L. & POL'Y REV. 28, 30 (1999).

65. Margaret Rosso Grossman & Thomas G. Fisher, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 138 (1983) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

66. *Id.*

67. 233 U.S. 546, 553 (1914).

tion becomes whether the immunity provision *in effect* authorized acquisition of a constitutionally protectible property interest for the beneficial use of the public.<sup>68</sup>

The property interest involved in the underlying cause of action will, therefore, be the focus of the inquiry. The definition used to analyze the constitutional legitimacy of the property interest was suggested by Justice Scalia in *Lucas v. South Carolina Coastal Council*:

The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.<sup>69</sup>

While this definition will be used as a guide, some of the "legal recognition and protection" provided by the State is inherently intertwined with the inquiry into whether a taking has occurred, as discussed in Part IV.B. The next section describes the property interest involved in the underlying causes of action, while the following section will focus on whether the interest warrants Fifth Amendment protection, *i.e.*, whether a taking has occurred.

### 1. Nuisance

Idaho's right of action for private nuisance is set forth in Idaho Code section 52-101: "Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance."<sup>70</sup> Accordingly, the interest at stake is the landowner's "enjoyment of his property or . . . the enjoyment of his life while using the property."<sup>71</sup>

Idaho courts have protected this type of interest in similar contexts to that in *Moon*. In *Payne v. Skaar*, the Idaho Supreme Court upheld a private nuisance action against a feedlot operation that

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68. See *Renninger v. State*, 70 Idaho 170, 177, 213 P.2d 911, 915 (1950) (discussing an instance where an alleged "taking" occurred pursuant to a governmental action and the State refused to commence condemnation proceeding claiming immunity). The court in *Renninger* explained that Idaho's Constitution "waives the immunity of the State from suit, and if the State takes the property without condemning, the landowner . . . must be entitled to sue therefor." *Id.*

69. 505 U.S. 1003, 1016 n.7 (1992).

70. IDAHO CODE § 52-101 (Michie 2000).

71. IDAHO CIV. JURY INSTRUCTION 490 (1982).

caused intolerable odors, dust, and flies on the claimant's neighborhood.<sup>72</sup> Also, in *Shreck v. Coeur d'Alene*, a successful nuisance action was brought against a dump operation that emitted offensive odors and effluvia, endangering the health and comfort of the claimants.<sup>73</sup> Furthermore, the court in *Covington v. Jefferson County* suggested that an increase in traffic, dust, flies, and noise by the operation of a landfill may also constitute a nuisance.<sup>74</sup> All of these examples included unreasonable interferences with the landowner's enjoyment of their land similar to those claimed by the plaintiffs in *Moon*.<sup>75</sup>

The case law thus supports the idea that Idaho should recognize a landowner's legitimate "property" interest in their right to be free from interference with their use and enjoyment of their land by field burning smoke.<sup>76</sup> Whether denying a legal defense of that interest is considered a compensable taking will be discussed in Part IV.B.

## 2. Trespass

Fifth Amendment analysis requires that the property interests involved in nuisance and trespass be accurately distinguished.<sup>77</sup> Where nuisance involves the unreasonable interference with the use and enjoyment of private property, the interest involved in common law trespass is the right of exclusive possession of that property.<sup>78</sup>

Traditionally, trespass required that the invasion of the land be direct or immediate and in the form of a physical, tangible object. . . . Under these principles, recovery in trespass for dust, smoke, noise, and vibrations was generally unavailable because they were not considered tangible or because they came to the land via some intervening force such as wind or water. Instead, claims concerning these irritants were generally pursued under a nuisance theory.<sup>79</sup>

Modern trespass law, however, has evolved to provide some relief for intangible invasions under certain circumstances. While the Idaho

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72. 127 Idaho 341, 900 P.2d 1352 (1995).

73. 12 Idaho 708, 87 P. 1001 (1906).

74. 137 Idaho 777, 781 n.2, 53 P.3d 828, 832 n.2 (2002).

75. Plaintiffs allege that field burning smoke and soot causes intolerable odors and dust, and that it endangers their health and comfort.

76. State recognition of this right is further supported by the fact that the Idaho legislature felt the need to provide field-burning farmers immunity when faced with litigation on this very issue.

77. While conceptually distinct, both theories may be applied where private property has been damaged.

78. *Mock v. Potlatch Corp.*, 786 F. Supp. 1545, 1548 (D. Idaho 1992).

79. *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219 (Mich. Ct. App. 1999).

Supreme Court has not ruled on the issue directly, the United States District Court of Idaho provided useful analysis of the State's law in *Mock v. Potlatch*.<sup>80</sup> Because "[t]he Idaho Supreme Court has not addressed the question of whether intangible entries onto another's land in the form of noise, smoke, light or odor can give rise to an action for trespass," the court looked "to traditional common law principles and the cases decided in other jurisdictions."<sup>81</sup> The court agreed with the modern trend relating to actions in trespass:

If there is a direct and tangible invasion of another's property, there is an infringement of the right of exclusive possession, and the law will presume damages. On the other hand, if the invasion is indirect and intangible (such as noise, odors, light, smoke, etc.), the proper remedy lies in an action for nuisance, based on interference with the right of use and enjoyment of the land. However, if the intangible invasion causes substantial damage to the plaintiff's property, this damage will be considered to be an infringement on the plaintiff's right to exclusive possession, and an action for trespass may be brought.<sup>82</sup>

An Oregon court in *Ream v. Keen* presented a different a theory, holding instead that smoke did represent a tangible invasion.<sup>83</sup> Under the Oregon theory, an invasion by smoke constitutes a trespass as a matter of law, and the only question "that the court must consider is whether the intrusion is so minimal that, as a matter of law, no legal consequences *can* attach."<sup>84</sup> Because the

[p]laintiffs' buildings were affected by the smoke, and there was a heavy pall of smoke over their property for short periods, followed by a residual smoke odor for several days after each of the burning incidents[,] [the lower court correctly] conclude[d] that defendant's conduct resulted in an invasion of plaintiffs' legally protected possessory interest, as a matter of law.<sup>85</sup>

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80. Plaintiffs asserted that the noise created by a nearby paper mill constituted a trespass.

81. *Mock*, 786 F. Supp. at 1548.

82. *Id.* at 1550-51 (emphasis omitted).

83. *Ream v. Keen*, 828 P.2d 1038, 1038 (Or. App. 1992); see also *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959) (providing the relevant rule guiding *Ream v. Keen*).

84. *Ream*, 828 P.2d at 1040.

85. *Id.*

Under either theory proposed, there is a strong argument that plaintiffs in *Moon* have suffered an injury beyond merely an interference with their use and enjoyment. Rather, certain plaintiffs have in effect been denied their ability to occupy their land as a result of defendants' practices. And even if plaintiffs have not suffered what amounts to a legal trespass under the theories presented, Idaho should at least recognize a legitimate property interest in the landowner's right to not only use, but also to occupy, their land without interference.<sup>86</sup> Whether denying a legal defense of that interest is considered a compensable taking will be discussed next in Part IV.B.

## B. Taking

In determining "whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word 'taken.'"<sup>87</sup> Often the taking element becomes the central issue in Fifth Amendment condemnation objections because the scope of what constitutes a taking has not been clearly defined. The Supreme Court, however, has drawn one helpful distinction based on the nature of the governmental action. In *Tahoe-Sierra* the Court explained that

[t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' . . . designed to allow 'careful examination and weighing of all the relevant circumstances.'<sup>88</sup>

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86. State recognition of this justifiable right is further supported by the fact that the Idaho legislature felt the need to provide field-burning farmers immunity when faced with litigation on this very issue.

87. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002).

88. *Id.* at 321-22.

The taking issue in *Moon*, however, does not fit exclusively into either the physical occupation or the regulatory restriction category. Rather, Idaho's Right-to-Burn Act can be described under both theories: a legislatively authorized physical occupation (by the farmers) for the beneficial use of the public or a regulation that so adversely affects the beneficial use of the property by the landowners that it amounts to a taking. Because of this ambiguity, the next section will discuss the constitutionality of Idaho's Right-to-Burn Act under both approaches in order to determine whether it amounts to a taking.

### 1. Idaho's Right-to-Burn Act Under Physical Occupation Analysis

According to the United States Supreme Court, "[w]hen the government condemns or physically appropriates . . . property, the fact of a taking is typically obvious and undisputed."<sup>89</sup> Unfortunately, whether the situation in *Moon* represents a taking by physical appropriation is not so obvious. While under the majority approach smoke generally discharged cannot "physically" invade property, there is support in some jurisdictions for a determination to the contrary. The Idaho Supreme Court, however, has not explicitly ruled on the subject, leaving the discussion open.

#### i. Whether Smoke Invasion Results in a Physical Occupation

Determination of whether a taking has occurred is an "essentially ad hoc, factual inquir[y]," focused on three factors "including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."<sup>90</sup> The "character of the government action" plays an especially important role in cases involving a physical occupation because "a physical invasion is a government intrusion of an unusually serious character."<sup>91</sup> Thus, while not always determinative,<sup>92</sup> "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government."<sup>93</sup> It is however unclear whether the traveling smoke in *Moon* results in a "physical" invasion.

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89. *Id.* at 322 n.17.

90. *Id.* at 315 n.10, 322 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

91. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

92. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (finding that "the fact that [the government] . . . may have 'physically invaded' . . . property cannot be viewed as determinative").

93. *Penn Central*, 438 U.S. 104, 124 (1978).

Fifth Amendment protection of an interest in airspace generally, has been upheld by the Supreme Court. In *Causby*, the Court approvingly quoted *Butler v. Frontier Telephone Co.* where the court held

that ejection would lie where a telephone wire was strung across the plaintiff's property, even though it did not touch the soil. . . . '[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above. . . . If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle.'<sup>94</sup>

The Court in *Causby* found that an invasion of a farmer's airspace by planes from a neighboring airport constituted a taking of a flight easement. The Court stated, "if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."<sup>95</sup> Therefore, "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."<sup>96</sup> The Court, however, provided a caveat stating that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."<sup>97</sup>

Courts, however, have rejected the notion that smoke generally discharged can result in a Fifth Amendment "physical" invasion of airspace. The federal cases that have applied *Causby* are instructive. Those cases draw a distinction between those landowners whose airspace is directly invaded by the planes themselves and those whose airspace is not; the prior may recover for smoke and noise damage while the latter may not. For example, in *Avery v. United States*, the Court of Claims dismissed the plaintiffs' assertion that "the damages to [their] adjoining properties [were] every bit as great as the damages experienced by the parcels which [were] subject to an avigation

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94. *United States v. Causby*, 328 U.S. 256, 265 n.10 (1946) (quoting *Butler v. Frontier Tel. Co.*, 79 N.E. 716, 718 (1906)).

95. *Id.* at 264; see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (holding that the government "has a categorical duty to compensate . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof").

96. *Causby*, 328 U.S. at 264; see also *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540 (1904) (finding that the hanging of a telegraph line over a railroad's right of way was a taking); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (finding that the firing and imminent threat of firing of artillery guns over plaintiffs land imposed a compensable aerial easement).

97. *Causby*, 328 U.S. at 266.

easement.<sup>98</sup> Even though noise, fumes, and clouds of dust inundated the landowners' property, the court found that there was no constitutional taking because there was "no actual invasion of the airspace over these plaintiffs' properties" by the neighboring military aviation base.<sup>99</sup> Quoting elsewhere, the court agreed that

'[t]he vibrations which cause the windows and dishes to rattle, the smoke which blows into the homes during the summer months . . . and the noise which interrupts ordinary home activities do interfere with the use and enjoyment by the plaintiffs of their properties. Such interference is not a taking. The damages are no more than a consequence of the operations of the Base and . . . they 'may be compensated by legislative authority, not by force of the Constitution alone.' As we see the case at bar, the distinctions which the Supreme Court has consistently made between 'damages' and 'taking' control and compel denial of recovery.'<sup>100</sup>

The Court in *Richards* came to a similar conclusion in the context of locomotive discharges.<sup>101</sup> The Court failed to find a taking for

such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of *smoke* and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad.<sup>102</sup>

In so concluding, the Court found that the constitution "does not confer a right to compensation upon a landowner, *no part of whose property has been actually appropriated*, and who has sustained only those consequential damages that are necessarily incident to proximity to the railroad . . ."<sup>103</sup>

According to the Court in *Richards*, that principle "has been so generally recognized that in some of the states . . . constitutions have

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98. 330 F.2d 640, 644 (1964); see also *Town of East Haven v. E. Airlines, Inc.*, 331 F. Supp. 16 (D. Conn. 1971) (requiring direct overflights for taking consideration of noise and fumes).

99. *Avery*, 330 F.2d at 645.

100. *Id.* (quoting *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962)).

101. *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914).

102. *Id.* at 554 (emphasis added).

103. *Id.* (emphasis added).

been established providing in substance that private property shall not be taken *or damaged* for public use without compensation."<sup>104</sup> Recently, where there was no such addition to that state's constitution, the Michigan court in *Spiek* continued to follow the *Richards* assertion that no physical invasion results from wandering smoke.<sup>105</sup> In that case, plaintiffs claimed that the State had taken their property "by increasing dramatically the levels of noise, vibrations, pollution and dirt in the once-residential area . . . [thus] destroy [ing] the desirability of the . . . property as an area for living and . . . destroy[ing] the acceptability of the property for residential purposes."<sup>106</sup> Discussing the Supreme Court's precedent, the court in *Spiek* found that the "plaintiffs have not suffered a physical invasion. . . . [Instead,] the plaintiffs here experienced the type of effects referenced . . . in *Richards* as part of the incidental inconvenience of living in proximity to the road."<sup>107</sup>

The Idaho Supreme Court in *Covington* also suggested that drifting fine particles do not represent physical invasions.<sup>108</sup> Plaintiffs in *Covington* contended that a taking had occurred "because the operation of [a] landfill ha[d] caused increased traffic in the area, increased noises, offensive odors, dust, flies and litter."<sup>109</sup> Recognizing the "long-standing distinction between physical and regulatory takings," the Idaho Supreme Court concluded that "there ha[d] been no actual physical invasion of their land, thus a regulatory taking is at issue."<sup>110</sup>

Furthermore, support for trespass actions in certain situations involving smoke, noise, and odors is not inconsistent with the conclusion that smoke does not result in a physical invasion.<sup>111</sup> According to the articulation of the law provided in *Mock v. Potlatch*,

if the invasion is indirect and *intangible* (such as noise, odors, light, smoke, etc.), the proper remedy lies in an action for nuisance, based on interference with the right of use and enjoyment of the land. However, if the intangible invasion causes substantial damage to the plaintiff's property, this damage

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104. *Id. See generally* S. Ry. Co. v. Fitzpatrick, 105 S.E. 663 (Va. 1921); Tidewater Ry. Co. v. Shartzer, 59 S.E. 407 (Va. 1907); Smith v. St. Paul, M. & M. Ry. Co., 81 P. 840 (Wash. 1905); Austin v. Augusta T. Ry. Co., 34 S.E. 852 (Ga. 1899).

105. *Spiek v. Mich. Dept. of Transp.*, 572 N.W.2d 201 (Mich. 1998).

106. *Id.* at 203.

107. *Id.* at 207.

108. *Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002).

109. *Id.* at 781, 832.

110. *Id.* The court in a footnote also suggested that the invasions argued "may constitute a nuisance claim which is not before this Court." *Id.* at 781 n.2, 832 n.2.

111. See above discussion on trespass *supra* Part IV.A.2. Trespass involves the interference with a landowner's exclusive possession and generally requires some form of entry.

will be considered to be an infringement on the plaintiff's right to exclusive possession, and an action for trespass may be brought.<sup>112</sup>

Under this theory, smoke remains an intangible invasion even though recovery may be available under certain circumstances. By adopting this theory, the author agrees with those jurisdictions that have rejected the Oregon Supreme Court's proclamation that all forces of energy are considered a physical intrusion.<sup>113</sup>

Where there has been no physical invasion, the proper analysis shifts to the *Penn Central* factors as discussed in the regulatory taking context in Part IV.B.2. Ultimately, this conclusion is consistent with the First District Court's decision in *Moon*, for the court relies upon a "condemnation by nuisance" theory, which bases recovery on an interference with use and enjoyment rather than physical invasion.<sup>114</sup>

## ii. Analysis Where Smoke Does Result in a Physical Occupation

Were the Idaho Supreme Court willing to adopt the more liberal Oregon interpretation of trespass, there would be strong support for extending the theory towards finding a physical invasion in the taking context.<sup>115</sup> The courts have described three classes of physical invasions that categorically warrant compensation: 1) where the occupation itself is permanent, 2) where the right of access is permanent, and 3) where the frequency and inevitability of the invasions transform them into permanent occupations of a definable term.

First, "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative."<sup>116</sup> For "when the 'character of the government action,' . . . is a permanent physical occupation of property, [Supreme Court] cases uniformly have found a taking to the extent of the occupation, without

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112. 786 F. Supp. 1545, 1550-51 (D. Idaho 1992) (emphasis altered).

113. See *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 390 n.9 (Colo. 2001); *Adams v. Cleveland-Cliffs Iron Co.* 602 N.W.2d 215, 221-23 (Mich. App. 1999).

114. The "condemnation by nuisance" doctrine was proposed by Professor William B. Stoebuck in his article *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967); see also Part IV.B.2.

115. Regardless of this Comment's ultimate conclusion that no physical occupation has occurred, because the Idaho Supreme Court has not yet ruled on the matter, this Comment discusses the takings analysis in the alternative.

116. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."<sup>117</sup>

Such permanent occupations are compensable even where the occupation is spatially minimal. For example, in *Loretto* the Supreme Court held that a *per se* taking occurred where the government authorized the appropriation of minimal portions of an apartment building for the permanent installation of cable television wires.<sup>118</sup> To the extent that smoke may cause a physical occupation, Idaho's Right-to-Burn Act does not, however, authorize farmers an absolute right to burn. Rather, field burning may be conducted only during a 45-day window per year. It therefore does not explicitly satisfy the permanence element of the *Loretto per se* taking rule.

Second, the Court has recognized that permanent rights of access that involve only temporary physical occupations are also categorically compensable.<sup>119</sup> Relating its discussion back to *Loretto*, the Court in *Nollan* found that "a 'permanent physical occupation' has occurred, for purposes of that rule, 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."<sup>120</sup> Because a continuous right of access is required, Idaho's Right-to-Burn Act does not prescribe a permanent easement where it authorizes burning only during a 45-day window.

Even so, the Constitution requires compensation for temporary as well as permanent takings.<sup>121</sup> This does not mean that all trespasses require compensation; rather it means that those physical occupations that do amount to a taking are compensable regardless of their duration.<sup>122</sup>

117. *Id.* at 434-35.

118. *Id.*

119. See *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825, 832 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay compensation.").

120. *Nollan*, 483 U.S. at 832.

121. *First Eng. Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 318 (1987) ("[T]emporary takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation.").

122. See JULIUS L. SACKMAN, 2A NICHOLS ON EMINENT DOMAIN § 6.05[3], at 6-77 (3d ed. 2003) ("Both federal and state decisions recognize that an entry on private land . . . may be compensable, even though the entry is temporary in nature and may be temporary in purpose as well."); see also *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922) (distinguishing between situations where the government intends to impose physical invasions whenever it sees fit versus situations where "they may be explained as still only occasional torts").

The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking. As [the case law reveals] . . . such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.<sup>123</sup>

While the Supreme Court has yet to specifically define a threshold which temporary invasions must pass,<sup>124</sup> the Federal Circuit Court of Appeals suggests that “[i]f the term ‘temporary’ has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass.”<sup>125</sup> Accordingly, the case law “characteristically focus[es] upon the regular nature and scope of the intrusive activity, the duration of the appropriation or interference, the intent of the governmental action, and the existence (or absence) of statutory authority for the entry.”<sup>126</sup> For example, “temporary entry for the purpose of cutting down trees to facilitate railroad construction, or to establish a base line for survey purposes, or for the purpose of diverting a watercourse, constitutes a temporary taking.”<sup>127</sup>

Agreeing with the Ninth Circuit, the Idaho Supreme Court proposed a similar test based on the frequency and predictability of the invasion: “Under the fifth and fourteenth amendments to the United States Constitution whether the damage is permanent may depend on proof of frequent and inevitably recurring inundation due to governmental action.”<sup>128</sup>

While Idaho’s Right-to-Burn Act predictably authorizes the inundation of smoke to occur each summer, the frequency with which the smoke invades plaintiffs’ property shall be restricted under its regulations to 45 days per year. While the temporary flooding cases suggest that such inundations must occur more than a few times before a tak-

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123. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982).

124. PATRICK J. ROHAN & MELVIN A. RESKIN, 9 NICHOLS ON EMINENT DOMAIN § 32.02 (3d ed. 2003).

125. *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

126. SACKMAN, *supra* note 122, § 6.05[3], at 6-71–6-73.

127. *Id.* § 6.05[3], at 6-78.

128. *Marty v. State*, 122 Idaho 766, 769, 838 P.2d 1384, 1388 (1992) (quoting *Marty v. State*, 117 Idaho 133, 144, 786 P.2d 524, 535 (1989)); see also *Pinkham v. Lewiston Orchards Irrigation Dist.*, 862 F.2d 184, 189 n.5 (9th Cir. 1988).

ing has occurred,<sup>129</sup> northern Idaho farmers have been burning and residents have been suffering each summer for over twenty years now.

Therefore, if the Idaho Supreme Court chooses to define smoke invasions as being “physical” in nature pursuant to takings claims, Idaho’s Right-to-Burn Act should be invalidated. “The *physical* invasion of neighboring property by earth, sand or other debris has been consistently held to constitute a taking when the invasion is the result of authorized government activity and the intrusion . . . is substantial.”<sup>130</sup> The Act would therefore unconstitutionally work a taking of plaintiffs’ property<sup>131</sup> and they would be entitled to just compensation.

## 2. Idaho’s Right-to-Burn Act Under Regulatory Takings Analysis

In the alternative, were the Idaho Supreme Court to find that plaintiffs did not suffer a physical invasion,<sup>132</sup> “[t]his case [would] not present the ‘classi[c] taking’ in which the government directly appropriates private property for its own use,’ instead the interference with property rights [would] ‘aris[e] from some public program adjusting the benefits and burdens of economic life to promote the common good,’”<sup>133</sup> and thus a regulatory taking analysis is at issue. The issue then becomes whether Idaho’s Right-to-Burn Act so adversely affects the beneficial use of the landowners’ properties through the authorization of field burning that it requires just compensation. For “if regulation goes too far it will be recognized as a taking.”<sup>134</sup>

The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While [the United States Supreme] Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government,

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129. See *Pinkham*, 862 F.2d at 189 n.5 (holding that two floodings are insufficient).

130. JULIUS L. SACKMAN, 2A NICHOLS ON EMINENT DOMAIN § 6.06[2][a], at 6-100 (3d ed. 2003) (emphasis added).

131. The nature of which would be of a limited duration.

132. As is the ultimate conclusion of this Comment.

133. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324–25 (2002) (citation omitted).

134. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."<sup>135</sup>

A land use regulation will not affect a taking if it "substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'"<sup>136</sup> or otherwise impose "an unduly harsh impact upon the owner's use of the property."<sup>137</sup> In its determination, the Supreme Court has "engage[d] in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance."<sup>138</sup>

#### i. Advancement of a Legitimate State Interest

Regulation may not "substantially advance legitimate state interests" if the limitations imposed are not "reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property."<sup>139</sup> The state interest advanced by the Legislature in Idaho's Right-to-Burn Act is the protection of the state's agricultural resources. Idaho Code section 22-4801 describes the state's dual reasoning:

The legislature finds that the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations. . . . The legislature finds that due to the climate, soils, and crop rotations unique to north Idaho counties, crop residue burning is a prevalent agricultural practice and that there is an environmental benefit to protecting water quality from the growing of certain crops in environmentally sensitive areas.<sup>140</sup>

"[I]n instances in which a state tribunal reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted

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135. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978) (citations omitted).

136. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

137. *Penn Central*, 438 U.S. at 127.

138. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

139. *Penn Central*, 438 U.S. at 134 n.30; see also *id.* at 133 n.29.

140. IDAHO CODE § 22-4801 (Michie Supp. 2003).

by prohibiting particular contemplated uses of land, [the Supreme Court] has upheld land-use regulations that destroyed or adversely affected recognized real property interests."<sup>141</sup> As an example, the Court in *Miller* held that the protection of agricultural economies was a legitimate state interest.<sup>142</sup> In that case, the state ordered landowners to remove a large number of ornamental cedar trees from their property because they produced a disease that threatened nearby apple orchards. At the time, "[a]pple growing [was] one of the principal agricultural pursuits in Virginia. . . . Many millions of dollars [were] invested in the orchards, which furnish[ed] employment for a large portion of the population."<sup>143</sup>

The Court held that the State might properly make 'a choice between the preservation of one class of property and that of the other' and since the apple industry was important in the State involved, concluded that the State had not exceeded 'its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public.'<sup>144</sup>

Grass seed and wheat farmers in Idaho provide similar economic benefits to their state to those provided by the apple growers in *Miller*. As discussed in Part II, Idaho's bluegrass seed farming industry "currently produce[s] half of the U.S. bluegrass seed crop,"<sup>145</sup> and acts as one of the largest employers in northern Idaho communities.<sup>146</sup> In addition, Idaho wheat farmers produce the eighth largest wheat export in the nation.<sup>147</sup> Accordingly, the state legislature and the public as a whole have a significant interest in preserving these economies.<sup>148</sup>

Furthermore, the relationship between protecting these agricultural activities and providing the farmers a right to burn is evident according to the Agriculture Administrator's determination that there

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141. *Penn Central*, 438 U.S. at 125.

142. *Miller v. Schoene*, 276 U.S. 272 (1928).

143. *Id.* at 279.

144. *Penn Central*, 438 U.S. at 126.

145. Loftus, *supra* note 13.

146. Linda Clovis, *Seed-field Burning*, GROUNDS MAINTENANCE, Aug. 1, 1997, available at [http://grounds-mag.com/ar/grounds\\_maintenance\\_seedfield\\_burning/](http://grounds-mag.com/ar/grounds_maintenance_seedfield_burning/).

147. Idaho Wheat Commission, *Wheat Facts*, at <http://www.idahowheat.org/info/wheatfacts.asp>.

148. "The notion of public use is a flexible one depending on the needs and wants of the community, and . . . the public, the legislature, and the courts of this state have demonstrated an awareness of public benefits, including environmental and population concerns, that perhaps were not recognized a century ago." *Cohen v. Larsen*, 125 Idaho 82, 84, 867 P.2d 956, 958 (1993).

is no other economically viable alternative to the practice.<sup>149</sup> In examining the nexus between the policy and the means, the legislature should be granted great deference.<sup>150</sup> It was thus reasonable for the Legislature to believe that ensuring the farmers a right to burn would further the protection of the industry, based on the Administrator's conclusion.

## ii. Deprivation of All Economically Beneficial Use

As a categorical rule, the Court in *Lucas* proclaimed "that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."<sup>151</sup> This determination focuses on the impact on "the value of the parcel as a whole," rather than the divisible interest in airspace<sup>152</sup> or the interest in use as described in segments of time.<sup>153</sup>

While activities authorized under Idaho's Right-to-Burn Act may have displaced certain plaintiffs from their property during times of heavy field burning, the Supreme Court has determined that "a regulation temporarily denying an owner all use of her property might not constitute a taking" where the deprivation is merely temporary.<sup>154</sup> "Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not."<sup>155</sup> Idaho's Right-to-

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149. The Growers' Guide, *ID Governor Agrees No Viable Alternative to Field Burning*, AG NEWS (July 24, 2003), at [http://www.growersguide.com/ag\\_newsaug03f.htm](http://www.growersguide.com/ag_newsaug03f.htm).

150. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 134 (1978) (refusing to reject the judgment of the city council that "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole"); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (finding in the public use context, "whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . [the] Legislature rationally could have believed that the [Act] would promote its objective").

151. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

152. See *Penn Central*, 438 U.S. at 130 n.27 (rejecting the contention "that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—*i.e.*, irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a 'taking'").

153. See generally *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (holding that temporary moratoriums on development are not takings *per se*).

154. *Id.* at 329.

155. *Id.* at 332.

Burn Act is thus not a categorical deprivation of all beneficial use where plaintiffs allege no diminution in value at all.<sup>156</sup>

### iii. Imposition of Nuisance as an Unduly Harsh Impact

Even where a regulation does not deny an owner complete beneficial use, it may still require compensation "if it [otherwise] has an unduly harsh impact upon the owner's use of the property."<sup>157</sup> But what if the government imposes upon landowners a nuisance-type burden that would normally give rise to a tort action if imposed by private actors? Does statutory authorization or even statutory immunization preclude a landowner from recovering for the resulting injuries?

The general rule is yes. "[I]f a nuisance-like activity is authorized by the legislature because of its attendant benefits to the public at large, an injured landowner *generally* has no remedy under the law of eminent domain."<sup>158</sup> As described by the Supreme Court:

That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. . . . A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it.<sup>159</sup>

An exception exists, however, where the authorized nuisance inflicts some "direct and peculiar" harm upon a certain landowner. "[T]o be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of pri-

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156. Compare *Penn Central*, 438 U.S. at 130 n.27 (rejecting in the regulatory taking context the appellants' "contention that a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel"), with *United States v. Dickinson*, 331 U.S. 745, 748 (1947) (holding in the physical appropriation context that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired").

157. *Penn Central*, 438 U.S. at 127.

158. SACKMAN, *supra* note 122, § 6.05[5], at 6-89.

159. *N. Transp. Co. v. City of Chicago*, 99 U.S. 635, 640 (1878).

vate property for public use."<sup>160</sup> The Court in *Richards* held that where nuisance activities inflict "direct and peculiar" harms upon an individual landowner, their burden is compensable:

Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a 'taking' within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad.<sup>161</sup>

....

[W]ith respect to so much of the damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by the fanning system therein installed, and issuing from the portal located near plaintiff's property in such manner as to materially contribute to render his property less habitable than otherwise it would be, and to depreciate it in value . . . . Construing the acts of Congress in the light of the 5th Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him.<sup>162</sup>

In *Richards*, the Court did not hold that all private nuisances are compensable, rather it held that only those that "in effect" constitute a taking are compensable. The Court draws a distinction between those harms suffered by the public in common and those harms that act directly and peculiarly upon a specific landowner. In doing so, the Court allows immunity only for those "damages as naturally and unavoidably result from the proper conduct of the [activity]."<sup>163</sup>

The majority approach defines the phrase "direct and peculiar" as requiring "an injury that is different in kind, not simply in degree,

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160. *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 553 (1914).

161. *Id.* at 554.

162. *Id.* at 556, 557.

163. *Id.* at 554.

from the harm suffered by all persons similarly situated."<sup>164</sup> The Supreme Court in *Pruneyard* supported this sentiment requiring compensation only where the landowner "surrenders to the public something more *and different* from that which is exacted from other members of the public . . ."<sup>165</sup> "It is, of course, true that [regulations may have] a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.'"<sup>166</sup> In *Richards*, the landowner was allowed to recover only for those damages attributable to a "fanning system installed in the tunnel which causes the gases and smoke emitted from engines while in the tunnel to be forced out of the south portal" and into plaintiff's house.<sup>167</sup> "The plaintiff in *Richards* prevailed, not merely on the basis of a difference in degree from the inconvenience experienced by the public at large, but because the harm he suffered was different in kind or character from that experienced by those similarly situated."<sup>168</sup>

In *Spiek*, the Michigan Supreme Court applied similar principles in rejecting a homeowner's claim that highway construction adjacent to their property caused a taking. The homeowner asserted that the construction "caused grave and serious damage to the value of the . . . property by increasing dramatically the levels of noise, vibrations, pollution and dirt in the once-residential area . . . destroy[ing] the acceptability of the property for residential purposes."<sup>169</sup> The court concluded that

[p]laintiffs' complaint does not allege harm to plaintiffs' property that differs in kind from the harm suffered by all living in proximity to a public highway in Michigan. Rather, plaintiffs' complaint alleges the same type of incidental and consequential harm as is experienced by all persons similarly situated to plaintiffs in that they reside near a public highway.<sup>170</sup>

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164. *Spiek v. Mich. Dep't of Transp.*, 572 N.W.2d 201, 209 (1998); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 147-48 (1978) ("The Fifth Amendment . . . 'says that when [one individual] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.'"); 29A C.J.S. *Eminent Domain* § 85 (1992) ("Compensable injuries must be such as specially affect the injured party, and not such as are suffered by the community generally or such as differ only in degree and not in kind from those suffered by the latter.").

165. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 n.7 (1980) (emphasis added) (quoting *United States v. Rands*, 389 U.S. 121, 126 (1967)).

166. *Penn Central*, 438 U.S. at 133.

167. *Richards*, 233 U.S. at 549.

168. *Spiek*, 572 N.W.2d at 206.

169. *Id.* at 203.

170. *Id.* at 210.

The harms asserted in *Moon* are of the kind borne by the public in common and are the "normal and non-negligent" result of the legalized field burning nuisance. To the extent that plaintiffs in *Moon* suffer substantial harm to their use and enjoyment and even to their health, these injuries vary from those suffered by the public at large only in a matter of degree.<sup>171</sup> Those injuries are caused by smoke and soot which "naturally and unavoidably result from the proper conduct of the [burning] and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a [farm]."<sup>172</sup> And because Idaho's Right-to-Burn Act does not authorize the imposition of any direct and peculiar injury, i.e., different in kind from that suffered by the public, the Act does not inflict an unconstitutionally undue harm.

The First District Court of Idaho in *Moon*, however, urges the adoption of an alternative definition of the phrase "direct and peculiar." The court does so in pursuance of the "condemnation by nuisance" doctrine.<sup>173</sup> The doctrine reads: "[G]overnmental activity by an entity having the power of eminent domain, which activity would constitute a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation."<sup>174</sup> Under this theory, "the right . . . to be free from 'special and peculiar' interference . . . mean[s] [only] something more severe than 'unreasonable.' And so the condemnable interest is the same in *kind* but greater in *degree* from that recognized in nuisance law."<sup>175</sup>

Under the condemnation by nuisance theory, plaintiffs would have a strong argument for recovery. Where plaintiffs are forced to suffer debilitating respiratory injuries and to submit to the practical ouster from their property, their injuries arguably rise to "something more severe than unreasonable."

The condemnation by nuisance doctrine was adopted by the Iowa Supreme Court in *Bormann v. Board of Supervisors* in a successful challenge to the constitutionality of the nuisance immunity provision of that state's right to farm act.<sup>176</sup> In that case, the court invalidated as unconstitutional the act's immunity provisions that in effect authorized the creation of noise, odor, dust, and fumes. "[T]he state can-

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171. While Plaintiffs in *Moon* may be more sensitive to the smoke produced by the field burning, they have not alleged that the nature of the smoke invasion itself is different from that suffered by the rest of the public. See generally Complaint, *supra* note 39.

172. *Richards*, 233 U.S. at 554.

173. Condemnation by nuisance is a theory of recovery proposed by Professor William B. Stoebuck. Stoebuck, *supra* note 114.

174. *Id.* at 208-09.

175. *Id.* at 214.

176. 584 N.W.2d 309, 321 (Iowa 1998).

not regulate property so as to insulate the users from [any] potential private nuisance claims without providing just compensation to persons injured by the nuisance.<sup>177</sup> The court's conclusion was in accord with its own definition of taking: "[A] 'taking' . . . may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof."<sup>178</sup>

Idaho Supreme Court precedent, however, suggests that the court will be less willing to adopt this more liberal avenue of redress. In *Covington*, for example, the court suggested a stricter definition of taking than the "substantial" interference standard used in Iowa; the court described "taking" as occurring "when the regulation in question permanently deprives the owner of 'all economically beneficial uses' of his land."<sup>179</sup> More importantly, Idaho's common law nuisance precedent refutes the adoption of the "something more severe than reasonable" approach. It has been a long established rule that in order

[t]o entitle plaintiffs to recover for injuries sustained from a public nuisance they must first allege in their complaint facts clearly showing that they have sustained special or peculiar damages, damages different *in kind and character* from the rest of the public, so that such damage cannot fairly be said to be a part of the common injury resulting from such nuisance.<sup>180</sup>

Even though there may be strong public policy in favor of adopting the "condemnation by nuisance" doctrine in this case,<sup>181</sup> it is unlikely that the Idaho Supreme Court will be willing to abandon its century's old nuisance precedent to do so. Accordingly, Idaho will presumably remain with the majority of jurisdictions that require "an injury that is different in kind, not simply in degree."<sup>182</sup> Because Idaho's Right-to-Burn Act authorizes only those damages similar in kind to those borne by the public, the Act does not impose a taking on its face under the Fifth Amendment.

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177. *Id.* at 319–20.

178. *Id.* at 321.

179. *Covington v. Jefferson County*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (emphasis added) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

180. *Stufflebeam v. Montgomery*, 3 Idaho 20, 26, 26 P. 125, 126–27 (1891) (emphasis added). This case may be found under the following Westlaw citation: 2 Idaho 763.

181. The degree of the public health concerns involved warrant extreme scrutiny.

182. *Spiek*, 572 N.W.2d at 209; see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 147–48 (1978) ("The Fifth Amendment . . . 'says that when [one individual] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."); 29A C.J.S. *Eminent Domain* § 85 (1992) ("Compensable injuries must be such as specially affect the injured party, and not such as are suffered by the community generally or such as differ only in degree and not in kind from those suffered by the latter.").

## V. CONCLUSION

Unless the Idaho Supreme Court deviates from the general theory that smoke results in an intangible, rather than a physical, invasion, Idaho's Right-to-Burn Act ought to survive a facial challenge. This is because it limits nuisance and trespass actions without inflicting unconstitutional takings upon those affected under its breadth. As a result, plaintiffs in *Moon* have suffered only those uncompensable injuries which fall under the rubric of *damnum absque injuria*: "Loss, hurt, or harm without injury in the legal sense; that is, without such breach of duty as is redressible by a legal action. A loss or injury which does not give rise to an action for damages against the person causing it."<sup>183</sup>

This is not to say that certain individuals may not "in effect" suffer compensable takings of a "direct and peculiar" nature. Such potential plaintiffs continue to retain their Fifth Amendment rights against the State despite the immunity clause in the Right-to-Burn Act.<sup>184</sup> The Idaho Supreme Court's articulation in *Renninger* is informative:

[T]he Constitution . . . waives the immunity of the State from suit, and if the State takes the property without condemning, the landowner, to give full force and effect to the provision of the Constitution as self-executing, must be entitled to sue therefor and such are the universal holdings of the courts which have had occasion to consider this specific point; i.e., where the State has taken private property for public use without paying for it, and tries to avoid paying by claiming immunity.<sup>185</sup>

The remedies available to plaintiffs who are able to convince the court either that they have suffered smoke invasions amounting to physical occupation, or that they have suffered some injury different in kind from the general public, are limited, however. Just compensation typically entails the payment of damages, and a "court will not ordinarily issue an injunction to restrain a private individual from trespassing [or otherwise invading] upon the land of another unless special circumstances exist to justify invoking equitable jurisdiction."<sup>186</sup> Instead, "[w]here there is an adequate remedy at law, an ap-

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183. BLACK'S LAW DICTIONARY 393 (6th ed. 1979).

184. The Act may protect farmers from tort liability, but it cannot protect the State from its Fifth Amendment "just compensation" obligation.

185. *Renninger v. State*, 70 Idaho 170, 178, 213 P.2d 911, 916 (1950).

186. JULIUS L. SACKMAN, 6A NICHOLS ON EMINENT DOMAIN § 28.02[4][c], at 28-30-28-31 (3d ed. 2003).

plication of injunctive relief will be denied."<sup>187</sup> In Idaho, a preliminary injunction may be available but only until proper damages can be prescribed.<sup>188</sup> Therefore, while inverse condemnation may provide some slim opportunity for relief in the field burning context, the relief available will ultimately come only in the form of damages.

Despite these results, the Idaho Legislature should nonetheless heed the concerns of its citizens and properly address what is in reality a serious health issue. In many cases, this is not just a matter of exchanging the burdens of inconveniences. Rather, peoples' health and, as demonstrated by the discussion of Ms. Mason at the beginning of this Comment, peoples' lives are at risk. To view this issue through a purely economical lens would be to blind oneself to the humanity of the citizenry.

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187. *Id.* at 28-31.

188. "Article 1, Section 14 of the Constitution of Idaho, is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid." *Renninger*, 70 Idaho at 177, 213 P.2d at 915.

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