THE U.S. CLAIMING OWNERSHIP AND CLOUDING TITLE IS A *PER SE* TAKING UNDER THE 5TH AMENDMENT: A HISTORICAL & LEGAL ANALYSIS OF THE TAKINGS CLAUSE AND LAND OWNERSHIP IN CULEBRA, PUERTO RICO[1]

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ARTICLE

"All truths are easy to understand,
once they are discovered;
the point is to discover them."
–Galileo

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I. Introduction

The case of *Katzin, et al v. United States*[2], began with the seemingly innocuous execution of an agreement for the purchase and sale of oceanfront property located in the Island of Culebra, Puerto Rico ("Subject Property"). The par-

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[1] The case of *Katzin v. United States* was previously the subject of a review entitled *Pirate of the Carribean* (sic)*: Claiming Ownership and Clouding Title is a Physical Taking*, published on July 18, 2016 by the well-known eminent domain blog www.inversecondemnation.com.

[2] 127 Fed. Cl. 440 (July 15, 2016) (Lettow, J.), appeal docketed No. 16-2636 (Sept. 14, 2016).

ties proceeded to the due diligence phase without hindrance. A new title search report was commissioned and showed that the sellers held fee simple title, free and clear, of the Subject Property. However, due to historical events related to the Spanish American War, the Treaty of Paris of December 10, 1898, the former use of the island as a target for U.S. Navy live ammunition combat exercises, and the establishment of the Culebra National Wildlife Refuge,[3] the purchasers contacted the United States Fish and Wildlife Service ("FWS") to inquire into any possible claims or rights over the Subject Property. The FWS responded by asserting title to the purchasers to certain non-specific portions of the Subject Property, but the FWS could not ascertain their specific location. The FWS's assertion of title caused the purchasers to rescind the agreement.

The sellers, the Katzin and Kjeldsen families (collectively, the "Katzins"), were thrusted into this mysterious ownership controversy. On the one hand the Registry of Property clearly established the fee simple title of the Katzins, and on the other the United States alleged ownership to unspecified portions to the Subject Property. The Katzins the attempted to negotiate with the FWS by offering a specific portion of the Subject Property in exchange for the FWS to quitclaim any interest. The FWS agreed to consider the offer, but after two years of evaluation the FWS still needed more time. The Katzins withdrew their offer and engaged in a historical research project to determine the location of the FWS's alleged property in order to find the truth of the Government's allegations. This meant delving into handwritten records and events spanning the 19th and 20th centuries.[4]

Specifically, the Government initially alleged ownership in fee simple title of the following disputed areas as located somewhere within confines of the Subject Property: (1) a 2.25-acre plot of land purchased by the United States Navy as a site for a gun mount in 1903; and (2) the "maritime zone", sometimes referred to by the Government as a coastal lot between the Subject Property and the ocean, by virtue of the Treaty of Paris of 1898.[5] The Katzins reviewed the records of the Registry of Property of Puerto Rico, all the literature associated with the colonization of Culebra by the Spanish Crown, and the original transfer of title documents from Spain to the first settlers of Culebra. The Katzins traced their title free and clear all the way back to the original 1887 land survey of the Island of Culebra for its division into lots in accordance with the original document of transfer of title from the Spanish Crown to a Mr. Jose Nabarro in the year 1892[6] and pinpointed the true location of the 2.25

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[3] U.S. Fish & Wildlife Service, *Culebra National Wildlife Refuge*, https://www.fws.gov/caribbean/refuges/PDF/EnglishCulebraNWRfactSheet2013.pdf (last visited May 19, 2017).

[4] *See generally*, *Katzin, et al. v. United States*, 120 Fed. Cl. 199 (2015).

[5] *Id.* at 201.

[6] Fondo Documental: Municipio de Culebra, Serie: Asuntos Relacionados con Terrenos, Registro: 40, Caja: 6, Año 1892, Exp. 24, José Nabarro Mato. PX 407. Property No. 55 of Culebra, registered at page 115 of Volume 1 of Culebra, Registry of Property of Puerto Rico, Fajardo Section.

acres gun mount outside the boundaries of the Subject Property. Notwithstanding the overwhelming evidence to the contrary, the FWS held steadfast to its claims and doubled down in its assertions of title. The FWS now also claimed title to a 10.01 acres property allegedly located in the peninsula of the Subject Property. This new assertion of title caused the breakdown of negotiations.

In order to vindicate their property ownership rights the Katzins considered a variety of legal avenues. However, after extensive research, they settled on an action for the taking of their property without just compensation under the Fifth Amendment. On June 15, 2012 the Katzins filed a complaint for the taking of the Subject Property without just compensation in the United States Court of Federal Claims, Washington, D.C.[7]

The controversies in this taking case regarding the Subject Property are twofold: (1) if the actions of the Government arise to the level of a taking under the Firth Amendment; and (2) if the Plaintiffs are the true owners of all of the Subject Property. If both of these questions were to be answered in the affirmative the Plaintiffs would be entitled to recover just compensation from the United States.

On the other hand, the claims of the Government would be resolved by determining the true legal existence, ownership, location, extension and boundaries of the properties at issue. This turns in large part upon the events and handwritten records that tell the story of the colonization of Culebra by the Spanish Crown, the Spanish American War, the Treaty of Paris of 1898, previous and subsequent statutes, Executive Orders, Presidential Proclamations, and the U.S. Navy's activities in the Island of Culebra.

This article will first provide a review and analysis of the historical events and the legal framework that is the basis of the Katzins private property ownership in Culebra, Puerto Rico, and second, it will review and analyze the Fifth Amendment to the Constitution of the United States regarding takings of property without just compensation, the Tucker Act, the United States Court of Federal Claims, and their relation to the United States' interference with the Katzins' private property rights.

A. History and legal framework

1. The Colonization of the Island of Culebra by the Spanish Crown, the Subject Property, the mangroves and the maritime zone.

The history of the opposing claims in this case traces back to the colonization of the Island of Culebra, Puerto Rico, by the Spanish Crown.[8] After certain misguided attempts to colonize Culebra, Puerto Rico, the Spanish Crown finally commissioned

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[7] *Katzin, et al. v. United States*, 120 Fed. Cl. 199 (2015).

[8] *Katzin v. United States*, 127 Fed. Cl. 440, 446 (2016).

and obtained a Survey for the Division of the Island of the Culebra into Lots ("1887 Map").[9] The Spanish government approved the 1887 Map in the year 1888.[10]

According to the Royal Order of 1888, the following was the division into lots approved by the Spanish Crown:[11]

	Areas	Hectares	Areas	Centiare
1.	Lots No. 1-80	1,861	30	00
2.	Small adjacent cays (Lots 81, 82, 83, 84)	6	50	00
3.	Mangroves (Lots 85, 86, 87, 88, 89)	35	60	00
4.	Lands reserved for the State	466	35	00
5.	Lands reserved for the war branch	4	50	00
6.	Lands reserved for the town	18	50	00
7.	Lagoons (Flamenco and Los Patos)	28	26	70
8.	Maritime Zone	134	60	00
	Superficial Area of the Island of Culebra	2.555	61	70

As noted above, Lots 1-84 were destined for private settlers, Lot 89 was a Mangrove Swamp comprised of 3.70 hectares, and the maritime zone was comprised of 134.60 hectares.[12]

On May 20, 1892, the Spanish Crown granted full fee title ownership of Lot 24 of the Official Survey of Culebra prepared by the Mountain Inspection on February 6, 1888, the 1887 Map, to Jose Nabarro [sic][13] with the following boundaries:

> [B]y the North with Lot number twenty five property of Mr. Escolástico Mulero, by the South with lot number twenty three of grantee, by the East with the ocean, and by the West with lot number twenty two of grantee being of an extension in accordance with the mentioned survey plan of twenty five hectares squared of land.

Also, on May 20, 1892, Escolástico Mulero acquired and was granted the definitive full fee title ownership of Lot 25 of the 1887 Map from the general govern-

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[9] Fondo; Mapoteca; Título: Plano Concerniente a la Isla de Culebra y de su División en Lotes; Año 1887; Número de Plano 406, Archivo Histórico de Puerto Rico.

[10] *División Parcelaria de los Terrenos de la Isla de Culebra*, Fondo Documental: Obras Públicas, Serie: Propiedad Pública, Año: 1888, Expediente: 7; Caja: 73, Archivo General de Puerto Rico.

[11] *Id. See* also Carmelo Delgado Cintrón, *Las Concesiones Privadas y las Zonas de Terrenos en la Isla de Culebra, Un Análisis Histórico y Jurídico*, 31 Rev. Col. Abo. P.R. 1 (1970).

[12] *Id.*

[13] Fondo Documental: Municipio de Culebra, Serie: Asuntos Relacionados con Terrenos, Registro: 40, Caja: 6, A;o 1892, Exp. 24, José Nabarro Mato, Archivo General de Puerto Rico; and Property No. 55 of Culebra, registered at page 115 of Volume 1 of Culebra, Registry of Property of Puerto Rico, Fajardo Section.

ment.[14] The following is the description of Lot No. 25 as appears in the Registry of Property of Puerto Rico, Fajardo Section:

> By the North with Lot number twenty six property of Mr. Antonio Lugo, by the South with Lot number twenty four property of Mr. Jose Nabarro, by the East with the sea, and by the West with Lot number twenty one property of Maria Vázquez, being the described lot of an extension of twenty five hectares squared.

On October 15, 1892, José Navarro sold all of his rights, title and interest in and to Lot 24 to Escolástico Mulero.[15] The following is a partial depiction of the areas in controversy from the 1887 Map[16]:

As readily appears from the records of the Registry of Property of Puerto Rico and the original deeds of transfer, the Spanish Crown transferred and delivered fee simple title to Lots 24 and 25 to the aforementioned settlers with an eastern boundary with the sea, and not with any other property, subject of course to all applicable laws then in force regarding the mangroves and the maritime zone. Full fee title ownership of Lots 24 and 25 was delivered to Jose Nabarro and Escolástico Mulero with an eastern boundary with the sea, six (6) years before the before the beginning

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[14] Fondo Documental: Obras Públicas; Serie: Propiedad Pública; Municipio: Culebra; Año 1894; Caja Número: 75; and Property No. 28 of Culebra, registered at page 61 of Volume 1 of Culebra, Registry of Property of Puerto Rico, Fajardo Section.

[15] Fondo Documental: Municipio de Culebra, Serie: Asuntos Relacionados con Terrenos, Registro: 40, Caja: 6, Año 1892, Exp. 24, José Nabarro Mato, Archivo General de Puerto Rico; and Property No. 55 of Culebra, registered at page 115 of Volume 1 of Culebra, Registry of Property of Puerto Rico, Fajardo Section.

[16] Fondo; Mapoteca; Titulo: Plano Concerniente a la Isla de Culebra y de su División en Lotes; Año 1887; Número de Plano 406, Archivo General de Puerto Rico.

of the Spanish American War and the execution of the Treaty of Paris of December 10, 1898.

Included within the lands that remained in the public domain of the Spanish Crown for common use of all people was Lot 89, a Mangrove Swamp of 3.70 hectares, equivalent to 9.14 acres, as indicated in the Division of Lands of the Island of Culebra, Year 1888.[17] As appears from the partial depiction of the 1887 Map above, Lot 89 is located in the south west of Lot 33, and such remains today a mangrove swamp.

After delivery of title to the settlers, the Spanish Crown retained jurisdiction over the maritime zone of the Island of Culebra for the use of all people pursuant to applicable law as will be further explained below. The maritime zone of Culebra is comprised of 134.60 hectares,[18] equivalent to 332.60 acres, and the Katzins contended that the 1887 Map attempted to depict such area as the line that contours the various lots in their boundary with the ocean, except in the area of the location of Lot 89, South west of Lot 33, where a mangrove swamp of 3.70 hectares remains to this day.[19]

2. The Treaty of Paris of December 10, 1898 and the Foraker Act of 1900

The Spanish American War resulted in the Treaty of Paris of December 10, 1898between Spain and the United States. [20] The Treaty of Paris was negotiated and executed with terms favorable to the U.S., and involved the exchange and delivery of $20,000,000 to Spain, who in turn ceded and delivered Cuba, Puerto Rico, Guam and the Philippines to the United States. Spain relinquished and delivered to the United States such real property, which, in accordance with the law, belonged to the public domain, and as such was under the administration of the Spanish Crown.[21] These real properties in the public domain included Lot 89 and the maritime zone of the Island of Culebra.

On March 29, 1899, by Presidential Proclamation Number 435, President William McKinley reserved for naval purposes certain lands on the island of Puerto Rico proper, lying to the eastward of the city of San Juan.[22] This reservation did not include any lands on the Island of Culebra.

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[17] *División Parcelaria de los Terrenos de la Isla de Culebra*, Fondo Documental: Obras Públicas, Serie: Propiedad Pública, Año: 1888, Expediente: 7; Caja: 73, Archivo General de Puerto Rico.

[18] *Id.*

[19] Fondo; Mapoteca; Titulo: Plano Concerniente a la Isla de Culebra y de su División en Lotes; Año 1887; Número de Plano 406, Archivo General de Puerto Rico; and *División Parcelaria de los Terrenos de la Isla de Culebra*, Fondo Documental: Obras Públicas, Serie: Propiedad Pública, Año: 1888, Expediente: 7; Caja: 73, Archivo General de Puerto Rico.

[20] *Treaty of Paris*, 30 Stat. 1754. (Westlaw 2017).

[21] *Id.* Article VIII.

[22] 31 Stat. 1947.

Since the end of the Spanish American War, Puerto Rico remained under a United States military government until the year 1900, when Congress established a civil government administration headed by a United States' civil governor appointed by the President of the United States.[23] On April 2, 1900, President William McKinley signed the bill that established the parameters for a civilian government in Puerto Rico. This new law was and is commonly known as the Foraker Act for its sponsor, Joseph Benson Foraker, and is also referred to as the Organic Act of Puerto Rico.[24] The new government included the governor, an executive council appointed by the President, a House of Representatives with 35 elected members, a judicial system with a Supreme Court, and a non-voting Resident Commissioner in Congress. In addition, all federal laws of the United States were to be in effect on the island. The first civil governor of the island under the Foraker Act was Charles H. Allen, inaugurated on May 1, 1900 in San Juan, Puerto Rico.

Furthermore, Section 13 of the Foraker Act also provided the following:

> That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in said treaty of peace in any public bridges, road houses, water powers, highways, unnavigable streams, and the beds thereof, subterranean waters, mines, or minerals under the surface of private lands, and all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor-works boards of Porto Rico, and all the harbor shores, docks, slips, and reclaimed lands, but not including harbor areas or navigable waters, is hereby placed under the control of the government established by this act to be administered for the benefit of the people of Porto Rico; and the legislative assembly hereby created shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable.

By virtue of this provision the United States relinquished and placed under the control of the government of Puerto Rico the properties described therein to be administered for the benefit of the people of Puerto Rico. The Foraker Act was to provide solace and protection of Puerto Rico's lands for the benefit of its people, but others had different plans.

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[23] 31 Stat., 77. The provisions of the Act were extensive to Puerto Rico and its adjacent islands, including the Island of Culebra.

[24] *Id.*

3. President McKinley, the Navy's Request for Culebra and the Opinion of the Attorney General of October 25, 1901

The late President William McKinley was popular and well liked, but, as he was just starting his second term in office, he was shot in the abdomen on the Fairgrounds at Buffalo, New York, on September 6, 1901. President McKinley passed away from complications on September 14, 1901. Vice-President Theodore Roosevelt was sworn in as the 26th President of the United States.

On October 15, 1901, one month after the death of the late President McKinley, once President Roosevelt was in office, the U.S. Navy informed the Attorney General that the General Board of the Navy Department recommended that the President be requested to assign by Executive Order the Culebra group of islands east of Puerto Rico for its use as an advance naval base.[25] Thus, the Navy requested the Attorney General issue an opinion on the question of whether, in view of the provisions of the Foraker Act of 1900, and the establishment of a civil government in Puerto Rico authorized by said Act, the Navy Department would be warranted in requesting the President to make assignment to it of said group of islands for the purposes mentioned.[26]

The Attorney General of the United States responded to the U.S. Navy's request on October 25, 1901[27] concluding the following:

> But, in view of existing provisions of law, I hold and advise you that the Navy Department would not be warranted in requesting the President to make assignment to it of the Culebra group of islands for a naval base, so far, at least, as that portion of the plan is concerned which involves harbor shores or any other branch of the rights and property committed to the administration of the government of Porto Rico by section 13 of the Organic act.

Notwithstanding his holding and advice to the U.S. Navy, the Attorney General, earlier in the opinion, suggested the following:

> That the United States should obtain, in accordance with the usual methods of authorization by Congress, a transfer of such individual property rights as may be involved, and a retrocession *pro tanto* from the government of Porto Rico. Congress may see fit, by some new law, to make it clear that the grant of local control and administration is

[25] 23 Op. Att'y Gen. 564 (1901).

[26] *Id.*

[27] *Id.*

> subject to such exception for national purposes as this case suggests, and may thereupon define the field generally or by special location, establishing appropriate methods and rules of procedure in making Federal reservations from public lands in Porto Rico.

The U.S. Navy disregarded the Opinion of the Attorney General and requested President Roosevelt deliver the Island of Culebra, Puerto Rico.[28]

4. The Presidential Proclamation of December 17, 1901

On December 19, 1901 President Theodore Roosevelt issued an Executive Order which reads as follows:

> Such public lands as may exist on Culebra Island between the parallels of 18'15' and 18'23 north latitude, and between the meridians of 65'10' and 65'25' west longitude, are hereby placed under the jurisdiction of the Navy Department.[29]

The actions of the U.S. Navy and the issuance of the Executive Order completely disregarded the best interests of the residents of Culebra, Puerto Rico who should have been protected by the provisions of the Treaty of Paris and the Foraker Act of 1900.[30] And, as it will come to bear, this was by no means the last time the Navy and the Government disregarded the law in what became its obsession to wrest this land from its inhabitants.[31]

5. The United States Act of July 1, 1902 and the Puerto Rico Act of February 16, 1903

The United States Navy moved quickly on Culebra. Perhaps motivated by the knowledge that its control over lands in Culebra was vulnerable to court attack provided the Attorney General's published binding legal opinion, the United States sought to cure retroactively such illegal land grab.[32] The attempt to cleanup this

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[28] Copaken, *Target Culebra: How 743 Islanders Took on the Entire U.S. Navy and Won*, 20, (University of Puerto Rico Press 2009).

[29] Gerhard Peters and John T. Woolley, *The American Presidency Project*, *Theodore Roosevelt: "Executive Order," December 19, 1901* http://www.presidency.ucsb.edu/ws/?pid=69696. (last visited May 26, 2017).

[30] Copaken, *supra* n. 28, pages 20-21

[31] *Id.* at page 21.

[32] *Id*.

transgression was initiated by the enactment of a new federal law, as suggested by the Attorney General in his Opinion of October 25, 1901.

On July 1, 1902, the United States approved "an Act Authorizing the President to reserve public lands and buildings in the island of Porto [sic] Rico for public uses, and granting other public lands and buildings to the government of Porto Rico, and for other purposes" ("U.S. Act of 1902").[33] As suggested in the Attorney General's Opinion, the language in the U.S. Act of 1902 made this second land grab look more reasonable; however, the grant of authority for reservation of public lands in Puerto Rico did not include the harbor areas, navigable streams, bodies of water and the submerged lands underlying the same, and this time Puerto Rico would have to acquiesce.

On February 16, 1903, the civil government of Puerto Rico enacted "An Act Authorizing the Governor of Porto [sic] Rico to convey certain lands to the United States for naval, military and other public purposes" ("P.R. Act of 1903"). Section 1 of the P.R. Act of 1903 refers to the conveyance of public lands to the United States in the Island of Culebra.[34] It should be noted that at the time of the enactment of the Act, the Governor of Puerto Rico and all members of one of the houses of the Legislative Assembly of Puerto Rico, specifically the Executive Council, were appointed by the President of the United States; they were not democratically elected officials.[35]

Notwithstanding the provisions of the Foraker Act of 1900, once these Acts were in place President Theodore Roosevelt had the authority to make reservation of such public lands and buildings belonging to the United States in the island of Puerto Rico for military, naval, and other public purposes, and the Governor of Puerto Rico was authorized to effectuate such transfer.

6. The Katzins Property in the island of Culebra as of May 1903

On May 27, 1902, Escolástico Mulero was the owner of various real properties in Culebra, which included the Subject Property. As of May of 1903, Mulero was the registered owner of the following properties according to the records of the Registry of Property of Puerto Rico:'

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[33] 32 Stat. 731, 48 U.S.C. § 746.

[34] See 28 L.P.R.A. Sec. 41, and 28 P.R.L.A. Sec. 41.

[35] The other house, the House of Delegates, was elected by those citizens of Puerto Rico residents of the island for more than a year, and that possessed the conditions required by the laws and military orders in effect at the 1st of March of 1900. 1 P.R.L.A. Sec. 29.

Property No. of the Registry of Property	Lot No. of the 1887 Map	Page	Volume of Culebra
28	25	61	1
29	Half of 23	62	1
30	Half of 74	63	1
50	21	104	1
55	24	115	1
79	Half of 23	164	1
86	75	177	1

The following is the pertinent section of the 1887 Map which provides a depiction of the lots actually owned by Escolástico Mulero as of May 1903:[36]

On April 25, 1903, Mulero executed a Deed of Grouping before Notary Public Jose C. Schroder and filed it in the Registry of Property on May 9, 1903. Mr. Mulero combined all the properties listed on the table above which resulted in the creation of

[36] Fondo; Mapoteca; Titulo: Plano Concerniente a la Isla de Culebra y de su División en Lotes; Año 1887; Número de Plano 406, Archivo General de Puerto Rico.

Property No. 117, duly registered at Page 246, Volume 1 of Culebra, 1st Inscription, Registry of Property of Puerto Rico. The description of Property 117 is originally in the Spanish language and translates as follows:

> RURAL: Tract of land of clean pasture dedicated for the raising of cattle, with the name Buena Vista, located at the Fraile Ward of Culebra, comprised of three hundred forty six cuerdas and fifty cents of another, with a house/studio made of wood, covered with a zinc roof, equivalent to one hundred thirty seven hectares fifty areas, bounded by the *SOUTH and EAST with the ocean, by the NORTH, with Mister Antonio Lugo*, and by the West with the estate of Mister Francisco Garcia. This property was formed by consolidating others and as such is not subject to any liens and/or encumbrances. Its value is five thousand dollars. Mister Escolástico Mulero, married, a property owner, of legal age, and a resident of Culebra, *has registered to his name* in this same Volume at pages sixty one, sixty two, sixty three, one hundred four, one hundred fifteen, one hundred sixty four, and one hundred seventy seven, *parcels numbered twenty eight, twenty nine, thirty, fifty, fifty five, seventy nine and eighty six, respectively, bounding with each other, and is his will to consolidate them to form one property under this number* and he requests be recorded in his name in this Registry. By virtue of which Mister Escolástico Mulero, sole last name, records this property by grouping. The foregoing appears from the copy of the deed executed in Fajardo dated April 25th past, before Notary Mister José C. Schroder, which has been filed in this Registry at nine today as per entry number sixty at page twenty one overleaf volume twelve of the diary. All of the foregoing being in accordance with the Registry and the referenced document I sign in Humacao on the ninth of May of 1903.

From the original description of Property 117, as with Lot 25 of the 1887 Map, Property 117 was bounded by the North with Lot 26 of Antonio Lugo, and by the East with the sea. Lot 25 or Lot 24 grouped with others under Property 117 did not have a boundary on the East with Lot 89, or any other private lot, only the ocean, all in accordance with applicable laws regarding the maritime zone as will be explained further below.

7. The Presidential Proclamation of June 26, 1903

On June 26, 1903, President Roosevelt issued Presidential Proclamation No. 502 by virtue of the authority vested in him by Congress pursuant to the U.S. Act of 1902. President Roosevelt proclaimed, in pertinent part, the following regarding lands in the Island of Culebra reserved for naval purposes:

> *Whereas,* by "An Act Authorizing the President to reserve public lands and buildings in the island of Porto Rico for public uses, and granting other public lands and buildings to the government of Porto Rico, and for other purposes," approved July 1, 1902, the President is authorized to make, within one year after the approval of said act such reservation of public lands and buildings belonging to the United States in the Island of Porto Rico for military, naval, light-house, marine hospital, post offices, custom houses, United States Courts and other public uses as he may deem necessary, all public lands and buildings, not including harbor areas, navigable streams and bodies of water and the submerged land underlying the same, owned by the United States in said Island and not so reserved, being granted to the government of Porto Rico upon the condition that such government by proper authority, release to the United States any interest or claim they may have in or upon the lands or buildings reserved under the provisions of said act; and
>
> […]
>
> All public lands, natural, reclaimed, partly reclaimed, or which may be reclaimed, in the island of Porto Rico, embraced within the following boundaries:
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> […]
>
> 5. All public lands and buildings thereon belonging to the United States on the island of Culebra and adjacent keys, lying between the parallels of 18 ° 15' and 18 ° 23' north latitude between the meridians 65 ° 12' and 65 ° 25' west longitude. [37]

By virtue of the grant of authority vested in him by Congress, President Roosevelt reserved for naval purposes such public lands and buildings thereon belonging to the United States in the Island of Culebra lying between certain parallels. However, such reservation did not include any harbor areas, navigable streams and bodies of water and the submerged land underlying the same.

This Presidential Proclamation was the subject of analysis by the U.S. Attorney General. In this Opinion he indicated that the limits of this reservation should be fixed in accordance with the faculty and authorization delegated upon the President, which did not include ports or navigable waters, and which did not delegate upon

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[37] Gerhard Peters and John T. Woolley, The American Presidency Project, *Theodore Roosevelt: "Proclamation 502 - Reservation of Lands in Puerto Rico for Naval Purposes," June 26, 1903*, http://www.presidency.ucsb.edu/ws/?pid=69371 (last visited May 26, 2017). .

the President any authority over navigable waters or submerged lands.[38] It should be noted that the Department of Justice of the United States held that the submerged lands that belonged to Spain were transferred to the public domain of the United States of America. The faculty to permanently dispose of such lands resided in Congress and in the absence of a statute that conferred such authority or power, it could not be exercised by the executive departments of the government.[39]

Therefore, the President was authorized to reserve certain lands in Puerto Rico, including lands in Culebra Island, but such faculty and authority did not include harbor areas, navigable streams and bodies of water and the submerged land underlying the same.[40]

However, under the Act of 1902 the government of Puerto Rico, by proper authority, still had to release to the United States any interest or claim in or upon the lands or buildings reserved by the President of the United States. This last domino did not fall for years, but it did not stop the U.S. Navy from continuing to exercise control and jurisdiction over lands in the Island of Culebra, Puerto Rico.

8. The U.S. Navy's Purchase of 2.25 acres on June 28, 1903

Two days after the issuance of the Presidential Proclamation, on June 28, 1903, Escolástico Mulero and his wife Tomasa Rivera, as sellers, and the United States of America, Department of the Navy, as purchaser, represented by David O. Chadwick, executed Deed of Purchase and Sale No. 130 before Notary Public Antonio de Aldrey y Montolio.[41] Under the terms of the Deed No. 130, Mulero, and his wife, Tomasa Rivera, as owners of Property No. 117 comprised of 346.50 cuerdas, equivalent to 336.52 acres or 136.17 hectares, bounded by the North with Antonio Lugo (owner of Lot 26), by the East with the ocean, by the South with the ocean, and by the West with the estate of Francisco Garcia, segregated from such property and sold to the U.S. Navy a plot of land of 2.25 acres more or less.[42] This segregation and sale transaction resulted in the creation of Property No. 120 which appears duly registered at page 250, volume 1 of Culebra, Registry of Property of Puerto Rico, Fajardo Section (the "Gun Mount"), translated as follows:[43]

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[38] "In issuing his proclamation, the President could not have had in contemplation the submerged lands of the harbor […]" 25 U.S. Op. Atty. Gen. 172 (1904).

[39] 22 U.S. Op. Atty. Gen. 544 (1899); 25 U.S. Op. Atty. Gen. 176 (1904).

[40] "In issuing his proclamation, the President could not have had in contemplation the submerged lands of the harbor […]" 25 U.S. Op. Atty. Gen. 172 (1904).

[41] Deed No. 130 of Purchase and Sale executed before Notary Antonio de Aldrey y Montolio, on June 28, 1903, Fondo Documental: Protocolos Notariales, Serie: Humacao, Municipio: Culebra, Caja: 79, Archivo General de Puerto Rico; Property No. 120, duly registered at page 250 of Volume 1 of Culebra, Registry of Property of Puerto Rico, Fajardo Section.

[42] *Id.*

[43] *Id.*

RURAL: Tract of land of clean pasture located at the Los Frailes Ward of the Island of Culebra comprised of eighty eight areas and forty three centiares, about two and a quarter acres more or less, bounded *by the NORTH, with Mister Antonio Lugo and the ocean at one end of the land, by the EAST, with the ocean*, by the SOUTH and WEST, with the principal property from which this tract is segregated. *This property is formed by way of segregation from property number one hundred seventeen which is recorded at page two hundred forty six of this volume and*, no sorry, I mean, is encumbered by a mortgage in favor of Mr. Enrique Baez Arias for the amount of one thousand five hundred sixty dollars. Mister Escolástico Mulero, property owner, of legal age, resident of Culebra, and married to Mrs Tomasa Rivera, is the owner of this property in a larger extension, and with such title and with the consent of his wife, *segregates and sells this portion of land to the United States of America*, Department of the Navy, for the amount of fifty dollars, which amount the seller acknowledges receipt from the hands of Mister David O. Chadwick, married, a marine, of legal age, and resident of San Juan, who represents the United States in his capacity as payment officer for the Armada; the contract was celebrated with the following conditions: the seller grants right of way passage without interruption and perpetually to or from the portions of land sold, by any or all lands today owned or that may be acquired by the sellers in the Island Culebra and adjacent to the lands occupied by the gun emplacements paying Mister Mulero the amount of ten dollars ($10.00) for such right of free passage this one time and who receives said sum at this time before the witnesses and the Notary, remaining the sellers liable for warranty against eviction, and by its virtue the United State of North America, Department of the Navy, registers to its benefit title to this property by purchase and sale. The foregoing appears as per copy of a deed executed in the island of Culebra, location named "Roosevelt Camp" on the twenty eighth (28th) of [illegible], before Notary Antonio de Aldrey, which document was translated into English by Manuel of [illegible], due to the fact that Mr. Chadwick did not know Spanish; such document was filed at ten of today as per entry number one hundred forty eight at page fifty five overleaf (55 ovlf.) of volume twelve (12) diary. The foregoing being in conformity with the registry and the cited documents, I sign this in Humacao on the twenty ninth (29th) of June nineteen hundred and three.[44]

[44] *Id.* (emphasis ours).

The Gun Mount bounded by the North with Mr. Antonio Lugo and the ocean at one end of the land, in the same manner as Property 117 bounded by the North with Antonio Lugo, owner of Lot 26 and by the East with the ocean.[45] Thus, the Gun Mount could not be located within Lot 24 of the 1887 Map, or the Subject Property, as alleged by the United States.[46]

9. The Katzins traced the ownership of the subject property

The Katzins traced Property 117's subsequent divisions and transfers, which resulted in the Subject Property. The history of ownership of this land includes powerful Sugar Conglomerates such as The Vieques Association and The United Port Rican Sugar Company of Puerto Rico and Eastern Sugar Associates. However, it results in the 1940 sale to Mrs. Kjeldsen's grandfather, Mr. Pilar González Alhoyo, from whom, both, Mrs. Kjeldsen and her sister Luz, inherited their property, and later Luz sold her interest to the Katzin family.

10. The Acquiescence of Puerto Rico to the Naval Reservation in 1908

On April 27, 1908, before Notary Herminio Díaz Navarro appeared Regis H. Post, Governor of Puerto Rico, in the name and in representation of the "The People of Puerto Rico," under the P.R. Act of 1903, to convey certain lands to the United States for naval, military and other public purposes, and transferred to the Navy, the property over all public lands and buildings thereon, as follows:

> Public lands and buildings located on the island of Culebra and adjacent keys, situated between parallels of 18 ° 15' and 18 ° 23' north latitude between the meridians 65 ° 12' and 65 ° 25' west longitude, not including a parcel of land segregated as number 62, and the buildings located thereon, purchased by the People of Puerto Rico.[47]

On July 15, 1909, more than a year after the transaction, the deed was presented for registration in the Registry of Property of Puerto Rico.[48] It was recorded notwithstanding the fact that it did not include the facts surrounding the origin of the title, without an accurate description of the boundaries and of the buildings, nor the area of the properties.[49]

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[45] *Id.*

[46] *Id.*

[47] Delgado Cintrón, *supra* n.11, page 48.

[48] *Id.*

[49] *Id.*

The Registry of Property proceeded to register the United States' property although the origin of title and the description of the lands transferred did not specifically described the property. The lack of specific descriptions besides the general coordinates of their location makes the inscription ineffective against third parties,[50] created an environment of confusion and such defect has not been corrected since its inception, 106 years ago.

11. The Jones Act of 1917

The Jones Act,[51] also known as the Puerto Rico Federal Relations Act of 1917, was signed by President Woodrow Wilson on March 2, 1917. The Jones Act superseded the Foraker Act of 1900 and granted United States' citizenship to the people of Puerto Rico two weeks prior to sending these new citizens into combat during World War I. It also created the Senate of Puerto Rico, established a bill of rights, and authorized the election of a Resident Commissioner, which was previously appointed by the President, to a four-year term, without a vote in Congress.

Section 7 of the Act provided that all property that may have been acquired in Puerto Rico by the United States under the cession of Spain by the Treaty of Paris in any public bridges, road houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines or minerals under the surface of private lands, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Puerto Rico, all the harbor shores, docks, slips, reclaimed lands and all public lands and buildings not heretofore reserved by the United States for public purposes, is hereby placed under the control of the government of Puerto Rico, to be administered for the benefit of the people of Puerto Rico; and the Legislature of Puerto Rico shall have authority, provided, that the President may from time to time, in his discretion, convey to the people of Puerto Rico such lands, buildings, or interests in lands or other property now owned by the United States and within the territorial limits of Puerto Rico as in his opinion are no longer needed for purposes of the United States. And he may from time to time accept by legislative grant from Puerto Rico any lands, buildings, or other interests or property which may be needed for public purposes by the United States.

Section 8 of the Jones Act further provided that the harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes, be, and the same are hereby placed under the control of the government of Puerto Rico, to be

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[50] *Royal Bank of Canada v. Registrador*, 104 D.P.R. 400 (1975).

[51] *Jones Act*, *Pub.L. 64–368*, 39 *Stat. 951.*

administered in the same manner and subject to the same limitations as the property enumerated in the preceding section, provided, that all laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable shall apply to said island and waters and to its adjacent islands and waters. Nothing in this Act shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers heretofore lawfully granted or exercised in or in respect of said waters and submerged in and surrounding said island and its adjacent islands by the Secretary of War or other authorized officer or agent of the United States. The Jones Act also provided that the Act of Congress approved June 11, 1906, entitled An Act to empower the Secretary of War, under certain restrictions, to authorize the construction, extension, and maintenance of wharves, piers, and other structures on lands underlying harbor areas in navigable streams and bodies of water in or surrounding Puerto Rico and the islands adjacent thereto, and all other laws and parts of laws in conflict with this section were thereby repealed.

As provided in the Jones Act, the jurisdiction and control of submerged lands was placed under the control of Puerto Rico when the Government transferred the harbor areas, navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, at such time owned by the United States and not reserved by the United States for public purposes.

12. The U.S. Navy Admits Lack of Knowledge and Records

An example of the U.S. Navy's lack of knowledge and confusion regarding the title of lands in Culebra Island is the letter of October 25, 1923 from Henry H. Hough, Governor of the U.S. Virgin Islands to the Governor of Puerto Rico.[52] The particular information requested by Mr. Hough referred to the land lots owned by the Navy Department. Hough expressed that the records of his office indicated that the Navy owned land lots numbered 69, 80, 87, 90, 91 and 92, and several gun mounts containing two to five acres each at various high points on the island. However, he admits that there is no record of the deeds by which such properties were conveyed to the Navy Department, and that he needed to ascertain if any such deeds are in existence and requests copies of the same.

On November 9, 1923 the Commissioner of the Interior of Puerto Rico responded to the Governor indicating the mangrove forests comprised by lots 85, 86, 87, 88, 89 and the lands reserved for the State (Forest Zone) comprised of lots 90, 91, and 92

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[52] Delgado Cintrón, *supra* n. 11, page 50; Puerto Rico General Archives, Docket 79, Files 13 and 21 of Culebra.

were federal property.[53] Pursuant to the Division of Culebra into Lots of 1888[54] the following are the surface areas of each of the lots of mangrove forest that belong to the United States in Culebra by virtue of the Treaty of Paris:

MANGROVE SWAMPS BELONGING TO THE UNITED STATES

Area of each lot:

Number of the Lots	Hectares	Areas	Centiares	
85	5	40	00	
86	5	60	00	
87	1	60	00	
88	19	30	00	
89	3	70	00	
Total	35	60	00	= 90.58 cuerdas

As previously stated, Lot 89 is a Mangrove Swamp comprised of an area of 3.70 hectares, equivalent to 9.14 acres. Notwithstanding the foregoing, until recently, the United States continued to assert that Lot 89 contoured the entire island, cutting off every property from the ocean.

The March 12, 1980 Amendment to the Jones Act and the Maritime Terrestrial Zone

On March 12, 1980 an amendment to the provisions of the Jones Act of 1917, was enacted and finally cleared up any confusion regarding the definition of the term "submerged lands underlying navigable bodies of water." [55] The amendment added the definition to such term as including lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide, all lands underlying the navigable bodies of water in and around the island of Puerto Rico and the adjacent islands, and all artificially made, filled in, or reclaimed which formerly were lands beneath the navigable bodies of water. Therefore, the maritime zone is included within these submerged lands and thus was delivered to Puerto Rico since 1917, including the maritime zone of the island of Culebra.

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[53] *Id.*

[54] *División Parcelaria de los Terrenos de la Isla de Culebra*, Fondo Documental: Obras Públicas, Serie: Propiedad Pública, Año: 1888, Expediente: 7; Caja: 73, Archivo General de Puerto Rico.

[55] *Puerto Rico Federal Relations Act*, Pub.L. 96-205 § 606(b), 94 Stat. 91.

To understand the concept of the maritime terrestrial zone we must first address the fact that things or property are either common or public.[56] Common things are those the ownership of which belongs to no one in particular and which all men may freely use, in conformity with their innate nature; such as air, rain water, the sea and its shores.[57] Things in the public domain are those intended for public use, as roads, canals, rivers, streams, and others of like nature.[58] The Puerto Rico Civil Code expressly establishes that the sea and its shores are within the public domain for public use, thus, such property does not belong to anybody in particular. Neither the mangroves or marshes are mentioned as such.[59]

The property of public use in Puerto Rico and towns thereof comprises the Commonwealth and local roads, the squares, streets, fountains, and public waters, walks, and public works for general use, paid for by the said towns or from the Treasury of Puerto Rico. All other property possessed by either the Commonwealth or the municipalities thereof, is common property for the use of the general and municipal governments (*bienes patrimoniales*), and shall be governed by the provisions of the Civil Code of Puerto Rico.[60] Besides common property for the use of the governments of the people of the United States, the people of Puerto Rico and the municipalities thereof, the property belonging to private parties, either individually or collectively, is of private ownership.[61] Things may be movable or immovable.[62] The scope of this is to establish the difference between things of general or public use by nature or definition, and things susceptible of being owned, belonging to the State or municipality.[63]

Real property may be of such category that is in the use and in the public domain, but not susceptible of private ownership and disposal due to its imminent public use by its nature.[64] This concept was included in the Spanish Water Act of August 3, 1866, extended to Puerto Rico five days later by virtue of the Royal Order of August 8, 1866.[65] Article 1 of said Act provided that the following are in the national domain and public use:

> 1. The coasts, or maritime borders of the Spanish territory, with its public works, coves, inlets, harbors and ports.

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[56] 31 L.P.R.A. § 1022.
[57] *Id.* § 1023.
[58] *Id.* § 1024; Michel J. Godreau, *Las Concesiones de la Corona y Propiedad de la Tierra en Puerto Rico, Siglos XVI-XX: Un Estudio Jurídico*, 62 Rev. Jur. U.P.R. 351, 560 (1993).
[59] *Rubert Armstrong v. Commonwealth*, 97 D.P.R. 588, 630 (1969).
[60] 31 L.P.R.A. § 1025.
[61] *Id.* § 1026.
[62] *Id.* § 1029.
[63] *Ortiz Carrasquillo v. Municipality of Naguabo*, 108 D.P.R. 366, 369 (1979).
[64] *Rubert Armstrong*, 97 D.P.R. at pages 616-617.
[65] *Id.* at page 618.

> 2. The littoral sea, or maritime zone around the coasts, as wide as determined by international law (it refers to the miles out into the ocean as internationally recognized).
>
> 3. The beaches, which is the space that alternatively is covered and exposed by the waters with the movement of the tides. Its interior or terrestrial limit is the line up to which the highest or equinoctial tides reach. Where the tides are not sensitive, the beach starts on the part of the land at the line where the waters reach during ordinary storms."[66]

In the profound and extensive study prepared by the Commission of 1859 that drafted the Spanish Water Act of 1866, that constitutes the Act's Statement of Motives, the Commission indicated that the term public domain of the Nation is that which is applicable to such things which use is common by its very nature or by the purpose for which are destined, such as the beaches, whose principal characteristic is that is inalienable and not subject to adverse possession.[67]

The marshes, also known as mangroves, are considered to be mountains of the State and defined as low swamp lands flooded by the ocean, also referred to as low lands contiguous to beaches or riverbanks that get flooded with the waters that sometimes flow from the oceans and rivers and that the 1866 Spanish Water Act provided for its concession by the State for their desiccation in regards to those that it owned, and rules for the desiccation of those of private property.[68]

The Spanish Water Act of 1866 was in effect in Puerto Rico until February 5, 1886, when by Royal Decree Spain made extensive to the island the Water Act of June 13, 1879, and the Ports Act of May 7, 1880.[69] In terms of the maritime terrestrial zone, the Water Act of 1866 was substituted by the Ports Act of 1880.

Article 1 of the Ports Act of 1880, provided that the following were of national and public domain, without prejudice to the rights of particulars. "The maritime terrestrial zone, which is the space of the coasts or maritime borders of the Island of Puerto Rico and those adjacent, that form part of Spanish territory and that is bathed by the sea in its ebb and flow, where the tides are sensitive, and the larger waves in storms where they are not."

This Act reproduced most of the provisions of public domain of the maritime zone contained in the Water Act of 1866, and expressly provides in Art. 1, paragraphs 7, 8 and 9:

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[66] *Id.*

[67] *Id.* at page 619-620.

[68] *Id.* at page 621.

[69] *Id.* at page 623.

> 7. The lands of private ownership adjacent to the sea or situated in the maritime terrestrial zone, are subject to the salvage and littoral surveillance easement.
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> 8. The salvage easements have the same extension in privately owned lands adjacent to the sea, as the maritime terrestrial zone, within which they are comprised, and 20 meters more inland, which shall be of public use in shipwreck cases, to salvage and deposit the remains, effects, and cargo of the shipwrecked vessels.
>
> * * *
>
> This servitude zone shall advance or retreat as the sea advances or retreats, as it is generally established for maritime terrestrial zones.
>
> For damages caused to properties in cases of salvage compensation is justified, . . .
>
> 9. The salvage servitude does not prevent the owners of the lands adjacent to the sea from cultivating, planting, and raising within the maritime terrestrial zone, in their own lands, agricultural buildings and country houses.[70]

It is important to note that in relation to property in the public domain, the State acts as its administrator.[71] The Supreme Court of Puerto Rico has indicated that the rights of the State, department, or municipality, over property in the public domain is not a property right since it does not contain the essential attributes of property *usus, fructus, abusus*. The State does not have over this part of its domain more than a right to guard, administer, and manage, not a property right.[72]

It is established doctrine that the classification of land in the public domain produces the following legal effects over such property: (a) these are no longer within the commerce of men, that is, are not susceptible of private property or disposition; (b) are not susceptible of adverse possession; and (c) may not be encumbered.[73] The public domain character cannot be transformed without express legislative authorization. The same and possibly even more limitations protect common things due to their imminent and inherent character of not being susceptible of particular appropriation.[74] And, pursuant to the provisions of the Jones Act of 1917 the maritime

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[70] *Rubert Armstrong,* 97 D.P.R. *at page 624.*

[71] *Figueroa v. Municipio de San Juan*, 98 D.P.R. 534, 563 (1970).

[72] Ambroise Colin y Henri Capitant, *Curso Elemental de Derecho Civil* tomo II, vol. II, 80 (4ta. ed., Instituto Editorial Reus, Centro de Enseñanza y Publicaciones, S.A., Madrid, Spain 1961)

[73] *Id.* at pages 80-81.

[74] José Ramón Vélez Torres, *Curso de Derecho Civil*, Vol. II, 41 (Spain, Offirgraf, S.A. 1983).

terrestrial zone of Culebra is under the control of the Commonwealth of Puerto Rico, in the public domain, for the administration and benefit of all people.

The Registry of Property of Puerto Rico

The Registry of Property of Puerto Rico is governed by the provisions of the Mortgage and Property Registry Act, as amended.[75] It is public for anyone interested in researching the legal status of real property rights registered therein.[76] The transactions, rights, and acts duly registered are presumed valid.[77] This presumption does not transform a null or annullable act into valid ones because registration does not give or take away any rights.[78] The Registrar of Property was, until recently authorized to issue literal or partial certifications of the registered entries pursuant to written requests.[79]

The Registry Act requires that the first inscription of a property express in a concise manner the following:

> (1) The nature, location, and boundaries of real properties subject to registration or affected by the right that must be recorded and their surface area measurements in the metric decimal system, as well as the name and number if they appear in the title and conforming to their description and official nomenclature when there is one, also consigning all those specifications leading to the complete individualization of the real property.
>
> (2) The nature, extension, suspensive or resolutory conditions and encumbrances on the right which is being recorded, and their value.
>
> (3) The right upon which the one subject to registration is constituted.
>
> (4) The name of the immediate titleholder from whom the property or rights which must be recorded are derived.
>
> (5) The name of the titleholder in whose name the registration is to be made.
>
> (6) The document which is being recorded, its nature, date and the court, notary or official who authorizes it.

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[75] *Mortgage and Property Registry Act*, 30 L.P.R.A.§ 1.

[76] *Id* at § 2101.

[77] *Consejo de Titulares v. MGIC, Financial Corp*., 128 DPR 538 (1991).

[78] *Id*.

[79] *Mortgage and Property Registry Act*, 30 L.P.R.A. § 2102; *See Autoridad de Carreteras v. Iñesta*, 169 D.P.R. 891 (2005).

> (7) The date of presentation of the document in the Registry, with a note of the hour, and indicating the number and volume of the presentation entry in the corresponding Day Book.
>
> (8) The date of registration and the Registrar's signature, which shall imply conformity of the registration with the copy of the document from which it was taken. [80]

The Registrar of Property is authorized and entrusted with the responsibility of reviewing (*calificar*) the legality of the deeds by virtue of which registration is requested and the capacity of the appearing parties.[81] Therefore, any document filed in the Registry of Property for registration is subjected to a strict review process to determine its legality.[82] The Registrar passes judgment on the legal merits of the document, makes sure that all notarial and registration formalities are complied with, and that there is no conflict between the document and existing entries.[83]

The purpose of the Registry of Property is the inscription and annotation of the documents or contracts relating to ownership and other real rights on immovables.[84] The titles of ownership or other real rights relating to immovables which are not properly registered or annotated in the Registry of Property shall not be prejudicial to third persons.[85] To determine the titles subject to annotation or inscription, the form, effect, and extinction of the same, the manner of keeping the registry, and the value of the entries contained in the books thereof, the provisions of the Registry Act shall be observed.[86]

For all legal purposes, it is presumed that recorded rights exist and belong to their titleholder in the form specified by the respective Registry entry.[87] It shall also be presumed that the person who has recorded the ownership of the real properties or rights has possession thereof.[88] These assumptions admit proof to the contrary, but n case of any doubt the recorded titleholder will be recognized as the owner.[89]

The Registry of Property of Puerto Rico affords its users protection against those who attempt to attack its entries. The Katzins traced their title all the way back to 1892 which afforded them a presumption of validity.

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[80] *Id.* at § 2308.

[81] *Id.* at § 2267.

[82] *Preciosas Vistas del Lago v. Registrador*, 110 DPR 802, 809-810 (1981).

[83] *Mortgage and Property Registry Act*, 30 P.R.L.A. § 2267.

[84] 31 L.P.R.A. § 1871.

[85] 31 L.P.R.A. § 1872.

[86] 31 L.P.R.A. § 1874.

[87] *Mortgage and Property Registry Act*, 30 L.P.R.A. § 2354.

[88] *Id.*

[89] *Id.*

The United States Response to the Katzins and the Congressional Inquiry

Once the Katzins' traced their private property ownership rights to the Spanish Crown and the evidence was presented to theUnited States, surprisingly it did not yield. Quite the opposite. The United States doubled down on its claims, asserting ownership of an even larger attract of land of 10.01 acres, a portion of the peninsula of the Subject Property. Therefore, with no other option, the Katzins prepared for litigation. However, in one last attempt at settlement, they approached the office of Senator Richard Blumenthal of Connecticut who intervened on their behalf. A formal Congressional Inquiry ensued. After months of conference calls with personnel located in more than three States and Puerto Rico, it was clear that no out of court settlement would be reached. Thus, the Katzins were left with no other choice but to file a complaint against the United States under the Fifth Amendment in the United States Court of Federal Claims.

II. The Fifth Amendment, The Tucker Act and Takings

A. The Fifth Amendment

The Takings Clause of the Fifth Amendment to the United States Constitution reads as follows: "[N]or shall private property be taken for public use, without just compensation."[90] The most influential statement of the principle behind the Fifth Amendment is found in *Armstrong v. United States*,[91] where the Supreme Court of the United States wrote: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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."[92]

The generally understood taking of private property requiring just compensation is the government's direct appropriation or physical invasion of private property.[93] In a direct appropriation the government may express its intention to take or may have in fact already taken private property.[94] However, the Supreme Court has recognized that government regulation of private property may, in some instances, be

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[90] U.S. Const.. amend. V

[91] *Armstrong v. United States*, 364 U.S. 40, (1960).

[92] *Id.* at 49.

[93] "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, *e.g., United States v. Pewee Coal Co*., 341 U.S. 114 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp*., 323 U.S. 373 (1945) (Government's occupation of private warehouse effected a taking); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

[94] *Id. See Kelo v. City of New London*, 545 U.S. 469 (2005).

so onerous that its effect may be tantamount to a direct appropriation or ouster, and that such "regulatory takings" may be compensable under the Fifth Amendment.[95] In Justice Holmes' words, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[96] In these actions the government usually takes private property, but denies that it is using its power of eminent domain.[97] In these situations the private property owner must bring a claim against the government, and only if successful will receive just compensation. A plaintiff may file claim against the government for violation of the Fifth Amendment's provision against takings of property without just compensation pursuant to the grant of jurisdiction under the Tucker Act.[98]

B. The Tucker Act and the U.S. Court of Federal Claims

According to the Tucker Act of 1887, the United States waived its sovereign immunity for certain claims. Specifically, the Tucker Act extended the original Court of Claims' jurisdiction to include claims for liquidated or unliquidated damages arising from the Constitution, including takings claims under the Fifth Amendment, a federal statute or regulation, and claims in cases not arising in tort.[99] The Tucker Act permits three kinds of claims against the government: (1) contractual claims, (2) non contractual claims where the plaintiff seeks the return of money paid to the government and (3) non contractual claims where the plaintiff asserts that he is entitled to payment by the government.[100] Today, jurisdiction over Tucker Act claims in excess of $10,000 is exclusively vested in the United States Court of Federal Claims, Washington, D.C.[101] Jurisdiction over similar suits against the United States for claims of less than $10,000 is vested concurrently with Federal District Courts.[102]

C. Takings

The Supreme Court of the United States' precedents identify two types of governmental action that generally will be deemed *per se* takings under the Fifth Amendment: (a) where the government requires the owner to suffer a permanent physical

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[95] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. at pages 537-538, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[96] *Pennsylvania Coal Co.*, 260 U.S. at page 415.

[97] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

[98] *Tucker Act*, 28 U.S.C. §§ 1346(a) and 1491.

[99] *Id*. *See* Cornell Law School, Legal Information Institute, *Tucker Act*, https://www.law.cornell.edu/wex/tucker_act (last visited May 19, 2017).

[100] *Id*.

[101] *Id*.

[102] *Id*.

invasion of his property, however, minor, must provide just compensation;[103] and (b) where the government action deprives the owner of all beneficial use of his property.[104] The first type of *per se* taking, the physical invasion of property, was addressed by the Supreme Court of the United States in the case of *Loretto v. Teleprompter Manhattan CATV Corp*.

"When the 'character of the governmental action,' […] is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[105] The *Loretto* Court further explained that to the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property:[106]

> The owner suffers a special kind of injury when a stranger invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the use of property, since the owner may have no control over the timing, extent, or nature of the invasion. And constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.[107]

The second type of *per se* taking, where the government deprives the owner of all economically viable use of his property was addressed by the Court in *Lucas v. South Carolina Coastal Council*.[108] The *Lucas* Court recognized the principle that some regulations may completely deprive an owner of "*all* economically beneficial use" of his property requiring just compensation.[109] Specifically the Court stated:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.[110]

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[103] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. at page *538*; *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. at page 441.
[104] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014-1019 (1992).
[105] *Loretto*, 458 U.S. at pages 426-435.
[106] *Id* at pages 435-438.
[107] *Id.*
[108] *Lucas*, 505 U.S. at page 1014-1019.
[109] *Id.* at page 1019.
[110] *Id.* at page 1027.

Besides the *per se* physical takings, which include the physical occupation and the deprivation of all economically viable beneficial use of property, a governmental action may constitute a taking governed by the doctrine and standards set forth in *Penn Central Transport Co. v. New York City*.[111] The Court in *Penn Central* acknowledged that it had been unable to develop any "set formula" for evaluating regulatory takings claims, but identified several factors that have particular significance:[112]

> (a) the economic impact of the regulation on the claimant and, the extent to which the regulation has interfered with distinct investment-backed expectations;[113]
>
> (b) the character of the governmental action — a taking may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[114]

Although the regulatory takings doctrine cannot be characterized as unified, the above three inquiries of *Loretto*, *Lucas*, and *Penn Central* have a common thread. They aim to identify actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.[115] The tests focus upon the severity of the burden imposed upon private property rights.[116] The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property, perhaps the most fundamental of all property interests.[117] In the *Lucas* case, the complete elimination of a property's value is the determinative factor,[118] however, the *Penn Central* inquiry turns, in large part, upon the magnitude of a regulation or action's economic impact and the degree to which it interferes with legitimate property interests.[119]

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[111] *Penn Cent. Trans. Corp. v. City of New York*, 438 U.S. 104 (1978); *Lingle*, 544 U.S. at page 538.
[112] *Penn Cent. Trans. Corp.*, 438 U.S. at page 124; *Lingle*, 544 U.S. at page 538.
[113] *Penn Cent. Trans. Corp.*, 438 U.S. at page 124, citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).
[114] *Id.* citing *United States v. Causby*, 328 U.S. 256 (1946).
[115] *Lingle*, 544 U.S. at page 539.
[116] *Id.*
[117] *Id.* citing *Dolan v. City of Tigard*, 512 U. S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 831-832 (1987); *Loretto*, 458 U.S. at page 433; *Kaiser Aetna v. United States*, 444 U. S. 164, 176 (1979).
[118] *Lingle*, 544 U.S. at page 539, citing *Lucas*, 505 U.S. at page 1017.
[119] *Lingle*, 544 U.S. at page 540.

Now we turn to examine the government's assertion of title to the purchasers of the plaintiffs in order to examine how such actions were determined to constitute a taking of property without just compensation under the Fifth Amendment.

D. The Government's Assertion of Title Constituted a *Per Se* Taking

By asserting to potential purchasers that it owned some portion of the Subject Property, the United States made the property unmarketable and unusable for any purpose, as Katzins' witnesses testified. Not only did the Government's actions caused the rescission of the contract for sale, but also subsequent efforts to sell the property. The Government repeatedly changed its title claims (first the 2.25-acre gun mount site based on the deed, and the maritime zone, then the 10.01-acre peninsula based on the Treaty of Paris) presenting a moving target for the Katzins and any potential purchaser who needed clear title to purchase and develop the property.
When, as here, the Government persisted in its wrongful assertions of title to all or a portion of private property, a taking exists. "It is the interference with the title to the land through a legally authorized assertion of ownership that constitutes the taking."[120] When the Government takes physical possession of property, it has a categorical duty to pay for the property taken.[121] As the Supreme Court recently stated:

> There is no dispute that the 'classic taking [is one] in which the government directly appropriates private property for its own use.' *Tahoe-Sierra Preservation Council*, *Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (brackets and internal quotation marks omitted). Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 426–435 (1982).[122]

The Government's claim of ownership is thus an appropriation which, without more, constitutes a taking for which just compensation is due:

> [W]hen there has been a physical appropriation, "we do not ask . . . whether it deprives the owner of all economically valuable use" of the item taken. *Tahoe-Sierra Preservation Council*, 535 U. S., at 323; see

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[120] *Yaist v. United States*, 228 Ct. Cl. 281, 287 (1981) (citations omitted). See also *Yuba Natural Res., Inc. v. United States*, 10 Cl. Ct. 486, 488 (1986); *Carlson v. United States,* 214 Ct.Cl. 1 (1977); *Bourgeois v. United States,* 212 Ct.Cl. 32 (1976).

[121] *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

[122] *Horne v. Dep't of Agric.*, No. 14-275, 2015 WL 2473384, at page 5 (U.S. June 22, 2015).

> *id.*, at 322 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (citation omitted)). For example, in *Loretto*, we held that the installation of a cable box on a small corner of Loretto's rooftop was a *per se* taking, even though she could of course still sell and economically benefit from the property. 458 U. S., at 430, 436. The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.[123]

In appropriation cases such as this one, the measure of damages is the fair market value of the property taken:

> [C]ases have set forth a clear and administrable rule for just compensation: "The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.' " *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (quoting *Olson* v. *United States*, 292 U. S. 246, 255 (1934)).[124]

Here, the Government's consistent wrongful assertion that it owned an unidentifiable portion of the Katzins' property, making it unsaleable and undevelopable, was an appropriation for which just compensation was due. This is not a regulatory taking since the Government here is acting in its proprietary capacity as a property owner, not as a sovereign. As the Court of Claims stated in *Yaist v. United States*,[125] a case in which both plaintiff and the Government held deeds and claimed title to the same parcel of land:

> The current claim of present ownership, which goes beyond the purpose to acquire property in the future … or beyond the impact of any reduction in the marketability of property due to possible future acquisition … is what brings the Government's conduct in this case within our jurisdiction. It is the interference with the title to the land through a legally authorized assertion of ownership that constitutes the taking [...]. [126]

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[123] *Id.* at page 8.

[124] *Id.* at page12.

[125] *Yaist v. United States*, 228 Ct. Cl. 281 (1981).

[126] *Id.* at page 287.

And as the Court of Claims has stated, a *per se* categorical taking arises when the Government destroys all economic value in property:

> A categorical taking is one in which "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000); see also *Lucas*, 505 U.S. at 1015 (indicating that categorical treatment is appropriate "where regulation denies all economically beneficial or productive use of land"). Thus, "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." *Luca*s, 505 U.S. at 1019. A categorical taking, like a permanent physical invasion of property, is deemed a per se taking under the Fifth Amendment. See *Lingle*, 544 U.S. at 538; see also *Res. Invs., Inc.*, 85 Fed. Cl. at 477 (stating that "[g] overment regulation goes 'too far,' and effects a total or 'categorical' taking, when it deprives a landowner of all economically viable use of his 'parcel as a whole'").[127]

"A physical taking occurs when [the] 'government encroaches upon or occupies private land for its own proposed use."[128] A physical taking can include either actual invasion of a landowner's property by the government or "appropriation of private property" for the government's benefit.[129] In the case of a non-possessory taking, governmental action can effect a taking when it prohibits or prevents a landowner from exercising his or her property rights because of a governmental claim of ownership of those rights.[130] Furthermore, "[a] cause of action arises for the plaintiff under the Fifth Amendment through his allegation that he, and not the [g]overnment, holds the valid title."[131]

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[127] *Love Terminal Partners, L.P. v. United States*, 97 Fed. Cl. at 375 (2011).

[128] *Katzin v. United States*, 127 Fed. Cl. 440, 479, citing *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 373 (2011) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

[129] *Id*. at page 479, citing *Huntleigh*, 525 F.3d at 1378; *Ridge Line*, 346 F.3d at 1356.

[130] *Id.* at page 479, citing *Yuba Goldfields*, 723 F.2d at 887-88 (reversing a grant of summary judgment for the government, and concluding that the government could have effected a "non-possessional taking" of plaintiff's mineral rights when it prevented plaintiff from extracting precious metals from a property because the government asserted it held those mineral rights); *see also Yuba Goldfields* at 891 (finding that the government can effect a physical taking of property rights through the acts and statements of its officials, regardless of whether those acts were authorized by Congress); *Yaist v. Unite States*, 656 F.2d 616, 621 (Ct. Cl. 1981).

[131] *Id.* at page 479, citing *Bourgeois v. United States*, 545 F.2d 727, 729 (Ct. Cl. 1976) (holding that a plaintiff could appropriately try title in a just compensation suit because the Quiet Title Act of 1972, codified at 28 U.S.C. §§ 1346(f), 1402(d) and 2409a(a), specifically excepted actions that could be brought under the Tucker Act).

The alleged taking in this case comported with the type of non-possessory physical taking found in *Yuba Goldfields* and *Bourgeois*.[132] Here, the government did not physically occupied plaintiffs' property, other than to post FWS refuge signs along the coastal zone. Rather, the government made a claim of ownership to part of plaintiff's property, and communicated that claim to prospective purchasers of plaintiffs' land, which actions plaintiffs claimed prevented them from exercising their right to sell the Subject Property. Accordingly, plaintiffs claimed a physical taking of their property rights. [133]

The government's position during the pendency of the case was inconsistent, having argued in its initial motion to dismiss that the United States has claimed ownership of the *peninsula* since the 1950s, but focusing in its post-trial brief on a claim to the gun mount site *on the peninsula*, while not disavowing a claim to the peninsula. Because of this inconsistency, the court accepted, as the plaintiffs and any prudent buyer would have to do, that the relevant governmental action was a claim of ownership, and thereby a permanent taking, of the entire 10.01-acre peninsula.[134]

After the nature of the alleged government action was determined, the further question for the court became whether that action did in fact appropriate plaintiffs' property rights.[135] The government's claim of ownership of part of the peninsula of the Subject Property adversely affected plaintiffs' ability to sell the property because they could not offer unfettered title to potential buyers.[136] And, the "ability to sell, assign, transfer, or exclude" is a "property right" within the meaning of the Fifth Amendment.[137]

The government's claim of ownership of part of the Subject Property appropriated the Katzins' property rights such that they were not able to sell the parcel free of the government's claims.[138] Although the Katzins alleged that the Government's actions effectuated a taking of the entire property, the Court determined that the Katzins' were due compensation for the physical taking of the 10.01-acre peninsula claimed by the government.[139]

III. Conclusion

The takings clause of the Fifth Amendment is a very powerful tool against unreasonable and unsubstantiated government claims and actions that adversely af-

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[132] *Id.* at page 480

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* citing *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012).

[138] *Id.*

[139] *Id.*

fect private property rights. A taking of property does not merely involve litigation between appraisers regarding the value of just compensation for the direct appropriation of private property. Sometimes, the actions of the government may, on its face, seem reasonable, but after careful analysis and examination such actions may actually be the exercise of the power of eminent domain without complying with the obligation of providing just compensation. The sovereign is not another owner of private property, the sovereign holds the power of eminent domain and with it come special duties and responsibilities towards private parties as enshrined in the U.S. Constitution.