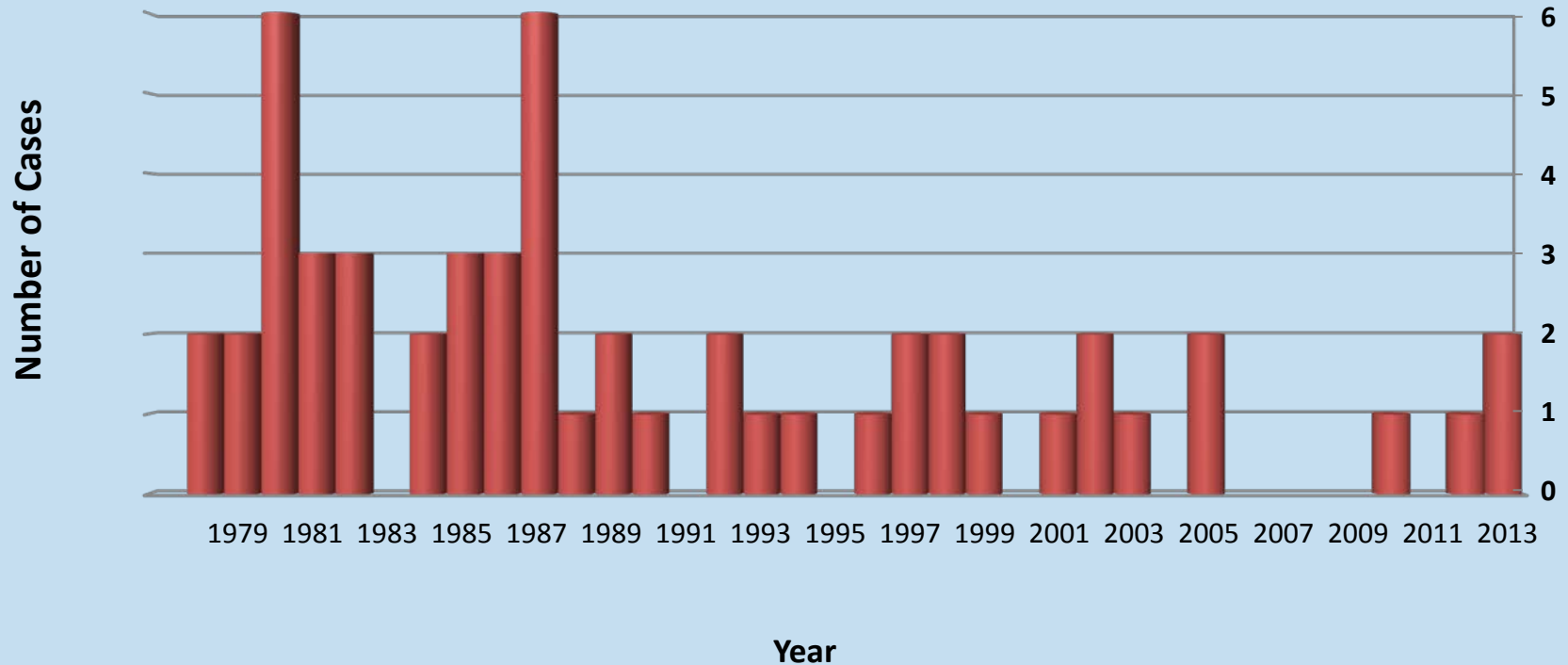


Regulatory Takings Trends

The views expressed in this presentation are mine and do not necessarily represent those of the California Department of Justice

Declining Interest Reversing?

USSC Regulatory Takings Cases
1978 - 2013



Stronger Clause Through 1990s

- ***Loretto/Lucas (1982/1992)***
 - Per se regulatory takings
- ***First English (1987)***
 - Temporary regulatory takings
- ***Nollan/Dolan (1987/1994)***
 - Heightened scrutiny

“[P]roperty owners have sure found a new friend today.” Justice Stevens’ *Dolan* dissent

Weaker 2001 - 2005

“The pendulum swung sharply”

Richard Epstein, 2002

- ***Tahoe-Sierra (2002)***
 - Parcel as a whole affirmed
- ***Lingle (2005)***
 - Discarded substantially advance
- ***San Remo Hotel (2005)***
 - No right to federal forum
- ***But: Stop the Beach Renourishment (2010)?***
 - Judicial taking? 4 2-2

Two Minor Cases

- *Arkansas Game & Fish Comm. v. U.S.* (2012)
 - 8-0
 - Temporary flooding can be taking
- *Horne v. Dept. of Ag.* (2013)
 - 9-0
 - Ducked whether fine can be taking

Koontz: Step Towards Stronger Clause

- Extended *Nollan/Dolan* to permit denials
- Extended *Nollan/Dolan* to land use permit conditions requiring monetary payments
- Left door open concerning many issues
 - E.g. Other monetary payments

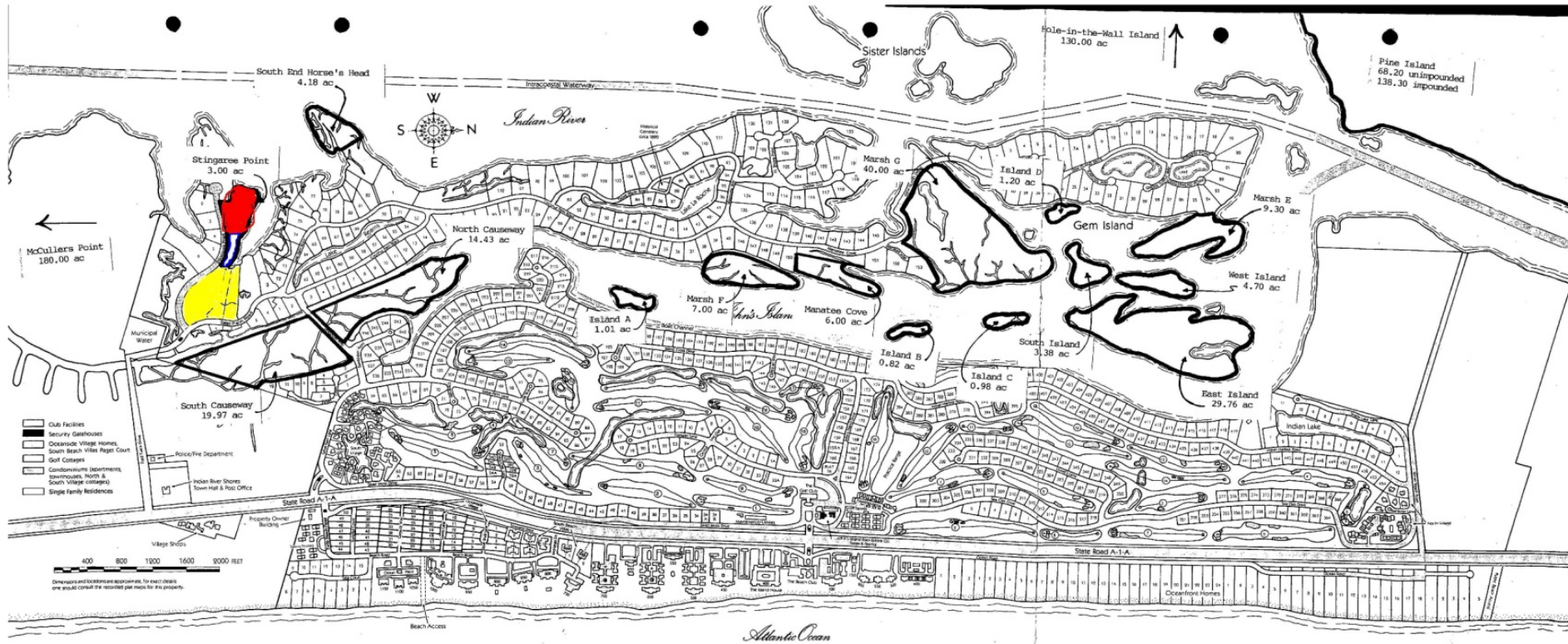
Two Other Takings Issues

Restrictions On Water Use: Physical or Regulatory?

- *Tulare Lake Basin Water Storage Dist. v. U.S.* (Fed. Cl. 2001)
 - Pumping restrictions = physical taking
- *Allegretti v. Co. of Imperial* (CA Ct. of A. 2006)
 - Pumping restrictions ≠ physical taking
- *Casitas Mun. Water Dist. v. U.S.* (Fed. Cir. 2008)
 - Preventing diversion ≠ physical taking
 - Redirecting diverted water back to river = physical taking
 - Dissent: “usufructuary” nature

What is the Parcel? *Lost Tree Village*

CONFIDENTIAL



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CONCLUSIONS

- This Court is interested in takings issues
- Arguably less deferential to government
- Many unresolved takings issues