REGULATORY TAKING ANALYSIS
REQUESTED BY TOM MOSMAN AND THE
IDAHO FARM BUREAU FEDERATION

This Regulatory Taking Analysis ("Analysis") is provided pursuant to Idaho Code §§ 67-8001 *et seq.* ("Idaho Regulatory Takings Act" or "IRTA"), the purpose of which is to provide for "an orderly, consistent review process that better enables state agencies . . . to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law." I.C. § 67-8001. The IRTA further provides that upon request of a private property owner, a state agency must provide a regulatory taking analysis no longer than forty-two (42) days after the request is filed with an agency. I.C. § 67-8003(2).

Procedural Background

On August 12, 2019, Tom Mosman, a private timber lands owner in Idaho, requested that the Idaho Department of Lands ("IDL") prepare a regulatory taking analysis regarding a portion of the Rules Pertaining to the Idaho Forest Practices Act, IDAPA 20.02.01.000 *et seq*. ("FPA Rules"). Specifically, Mr. Mosman has requested the analysis as to IDAPA 20.02.01.030.07.e, more commonly known as the "Shade Rule," alleging that the Shade Rule "has deprived me of my right to harvest certain timber on my own private property without any compensation." Letter from Tom Mosman to Dustin Miller, IDL Director, dated August 12, 2019 ("Request").

On August 15, 2019, the Idaho Farm Bureau Federation ("Farm Bureau") provided comments to the FPA Rules, as part of the rulemaking process. While the Farm Bureau did not specifically request a regulatory takings analysis, it asserted that:

> The shade rule's prohibition of harvest of privately owned trees is a deprivation of property within [the regulatory taking definition in I.C. § 67-8002(4)]. It directly takes money out of the pockets of private landowners when they are forced to leave trees that they might otherwise profitably harvest.

I.C. § 67-8002(4).

Legal Background

As previously noted, the Shade Rule was amended in 2014, and the Notice of Rulemaking – Adoption of Pending Rule for those amendments provides, in pertinent part:

> The Idaho Forest Practices Act Advisory Committee (FPAAC) is comprised of 9 voting members across the state of Idaho representing family forest owners, industrial forest owners, fisheries biologists, citizens at large, and logging operators. This committee is statutorily charged with advising the Idaho State Board of Land Commissioners, in cooperation with the Idaho Department of Lands (IDL), in rulemaking matters associated with the Idaho Forest Practices Act. As a result of quadrennial water-quality audits conducted by the Idaho Department of Environmental Quality (IDEQ) in 2000 and 2004, FPAAC has been working over

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> the last 10 years to develop a science-based streamside tree-retention rule (shade rule) that is based on Idaho forest riparian data. The proposed shade rule will allow forest landowners to select from two options which are meant to address both shade and large wood recruitment . . .

Idaho Admin. Bulletin Vol. 14-1, p. 127 (January 1, 2014). *See also* Idaho Admin. Bulletin Vol. 13-9, p. 159 (September 4, 2013).

The Shade Rule provides that during and after forest practice operations[1] those conducting the operations must "[p]rovide for large organic debris (LOD), shading, soil stabilization, wildlife cover and water filtering effects of vegetation along streams," by taking certain steps:

> i. Leave shrubs, grasses, and rocks wherever they afford shade over a stream or maintain the integrity of the soil near a stream.
>
> ii. Adjacent to all Class I streams[2], to maintain and enhance shade and large woody debris recruitment, landowners must comply with one of the two following options defining tree retention. The Relative Stocking per acre (RS) referenced in the options is calculated according to the relative-stocking-contribution table in Subsection 030.07.e.ii.
>
> (1) Option 1: Within twenty-five (25) feet from the ordinary high water mark on each side of the stream, live conifers and hardwoods will be retained to maintain a minimum relative stocking per acre of sixty (60). A relative stocking per acre of thirty (30) must be retained in the stream protection zone between twenty-five (25) feet and seventy-five (75) feet from the ordinary high water mark on both sides of the stream.
>
> (2) Option 2: Within fifty (50) feet from the ordinary high water mark on each side of a stream, live conifers and hardwoods will be retained to maintain a minimum relative stocking per acre of sixty (60). A relative stocking per acre of ten (10) must be retained in the stream protection zone between fifty (50) and seventy-five (75) feet from the ordinary high water mark on both sides of the stream.
>
> (3) Only one (1) option may be implemented within the stream protection zones of a harvesting unit covered by a single notification. Landowners are strongly encouraged to retain all trees immediately adjacent to the stream.

Forest Type	Per Tree Contribution to Relative Stocking by Diameter Class						
	Diameter Class (DBH in inches)						
	4-7.9"	8-11.9"	12-15.9"	16-19.9"	20-23.9"	24-27.9"	28-31.9"
NIGF (North Idaho Grand Fir)	0.097	0.209	0.347	0.506	0.683	0.878	1.088
CIGF (Central Idaho Grand Fir)	0.113	0.244	0.405	0.59	0.797	1.024	1.27

[1] The term "forest practice" is defined in Idaho Code § 38-1303(1).

[2] Class I streams "are used for domestic water supply or are important for the spawning, rearing or migration of fish. Such waters shall be considered to be Class I upstream from the point of domestic diversion for a minimum of one thousand three hundred and twenty (1,320) feet." IDAPA 20.02.01.010.60.a.

SIGF (Southern Idaho Grand Fir)	0.136	0.293	0.486	0.708	0.957	1.229	1.524
WHSF (Western Hemlock-Subalpine Fir)	0.123	0.267	0.442	0.644	0.87	1.117	1.385
DFPP (Douglas-fir-Ponderosa Pine)	0.151	0.326	0.54	0.787	1.063	1.366	1.693

iii. To protect filtering and shade effects of streamside vegetation adjacent to all Class II streams[3] following harvesting and hazard management activities, live trees will be retained or new trees established within thirty (30) feet on each side of the streams [sic] ordinary high water mark to comply with the minimum stocking standards expressed in Subsection 050.04.

iv. During harvesting, carefully remove timber from the Stream Protection Zone in such a way that large organic debris, shading and filtering effects are maintained and protected. When portions of felled trees fall into or over a Class I stream, leave the portion consistent with the LOD definition of Subsection 010.35.[4]

v. When harvesting portions of trees that have fallen naturally into or over a Class I stream, leave the portion(s) over the [stream] consistent with the LOD definition of Subsection 010.35. Leaving the section with the root ball attached is preferred.

vi. During harvesting operations, portions of felled or bucked trees not meeting the LOD definition shall be removed, consistent with the slash removal requirements of Subsection 030.06.

vii. To obtain a variance from the standing tree and shade requirements, the operator must develop a site specific riparian management prescription and submit it to the department for approval. The prescription should consider stream characteristics and the need for large organic debris, stream shading and wildlife cover which will achieve the objective of these rules.

viii. Stream width shall be measured as average between ordinary high water marks.

IDAPA 20.02.01.030.07.e. The Shade Rule does not require that particular stream-adjacent trees be retained in perpetuity. Rather, a combination of trees sufficient to meet the minimum relative stocking levels must be retained – trees may be harvested, so long as the minimum stocking levels remain.

[3] Class II streams "are usually headwater streams or minor drainages that are used by only a few, if any, fish for spawning or rearing. Where fish use is unknown, consider streams as Class II where the total upstream watershed is less than two hundred and forty (240) acres in the north forest region and four hundred sixty (46) acres in the south forest region. Their principle value lies in their influence on water quality or quantity downstream in Class I. streams." IDAPA 20.02.01.010.60.b.

[4] Large Organic Debris is "[l]ive or dead trees and parts or pieces of trees that are large enough or long enough or sufficiently buried in the stream bank or bed to be stable during high flows. Pieces longer than the channel width or longer than twenty (20) feet are considered stable. LOD creates diverse fish habitat and stable stream channels by reducing water velocity, trapping stream gravel and allowing scour pools and side channels to form." IDAPA 20.02.01.010.35.

Although not entirely clear, it appears that Mr. Mosman and the Farm Bureau's regulatory takings concerns lie with subsections ii and iii, above, and this analysis will focus on those provisions.

ANALYSIS

NOTE: Mr. Mosman did not provide specific information about the location of his property or his involvement with forest practices, other than to assert that the Shade Rule deprives him of the right to harvest certain timber on his private property. For purposes of this analysis, IDL assumes that Mr. Mosman has a property/ownership interest in land in Idaho, and in harvestable trees located on that land. IDL will also assume that some of those trees are located within seventy-five of the ordinary high water mark ("OHWM") of a Class I stream or thirty feet of a Class II stream, respectively. The Farm Bureau has asserted that "[a] significant number of our members are private timberland owners who are directly impacted by this rule," but that assertion lacks specific information necessary to conduct a full regulatory takings analysis. Notably, absent a property interest, Mr. Mosman and the Farm Bureau (or its individual members) could not maintain a takings claim. *See Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 949 (9th Cir. 2001) (individual without a property interest in the principal or interest of an IOLTA account could not maintain a taking claim); *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003) (in order to maintain a taking claim, "the complaining party must show it owned a distinct property interest at the time it was allegedly taken, . . .")

Whether the Shade Rule results in a taking under the Idaho Constitution is analyzed in Section IV, below. In determining whether a regulation or the application thereof results in a taking for which compensation is due under the Fifth Amendment of the United States Constitution, a court must determine whether the regulation:

- Results in a permanent or temporary physical occupation of all or a portion of private property (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982);
- Requires a property owner to dedicate a portion of property to public use or grant an easement, in a manner contrary to the standards set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994);
- Prohibits ***all*** economically viable uses of land (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992);
- Constitutes a taking under the standards enunciated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

I.
WHETHER THE SHADE RULE PROVIDES FOR OR CONSTITUTES A PHYSICAL TAKING

Neither Mr. Mosman nor the Farm Bureau appear to argue that the Shade Rule results in a physical taking of private property. Nevertheless, in order to be complete, an analysis of whether the Shade Rule may or has resulted in a physical taking follows.

A. Physical Takings (Permanent or Temporary)

A governmental action that results in a "permanent physical occupation of property," is a taking, regardless of public benefit or economic impact to the owner. *Loretto v. Teleprompter Manhattan CARV Corp.*, 458 U.S. 419, 441 (1982) (holding that a state law which required landlords to permit cable companies to install cable television facilities in apartment buildings resulted in a compensable taking). A temporary physical occupation may also constitute a taking. *See Arkansas Game and Fish Comm'n v. United States*, 133 S.Ct. 511 (2012) (providing that temporary flooding of property by the government may constitute a taking). The physical takings category is "very narrow," and applied only to ***physical occupations*** of property – it does not include those circumstances in which the government limits the ***use*** of one's property. *Loretto*, 458 U.S. at 441.

The requirements of the Shade Rule, including those regarding tree retention, do not constitute a physical taking – instead, the Shade Rule is a limitation. The Shade Rule does not require nor provide for the permanent or temporary physical occupation of a person's property by the government. In addition, the government is not physically taking or removing timber or trees from private lands – rather, the Shade Rule requires the retention of a minimum relative stocking of trees per acre, adjacent to a Class I or Class II stream.

B. Easement/Dedication of Property ("Land Use Exaction")

This type of taking, known as a "land use exaction" taking, results when a government entity requires that a landowner dedicate a part of his or her property to a public use as a condition of receiving a permit or approval. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (taking occurred when permit to build a large beachfront house was conditioned on the dedication of a public access easement); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (taking occurred when requirement that landowner dedicate a portion of the subject property as a public greenway in order to obtain a permit to expand a store and parking lot). *Nollan* and *Dolan* have been described "takings challenges to land-use exactions – specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546, 125 S.Ct. 2074, 2086 (2005). The Court's holdings in those cases were based on the premise that had the government outright taken a portion of the beachfront property as an easement, or the store property as a public greenway, it would have been a per se physical taking. *See Lingle*, 544 U.S. at 547, 125 S.Ct. at 2087 ("*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.") Courts have concluded that in those specific land-use exaction cases, "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Dolan*, 512 U.S. at 385.

Neither Mr. Mosman nor the Farm Bureau indicated that they were asserting that a land use exaction or forced dedication occurred by virtue of the Shade Rule, either facially or as applied. The Shade Rule does not require landowners to dedicate any portion of their property for a public "greenway" or easement, including as a condition of receiving a compliance certificate from IDL.

Moreover, unlike the situations in *Nollan* and *Dolan*, the Shade Rule does not require a property owner to dedicate a portion of his or her property for public access. That fact is significant – the *Dolan* court specifically noted that in that case, the city never explained why a ***public*** greenway, as opposed to a ***private*** greenway, was necessary to protect the city's legitimate interest of flood control. *Dolan*, 512 U.S. at 393. The loss of Dolan's ability to exclude others was significant to the court. In contrast, the Shade Rule does not deprive property owners of their ability to exclude others; rather, the minimum retention provisions are analogous to a private greenway.

II.
PER SE TAKINGS DUE TO LOSS OF ALL ECONOMICALLY BENEFICIAL USE OF PROPERTY

While not a physical occupation, a different type of *per se* taking occurs "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." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original). The *Lucas* "holding [is] limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1017) (emphasis in *Lucas*, bracketed material added). In other words, "the categorical rules would not apply if the diminution in value were 95% instead of 100% . . . . Anything less than a 'complete elimination of value' or a 'total loss' . . . would require the kind of analysis applied in *Penn Central [Transp. Co. v. New York City*, 438 U.S. 104 (1978)]." *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1019-20, n. 8). This type of regulatory taking has been termed a "categorical taking."

In order to find a taking under *Lucas*, the landowner must be called upon to "leave his property economically idle." *Lucas*, 505 U.S. at 1019. This type of taking "is quite narrow and has been confined to facts that substantiate a ***permanent*** deprivation of ***all economic use*** on all the parcels purchased by the property owner." *Sartori v. United States*, 67 Fed. Cl. 263, 275 (Fed. Cl. 2005) (emphasis added). Courts will typically consider an owner's property as a whole in determining whether a taking has occurred, rather than "divid[ing] a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Murr v. Wisconsin*, ___ U.S. ___, 137 S.Ct. 1933, 1944 (2017) (quoting *Penn Central*, 438 U.S. at 130, 98 S.Ct. at 2646). As an example, the Supreme Court found that even though a property owner was precluded from filling in and developing wetlands on his property, he had not suffered a loss of all economic use, because he retained $200,000 in development value, and could build a home, on the uplands portion of his property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 630-31, 121 S.Ct. 248, 2464-65 (2001) ("[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" (Emphasis added)).

Facially, the Shade Rule does not deprive a timber owner of ***all*** economically beneficial uses. Owners are permitted to harvest the timber on their property. Moreover, nothing in the Shade Rule prevents landowners from conducting other activities on their land to generate economic value or income. While certain minimum relative stocking levels must be retained adjacent to Class I or II Streams, the Shade Rule does not deprive a landowner of all economically beneficial uses of his

or her land – there may even be instances where the retention of minimum stocking levels enhances certain uses of land.

To the extent that Mr. Mosman contends that the Shade Rule has deprived him of all economically beneficial use of his land, or to the extent that the Farm Bureau contends that the Shade Rule has deprived a particular member of all economically beneficial uses of his or her land (an "as applied" analysis), IDL lacks sufficient information about those specific situations to conduct such an analysis.

III.
THE *PENN CENTRAL* REGULATORY TAKINGS ANALYSIS

Absent a taking under the *Loretto*, *Nollan/Dolan* and *Lucas* standards, a regulatory taking may occur under the standards enunciated in *Penn Central*. *See Lingle v. Chevron U.S.A., Inc*, 544 U.S. 528, 548 (2005). There is no "set formula" for determining whether a non-categorical regulatory taking has occurred, and the Supreme Court has described the analysis as "ad hoc, factual" and dependent upon the particular circumstances of a case. *Penn Central*, 438 U.S. at 124.

In *Penn Central*, the owners of Grand Central Terminal in New York City sought to construct a 55-story office building atop the terminal. The building had previously been designated as an historical landmark, requiring the owners to apply to the Landmarks Preservation Commission for authorization to alter the terminal. After their approval was denied, the owners appealed, asserting in part that prohibiting their development of the "airspace" above the terminal had resulted in a taking. *See generally id.* at 108-119. While acknowledging the ad hoc, factual nature of a regulatory takings analysis, the Court noted

> several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [Citation omitted]. So, too, is 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 government, [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.
>
> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," [citation omitted] and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.

Id. at 124. *See also Lingle*, 544 U.S. at 538-39.

The Court applied those factors, and first held that the "air rights" above the Terminal were not separate from other property rights for purposes of determining whether a taking had occurred.

Instead, the Court focused "both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole – here, the city tax block designated as the 'landmark site.'" *Penn Central*, 438 U.S. at 130-31. Second, the Court rejected the Terminal owner's argument that the landmark law's application constituted a taking because it significantly reduced the value of the Terminal. Specifically,

> Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

Id. at 131.[5] Third, as to the landmark regulation's character, the Court held that it was not akin to a situation where the government invaded airspace or private property or appropriated it for its own governmental use. Rather, the regulation's effect was "simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in gainful fashion." *Id.* at 135. The Court therefore concluded that appellants had not established that the landmark regulations effected a taking.

With that framework in mind, IDL turns to an application of the *Penn Central* factors.

A. Economic Impact of the Regulation on Mr. Mosman or any Farm Bureau Members.

IDL does not have the information necessary to assess the economic impact of the Shade Rule on Mr. Mosman or any specific Farm Bureau members. However, IDL does note that pursuant to *Penn Central,* a court would consider the economic impact of the Shade Rule on a property owner's property as a whole – not just a strip of stream-adjacent land.

B. Interference with Distinct Investment-Backed Expectations

A property owner's investment-backed expectations, and the reasonableness of those expectations are "shaped by the regulatory regime in place as of the date it purchased the leases at issue." *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)). IDL does not know when Mr. Mosman acquired his property, or parts thereof, and therefore cannot determine what investment-backed expectations may have been reasonable at the time of acquisition. A similar fact-specific inquiry would be required for individual Farm Bureau members.

However, it is notable that the overall Forest Practices Rules have been in effect in some form since 1975. Requirements for a minimum amount of standing trees within thirty feet (30′) of Class

[5] Having rejected that argument, the Court then asked whether the interference with the Terminal owner's property rights was so significant that just compensation was required. Answering that question in the negative, the Court noted that appellants had not been prohibited from using or occupying any portion of the airspace. Moreover, the "air rights" were transferable to other properties in the vicinity. *Penn Central*, 438 U.S. at 137-38.

II streams or fifty feet (50′) of Class I streams have been in effect since at least 1996. *See* https://adminrules.idaho.gov/rules/1996/20/0201.pdf (pp. 12-13). In 2006, the Rules were amended to add a predecessor version of the Shade Rule, which included minimum standing tree requirements. *See* https://adminrules.idaho.gov/rules/2013/20/0201.pdf (pp. 11-12). The existing (and proposed) version of the Shade Rule was first adopted in 2014.

More broadly, forestry and timber harvesting activities, even on private land, have long been regulated. The Forest Practices Act, Title 38, Chapter 13, Idaho Code, was first enacted in 1974, and has been amended several times over the years. The Idaho Forestry Act, Title 38, Chapter 1, Idaho Code, was first enacted in 1972 and similarly contains some limitations on forestry activities on private land. *See also,* Rules Pertaining to Forest Fire Protection, IDAPA 20.04.01.000 *et seq.*; Rules Pertaining to the Idaho Forestry Act and Fire Hazard Reduction Laws, IDAPA 20.04.02.000 *et seq.*

Those long-standing regulations, and particularly the fact that some form of retention rule regarding stream-adjacent trees has been in place for at least twenty-three (23) years and the overall the Forest Practices Rules for forty-five (45) years, and other statutes and regulations would factor into any analysis of a landowner's investment-backed expectations.

C. The Character of the Government Action

Earlier in takings jurisprudence, this factor was characterized as whether the regulation "substantially advances a legitimate state interest." However, more recently, the United States Supreme Court has removed that test from consideration in a takings analysis:

> [T]he "substantially advances" formula is not a valid takings test, and indeed [we] conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories. . . by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. . . .

Lingle, 544 U.S. at 548. The Court explained its holding by noting that the questions asked in a *Loretto, Lucas* or *Penn Central* analysis

> share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Id. at 539. The Court then went on to note that

> In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does

> it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Id. at 542 (emphasis in original).

The question, then, is not whether the Shade Rule "substantially advances a state interest," but instead the character of the regulation. As the *Penn Central* court held "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some ***public program adjusting the benefits and burdens of economic life*** to promote the common good." *Id.* at 124 (emphasis added).[6] In *Murr*, the Court held that the regulation at issue was "a ***reasonable land-use regulation***, enacted as part of a coordinated federal, state and local effort to preserve the river and surrounding land." *Murr*, 137 S.Ct. at 1949-50 (emphasis added).[7] Finally, courts have indicated that it remains "appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis*." Rose Acre Farms, Inc. v. United States*, 599 F.3d 1260, 1281 (Fed. Cir. 2009).

The Shade Rule was implemented "[a]s a result of quadrennial water-quality audits conducted by the Idaho Department of Environmental Quality (IDEQ) in 2000 and 2004, . . ." As set forth in the Rule itself, the purpose of the Shade Rule provisions pertaining to Class I streams is "to maintain and enhance shade and large woody debris recruitment . . . ." IDAPA 20.02.01.030.07.ii. Similarly, the purpose of the Shade Rule provisions pertaining to Class II streams is "[t]o protect filtering and shade effects of streamside vegetation . . . ." A court would likely find that the Shade Rule is a reasonable regulation, designed to benefit the public by protecting water quality in certain streams, while carefully balancing that public benefit to the interests of private property owners.

D. <u>Summary</u>

IDL does not possess the information necessary to sufficiently analyze all of the *Penn Central* factors. Given the *ad hoc* nature of the analysis, it cannot be determined whether, as a facial matter, the Shade Rule constitutes a taking under the Fifth Amendment to the United States Constitution. Any such determination would be fact- and owner-specific.

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[6] The *Penn Central* court further reiterated that "'[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" *Penn Central*, 438 U.S. at 124 (quoting *Pennsylvania Coal. Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

[7] While a law may have "a more severe impact on some landowners than on others . . . that in itself does not mean that the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others. . . ." *Penn Central*, 438 U.S. at 134. *See also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009) (upholding a set of regulations that did not single out producers, even though it impacted some producers more than others).

IV.
TAKING UNDER THE IDAHO CONSTITUTION

A. Article I, § 13

Article I, § 13 of the Idaho Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of . . . property without due process of law." Under that provision "if the purposes of [the law at issue] are within the police power [of the state] and the means adopted are constitutional then there is no taking of property requiring just compensation." *State ex rel. Andrus v. Click*, 97 Idaho 791, 800-01, 554 P.2d 969, 978-79 (1976) (bracketed material added). A law or regulation is within a state's legitimate police power "if it 'bears a reasonable relationship to the public health, safety, morals or general welfare.'" *Id.* at 801, 544 P.2d at 979 (quoting *Johnston v. Boise City*, 87 Idaho 44, 390 P.2d 291 (1964)); *see also Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 879, 499 P.2d 575, 578 (1972) (through both eminent domain and its police powers, a state "may legitimately protect the public from disease, crime and perhaps even deterioration, blight and ugliness").

The purposes of the Shade Rule, described above, are within the state's legitimate police power to protect water quality. In addition, the Rule is designed to fulfill that legitimate purpose by requiring some trees near streams to be maintained during a forest practice. Therefore, the Shade Rule's requirements are reasonably related to the public health, safety, morals or general welfare, and the Rule does not constitute a taking under Article I, § 13.

B. Article I, § 14

Article I, § 14 of the Idaho Constitution provides, in pertinent part, that "[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." If private property is not taken by a direct condemnation action, a party may bring an inverse condemnation action. *Wadsworth v. Dep't of Transp.*, 128 Idaho 439, 441, 915 P.2d 1, 3 (1996).

The Idaho Supreme Court has found it significant that unlike other states' constitutions, Article I, § 14 includes the word "taken" but not "damaged." *Covington v. Jefferson County*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (no compensable taking occurred because the subject property retained residual value, even though its value may have been reduced by the county's actions). *See also Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637, 643 (no taking occurred under the Idaho Constitution when there was "less than a total deprivation of use or denial of access.") In order to find a compensable inverse condemnation, the condition or change must be also permanent. *Covington*, 137 Idaho at 780, 53 P.3d at 828 (citing *Marty v. State*, 122 Idaho 766, 769, 838 P.2d 1384, 1387 (1992)) (additional citations omitted).

The Shade Rule does not facially result in the total deprivation of use of one's property, or in the total denial of access. Therefore, it does not constitute a taking under the Idaho Constitution.