THE ASIAN CITRUS PSYLLID AND THE REGULATORY TAKINGS THAT ORGANIC FARMERS IN THE STATE OF CALIFORNIA MAY FACE WITH ITS ERADICATION PROGRAM

I. INTRODUCTION

As you drive through the State of California you are bound to see the incredible amount of land used for agriculture.[1] California is famous for its citrus industry,[2] and is home to the second largest citrus producing region in the United States (behind Florida),[3] generating a 1.8 billion dollar citrus harvest, 1.2 billion dollars for California's economy, and nearly 25,000 jobs.[4] Now imagine that California-grown citrus disappeared, many jobs would be lost, California's economy would decline,[5] and California's iconic citrus trees would be a thing of the past.[6]

Indeed, the Californian citrus industry faces such a threat of loss from a tiny insect[7] only 3mm in length.[8] The Asian Citrus Psyllid ("the Psyllid") is an invasive species from Asia that lives and feeds on citrus trees,

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[1] *See* Edward Thompson Jr., *California Agricultural Land Loss & Conservation: The Basis Facts*, AMERICAN FARM TRUST, July 2009, 1, http://www.farmland.org/documents/AFT-CA-Agricultural-Land-Loss-Basic-Facts_11-23-09.pdf.

[2] CAL. DEP'T OF PARKS & RECREATION, *California Citrus SHP, State Historic Park*, PARKS.CA.GOV, http://www.parks.ca.gov/?page_id=649 (2012).

[3] Cary Blake, *ACP Quarantine Hits Citrus Industry*, WESTERN FARM PRESS, June 18, 2010, http://westernfarmpress.com/orchard-crops/acp-quarantine-hits-citrus-industry.

[4] CAL. FOOD & AGRIC. CODE § 5911(f) (West 2009).

[5] *See id.*

[6] *See* CAL. DEP'T OF FOOD & AGRIC., *Citrus Disease Huanglongbing Detected in Hacienda Heights Area of Los Angeles County,* CALIFORNIACITRUSTHREAT.ORG (Mar. 30, 2012), http://www.californiacitrusthreat.org/huanglongbing-citrus-greening-disease-found-in-california.php [hereinafter *HLB Detected in L.A.]*.

[7] Leslie Berestein, *Citrus in Peril, Organic Farms Face Particular Risk From Bug-Borne Disease*, THE SAN DIEGO UNION-TRIBUNE, Sept. 6, 2009, 2:00 AM, http://www.utsandiego.com/news/2009/sep/06/citrusperil/?page=1#article.

[8] CAL. DEP'T OF FOOD & AGRIC., *Asian Citrus Psyllid Pest Profile,* TARGET PESTS AND DISEASE INFORMATION (May 23, 2012), http://www.cdfa.ca.gov/plant/PDEP/target_pest_disease_profiles/ACP_PestProfile.html [hereinafter *ACP Profile*].

the Psyllid has spread to the United States, including California.[9] The insect itself is not the threat; rather, the insect is a vector[10] for a bacterial disease called Huanglongbing ("HLB") or citrus greening.[11] HLB infects the vascular system of citrus plants.[12] Diseased citrus displays discolored leaves, produces inedible fruit, and will eventually die.[13] The only known way to stop HLB is to destroy the vector (the Psyllid) and any plants exhibiting disease symptoms or testing positive for HLB.[14] Allowing the Psyllid and HLB to spread throughout California would negatively impact California citrus growers, and thus California's economy.[15]

Implementation of a Psyllid control program in California may face unique challenges with organic farmers[16] who, unlike "conventional" farmers, choose not to use synthetic pesticides.[17] The California Department of Food and Agriculture ("CDFA") is working to prevent the spread of the Psyllid and HLB with synthetic (i.e. non-organic) pesticides.[18] As of now, commercial farmers are making their own decisions on how to deal with possible infestations of the Psyllid on their crops.[19] This may change if the situation worsens, since the CDFA will be responsible for stopping the spread of HLB with means they consider to be effective.[20] A lack of an organic alternative in the Psyllid control program would

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[9] *Id.*

[10] *HLB Detected in L.A.*, *supra* note 6 (a vector is also known as a carrier for a disease, HLB's vector is the Asian Citrus Psyllid).

[11] *Id.*

[12] *Id.*

[13] *ACP Profile*, *supra* note 8.

[14] CAL. DEP'T OF FOOD & AGRIC., *Huanglongbing Pathogen Pest Profile,* CDFA.CA.GOV (Apr. 26, 2012), http://www.cdfa.ca.gov/plant/pdep/target_pest_disease_profiles/HLB_PestProfile.html) [hereinafter *HLB Profile]*.

[15] *See* CAL. DEP'T OF FOOD & AGRIC., *Public Service Announcement on the Asian Citrus Psyllid*, CDFA.CA.GOV (Apr. 11, 2011), 1, http://www.cdfa.ca.gov/plant/acp/docs/video/ACP-PSAcaptions.pdf [hereinafter *Announcement on ACP*].

[16] *See* 7 U.S.C.A. § 6504 (West 2012); *see also* 7 U.S.C.A. §6502 (West 2012) (botanical pesticides are naturally derived from plants. Organic farmers cannot use anything but botanical pesticides if they want to remain organic growers; a program to control the Asian Citrus Psyllid that requires synthetic pesticides versus botanical pesticides would create challenges).

[17] *See* 7 U.S.C.A. § 6504.

[18] CAL. DEP'T. OF FOOD & AGRIC., *Information About Asian Citrus Psyllid Treatment Available at Public Meetings in San Diego, Imperial Counties*, CDFA.CA.GOV (Nov. 10, 2008), http://www.cdfa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=08-076 [hereinafter *Public Information about ACP*].

[19] Interview with Crystal D'Souza, Staff Counsel, Cal. Dep't. of Food & Agric. (Aug. 13, 2012).

[20] Interview with Jeremy Larson, Agricultural and Standards Investigator, Riverside County Agricultural Commissioner (Aug. 16, 2012).

negatively affect organic farmers if a mandatory spray regimen was created that required the use of synthetic pesticides on organic crops, resulting in a loss of organic certification.[21]

This Comment will address an organic farmer's ability to receive compensation for a regulatory taking in connection with the CDFA's exercise of its power to eradicate the Psyllid and prevent the spread of HLB.[22] If the CDFA "takes" property by restricting the use of the land with a regulation there is an argument that just compensation should be given to the property owner for the regulatory taking.[23] Section II will focus on background information about the Psyllid and the impact of HLB on California, as well as the CDFA's power to eradicate HLB and the Psyllid. Section III will argue that if organic farmers are exposed to the mandatory spraying of synthetic pesticides they may be entitled to just compensation[24] for damage to their property under the California Constitution.[25] Next, this section will apply and analyze a regulatory takings analysis.[26] Section IV will discuss the significant public nuisance exception to compensation for regulatory takings, and why it may not apply in this situation. Section V will argue that California should follow Florida courts' narrow interpretation of when a citrus disease may qualify as a public nuisance, which holds that healthy trees are not a citrus nuisance.[27] Solutions and recommendations are then offered so that the CDFA can help prevent the spread of a debilitating citrus disease while working with organic farmers.

II. BACKGROUND

A. History of the Spread of the Psyllid and HLB

1. The United States and the Psyllid/HLB Eradication

The Asian Citrus Psyllid is naturally found in Afghanistan, Saudi Arabia, tropical and subtropical Asia, Réunion, parts of South and Central America, Mauritius, Mexico, and parts of the Caribbean.[28] The Psyllid

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[21] Loosing certification would happen if synthetic pesticides were found on an organic property. *See* 7 U.S.C.A.§ 6504.

[22] *See* CAL. FOOD & AGRIC. CODE § 5029(b) (West 2005).

[23] *See* U.S. CONST. amend. V (West, WestlawNext).

[24] *See id.*

[25] *See* CAL. CONST. art. 1,§ 19 (West, WestlawNext through June 2008 amendments).

[26] *See* Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

[27] Dep't. of Agric. & Consumer Serv. v. Bogorff, 35 So.3d 84, 88 (Fla. 2010).

[28] Elizabeth E. Grafton-Cardwell, Kris E. Godfrey, Michael E. Rogers, Carl C. Childers, and Philip A. Stansly, *Asian Citrus Psyllid,* THE CITRUS CLONAL PROTECTION

was found in the United States in 1998 in a Florida backyard.[29] By 2001, Florida found the Psyllid in 31 counties, having spread with infested nursery plants.[30] The disease HLB was detected in Florida in 2005, and by 2012 the Psyllid and HLB were found in 30 of the citrus producing counties in Florida.[31] HLB and the Psyllid are also found in Texas, Louisiana, South Carolina, and Georgia.[32] Mississippi, Arizona, and Alabama detected the presence of the Psyllid, but not the disease HLB.[33] HLB has cost Florida 3.6 billion dollars in lost economic activity.[34] California fears a similar fate for its own economy.[35]

2. California and the Psyllid

Large-scale efforts were initiated in 2008 to determine the extent of the Psyllid infestation in California after a single Psyllid was found in San Diego, California.[36] The United States Department of Agriculture ("USDA"), the CDFA, and county agricultural commissioners gathered a team of specialists that began trapping, sweep-netting, surveying, and inspecting citrus trees in California for the Psyllid.[37] Their efforts are intended to reduce the Psyllid population to undetectable levels before the Psyllid has a chance to spread HLB by migrating and reproducing on citrus groves across California.[38]

Once there is evidence of a Psyllid infestation, a quarantine is established by the USDA.[39] The CDFA will restrict movement of any citrus plants that can act as a host for the Psyllid within a five mile radius of where the Psyllid was detected.[40] A host plant of the Psyllid is any citrus tree that the Psyllid feeds on.[41] In a quarantined area, special regulations

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PROGRAM AT UNIVERSITY OF CALIFORNIA, RIVERSIDE, 1, (Aug. 2005), http://ccpp.ucr.edu/news/PsyllidbrochureAug05.pdf.

[29] *Id.*

[30] *Id.*

[31] *HLB Detected in L.A.*, *supra* note 6.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See Id.* (the ramification that HLB had in Florida threatens California in a similar way).

[36] *See* CAL. DEP'T OF FOOD & AGRIC., *Single Asian Citrus Psyllid Detected in San Diego,* CDFA.CA.GOV (Aug. 29, 2008), http://www.cdfa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=08-057.

[37] *Announcement on ACP*, *supra* note 15.

[38] *See id.*

[39] *Single Asian Citrus Psyllid Detected in San Diego*, *supra* note 36.

[40] *Id.*

[41] *ACP Profile*, *supra* note 8.

apply to packing,[42] the disposal of host plant waste,[43] and the handling of retail nursery host plants.[44] Residents who grow citrus on their property are also urged to only consume their backyard citrus at their home and avoid transportation of the citrus.[45] All these quarantine regulations are within the CDFA's power to eradicate a citrus pest.[46] If organic farmers are in an area that is quarantined, they are more susceptible to infestations because their organic status precludes the use of synthetic pesticides on their orchards, thus making organic farmers more likely to be subject to regulations in order to control the Psyllid infestations in that area.[47]

Following the discovery of the first Psyllid in San Diego, the CDFA used insect traps to survey residential and commercial citrus groves to determine the extent of the infestation.[48] The Psyllid was confirmed to have infested a residential citrus tree in San Diego; as a result, the southern portion of San Diego was placed under quarantine in September of 2008.[49] The CDFA began treatments for the Psyllid in twelve areas of San Diego, using at first Pyganic, an organic insecticide, and Merit, a non-organic systemic treatment used under the soil.[50] There have been additional findings of the Psyllid, and subsequent quarantines or restrictions have been initiated in: San Diego County, Orange County, Los Angeles County, Riverside County, Ventura County, Southern Santa Barbra County, and Tulare County.[51] When the Psyllid spread past southern San Diego, the organic insecticide Pyganic was replaced by a non-organic

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[42] *See* CAL. DEP'T OF FOOD & AGRIC., *Southern San Diego County Placed Under Pest Quarantine to Prevent Spread of Asian Citrus Psyllid,* CDFA.CA.GOV (Sept. 11, 2008), http://www.cdfa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=08-060 [hereinafter *San Diego Placed Under Quarantine*].

[43] *See id.*

[44] *Id.*

[45] *Id.*

[46] *See* CAL. FOOD & AGRIC. CODE § 5911(f) (West 2012).

[47] *See* Berestein, *supra* note 7.

[48] CAL. DEP'T OF FOOD & AGRIC., *About ACP and HLB*, CDFA.CA.GOV, http://www.cdfa.ca.gov/plant/acp/index.html (last modified May 23, 2012).

[49] *Single Asian Citrus Psyllid Detected in San Diego*, *supra* note 36.

[50] CAL. DEP'T. OF FOOD & AGRIC., *Limited Asian Citrus Psyllid Ground Prevention Treatment Scheduled to Begin for 12 Sites Wednesday, September 17 in San Diego County,* CDFA.CA.GOV (Sept. 15, 2008), http://www.cdfa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=CDFA08-062[hereinafter *ACP Treatment for Twelve Sites*].

[51] *See* CAL. DEP'T OF FOOD & AGRIC., *Asian Citrus Psyllid (ACP)/ Huanglongbing (HLB),* CDFA.CA.GOV, http://www.cdfa.ca.gov/plant/acp/pressreleases.html (last visited Jan. 1, 2012).

insecticide called Tempo.[52] HLB was first discovered in Hacienda Heights in Los Angeles County, California in March of 2012, (despite the efforts of the CDFA and the USDA to quarantine and treat areas for the Psyllid).[53]

B. The CDFA's Emergency Plan to Stop the Spread of HLB

Once HLB was detected in California in 2012, the CDFA proclaimed that the Psyllid and HLB were now part of an emergency project.[54] The Psyllid control program will treat residential areas with insecticides that are within 800 meters of a tree that was found to be infected with HLB.[55] Commercial citrus trees that are found to be infected will be treated along with any orchard that intersects with the 400 meter radius of the find site.[56] The emergency plan has officially designated Tempo and Merit and CoreTect as the three chemical insecticides the CDFA will be using to treat the Psyllid population.[57] There are no organic pesticides listed in the emergency plan.[58]

The lack of a designated organic pesticide is likely a result of guidelines for organic and commercial growers that strongly advise against using organic pesticides to treat the Psyllid because of the short length of time they remain effective compared to synthetic pesticides.[59] The

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[52] *Public Information about ACP*, *supra* note 18, *see also ACP Treatment for Twelve Sites* (The organic pesticide, Pyganic was later found to be ineffective).

[53] *HLB Detected in L.A*, *supra* note 6.

[54] CAL. DEP'T. OF FOOD & AGRIC., *Proclamation of an Emergency Program Against the Asian Citrus Psyllid and the Huanglongbing Disease,* CDFA.CA.GOV (Apr. 5, 2012), 1, http://www.cdfa.ca.gov/plant/pdep/treatment/pep/PEP-ACP-HLB-Hacienda-Hts-040512.pdf (according to Sections 5401-5405 and 5761-5763 of the California Food and Agricultural Code, an emergency proclamation means the Secretary is mandated to investigate any existence of a pest; determine the probability of the pest spreading; and adopt regulations that are reasonably necessary to carry out these code section requirements. The Secretary after an emergency project is declared is to abate the pest from the area and prevent further damage. This includes treatment and removal of infected host plants) [hereinafter *Emergency Program for ACP and HLB*].

[55] *Id.*

[56] *See* U.S. DEP'T OF AGRIC., *Technical Working Group (TWG) Report Area-wide Control of Asian Citrus Psyllid (ACP).* USDA.GOV (Nov. 23, 2010), 10, http://www.aphis.usda.gov/plant_health/plant_pest_info/citrus_greening/downloads/pdf_files/twg/Psyllid%20Area%20Wide%20Control11-23-10.pdf [hereinafter *TWG Report for ACP*].

[57] *Emergency Program for ACP and HLB*, *supra* note 54 at 3.

[58] *See Id* (this source is a complete list of the pesticides that are to be used for the Psyllid/HLB emergency project and no organic pesticide is included in this complete list).

[59] *See* Beth Grafton-Cardwell, *Sampling and Management of Asian Citrus Psyllid during the Early Phases of Infestation*, UNIV. OF CAL. AGRIC. & NAT'L RES., 3, (Sept. 14, 2012, 4:49 p.m.), http://ucanr.org/blogs/ucanrorgblogscitruspest/blogfiles/12687.pdf.

CDFA relies on recommendations from entomologists in the University of California system.[60] Those scientists recommend that organic certification be abandoned (at least temporarily) if HLB spreads to areas near commercial groves since organic insecticides will not reduce the population of the Psyllid to undetectable levels.[61] The reason organic insecticides do not work as well for the Psyllid is because there has to be direct contact with the insect body in order for the insect to die; it is difficult for the insecticides to reach the young nymphs tucked inside leaf folds.[62] Organic insecticides lack the lingering effects of synthetic pesticides.[63] The relatively short length of time that organic pesticides last might not eradicate all the life stages of the Psyllid, allowing the infestation to persist.[64] Further, with organic pesticides there would be no residual pesticides on the tree for the nymphs to come in contact with after emerging from the leaf folds.[65] Synthetic pesticides would be applied every month or two depending on the situation, whereas organic pesticides would have to be applied every ten to fourteen days.[66] It is not only ineffective to use currently available organic pesticides for the Psyllid,[67] but also the expense might become unreasonable to maintain because of how often they need to be applied.[68]

Organic citrus groves are not likely to escape HLB if it begins to spread past Hacienda Heights.[69] The Psyllid has already begun to occupy and infest in San Diego,[70] which is the largest organic citrus producing county in the State.[71] San Diego and Hacienda Heights are only about 100 miles apart and it was shown in Florida that once HLB is present it begins to spread to nearby citrus groves via the Psyllid.[72]

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[60] *See id.* (The CDFA relies on scientific information from the California University System as seen by how the CDFA follows The California University System's recommendations for the Psyllid and HLB).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Berestein, *supra* note 7.

[69] See, *id.*

[70] *See San Diego Placed Under Quarantine*, *supra* note 42.

[71] CAL. DEP'T. OF FOOD & AGRIC., *2007 Producer,* CDFA.CA.GOV, http://www.cdfa.ca.gov/is/docs/2007Producer.pdf (under "Organic Sales Reports", click on 2007 under "Producer Acreage and Sales by County" 46, (2012).

[72] *See HLB Detected in L.A*, *supra* note 6.

C. The Impact of the CDFA's Emergency Plan on Organic Farmers

Organic farmers have not yet been forced to use non-organic pesticides to treat the presence of the Psyllid on their citrus groves,[73] but that may change if HLB is found in other areas of California,[74] or begins to spread rapidly as it did in Florida.[75] As of now, there is no distinct plan for treating organic farms any differently than conventional farms.[76] The CDFA will use organic pesticides for their Psyllid control program if effective organic pesticides are discovered and approved.[77]

The CDFA has worked with organic farmers on pesticide treatments for invasive insects in the past.[78] An organic solution may be possible for the Psyllid/HLB eradication program also, but it may unfortunately come too late for organic farmers to use if HLB spreads beyond Hacienda Heights before an organic alternative is found.[79] Unfortunately, moving forward with the Psyllid eradication program without an organic alternative will create damage to organic citrus farms if non-organic pesticides are forced upon them by regulations.[80] The question remains if the organic farmers who endure a loss of organic certification because of the CDFA's Psyllid eradication program should be compensated for that loss.[81]

III. REGULATORY TAKINGS AND ORGANIC CERTIFICATION

The Fifth Amendment to the United States Constitution requires that no, "private property be taken for public use, without just compensation."[82] The California Constitution follows the United States Constitution, but also adds damage to property taken for a public use as a reason for just compensation.[83] This is more expansive than the United States

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[73] Interview with Crystal D'Souza, *supra* note 19.
[74] Interview with Jeremy Larson, *supra* note 20.
[75] *HLB Detected in L.A*, *supra* note 6.
[76] Interview with Crystal D'Souza, *supra* note 19.
[77] Interview with Jeremy Larson, *supra* note 20.
[78] CAL. DEP'T OF FOOD & AGRIC., *Organic Growers Support Gypsy Moth Control Program,* CDFA.CA.GOV, http://www.cdfa.ca.gov/plant/GypsyMoth/docs/gypsy%20moth_OrganicGrowers_032109.pdf, 1, (last modified Sept. 14, 2009).
[79] Interview with Jeremy Larson, *supra* note 20.
[80] *See infra* Part III.C.1.
[81] *See infra* Part III.
[82] U.S. CONST. amend. V (West, WestlawNext).
[83] CAL. CONST. art.,1 § 19 (West, WestlawNext through June 2008 amendments); *see also* Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal.4th 761, 775 [66 Cal.Rptr.2d 62] (California uses federal takings tests when analyzing if there has been a

Constitution, and therefore the California Constitution may trigger takings liability in some situations when the Federal Constitution would not.[84] Any takings issues that would arise with the CDFA and organic farmers in California would use the California Constitution as legal authority because the agency that would be taking property would be a state agency (CDFA).[85]

When the government takes private property for public use, it must give just compensation to the owner of the property.[86] Acceptable forms of "public use" include anything from the furtherance of an economic development plan for revitalization of a downtown area,[87] correcting land oligopoly problems by taking property owned by lessors and transferring it to lessees to reduce concentrated land ownership,[88] to promoting recreation of the public by using private land to build a parking lot for county fairgrounds.[89] Just compensation has been interpreted in California to mean the fair market value for the property.[90]

The State may also indirectly cause a taking through regulation promulgated in exercise of its police power.[91] Sometimes when the State is exercising its police power with a regulation, that regulation may exceed the scope of police power and is considered a taking, and just compensation is required.[92] Here, the CDFA would be using its police power to control a threat to California agriculture.[93] A regulation that temporarily takes an organic farmer's certification may require just compensation, so long as the land owner can show that there is value in organic certification, which is the basis for any takings claim.[94]

A. Basis for a Regulatory Taking

A regulatory taking is when an agency of a state enacts a regulation that in effect takes or damages private property by restricting the use of

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taking according to the California Constitution, this case used the *Penn Central* test to analyze if there was a taking because of regulation by a rent control board).

[84] CAL. CONST. art.,1 § 19 (West, WestlawNext through June 2008 amendments).

[85] *Id.*

[86] *Id.*

[87] Kelo v. City of New London, Conn., 545 U.S. 469, 484 (2005).

[88] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 229-230 (1984).

[89] Alameda Cnty. v. Meadowlark Dairy Corp. (1964) 227 Cal.App.2d 80,84 [38 Cal.Rptr. 477].

[90] CAL. CIV. PROC. CODE § 1263.310 (West 2012).

[91] CAL. CONST. art. 1, § 19(c) (West, WestlawNext through June 2008 amendments).

[92] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).

[93] *See* CAL. FOOD & AGRIC. CODE § 5401 (West 2005).

[94] *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011-1012 (1984).

the private land in some way.[95] Landowners can file a claim for inverse condemnation if they can show that a regulatory taking occurred and they have not been properly compensated.[96] A compensable property interest is a threshold requirement for any taking and must be established before any claim for compensation can be successful.[97] A regulation has to affect the landowner's property interests if damaged to be a regulatory taking.[98] Generally, if there is a value or economic use that has been diminished by a government regulation, the government will not compensate the owner unless the property is being deprived of *all* value or *all* economic use.[99]

In the absence of total deprivation, a court will apply a balancing test to determine if there has been a taking.[100] The balancing test generally weighs the diminished value of the property against the benefit of the regulation to the State.[101] Other considerations in this balancing test are the necessity of that regulation to effectuate the government's purpose, the nature of the governmental intrusion,[102] and whether the landowner has any distinct investment-backed expectations impaired by the regulation.[103] Since investment-backed expectations must be more than an independent or abstract need,[104] the land owner must prove with some level of certainty the expectations of the owner in order to conclude if they have been impaired.[105]

B. Compensable Property Interest

In order for landowners to claim any type of taking, the government regulation must impact a property interest.[106] A compensable property interest can be any right, title, or estate in the property.[107] If there is a claim that something on the property has been damaged or reduced in

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[95] Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922).

[96] *Id.* at 413 (the reason that the cause of action for inverse condemnation is an option and other causes of action such as: nuisance, negligence, and trespass are not is because governmental immunity prevents it); *see also* CAL. GOV. CODE §815 (West 2012).

[97] *See* Ruckelshaus, 467 U.S. at 1000-1005.

[98] *Id.*

[99] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

[100] *See id* at 1077-1018.

[101] Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

[102] *Id.*

[103] *Id.*

[104] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

[105] Allegretti & Co. v. Cnty. of Imperial (2006) 138 Cal.App.4th 1261, 1279 [42 Cal. Rptr.3d 136].

[106] *See* Ruckelshaus, 467 U.S. at 1005.

[107] CAL. CIV. PROC. CODE §1235.125 (West 2012).

value there has to be some value and interest in the property.[108] Organic farming has the same value for a land owner as conventional farming does, but by using different methods that prevent environmental damage and create sustainable agriculture.[109] Organic farmers have a goal of creating a soil balance and an insect ecology that functions without pesticides used in conventional farming.[110]

1. Legal Recognition of Organic Status

The philosophy behind organic farming is that there is value in maintaining the organic growing of crops mainly for the positive environmental effect of organic farming.[111] Organic farmers do not use synthetic pesticides and allow a certain level of insect pests to be tolerated.[112] Some organic farmers do not use approved organic pesticides, allowing crops to grow and develop in the most natural soil and insect ecology.[113] The amount of crops lost to these pests is considered a natural loss compensated through the higher price of the produce.[114] Organic crops tend to sell for twenty-five to fifty percent more than conventional produce, although the prices vary greatly from farm to farm.[115]

Courts have recognized a right to maintain organic crops, as seen through judgments against private citizens in civil cases who have negligently permitted drift of inorganic materials into neighboring organic farms.[116] In California, a loss of organic certification,[117] is a value that can be damaged and must be compensated if damaged.[118] There is value in having organic certification and California courts recognize that value can be temporarily taken away[119] and that there must be compensation given to organic farmers for the financial loss.[120] Thus, there is a compensable property interest in organic certification, and a value in being

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[108] *See* Ruckelshaus, 467 U.S. at 1003-1004.
[109] *See* Mark Shwartz, *Study Confirms Value in Organic Farming,* THE STANFORD REPORT (Mar. 15, 2006), http://foodsecurity.stanford.edu/news/703.
[110] Interview with Tom Willey, Organic Farmer, TD Willey Farms (Aug. 14, 2012).
[111] *See* Shwartz, *supra* note 109.
[112] Interview with Tom Willey, *supra* note 110.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See* Jacobs Farm/Del Cabo Inc. v. W. Farm Serv. Inc. (2010) 190 Cal.App.4th 1502 [119 Cal.Rptr.3d 529].
[117] *See id.*
[118] *See id.*
[119] *See id.*
[120] See *id.*

able to remain an organic seller without interruption.[121] The government is also capable of damaging or taking property from an organic farmer with regulations forcing the usage of non-organic pesticides.[122] Organic farmers would be able to meet the requirement of showing a compensable property interest, which is a threshold requirement for any takings claim.[123]

C. Balancing Test

There is no set formula to determine when a regulation goes too far and is considered a taking.[124] Courts instead prefer an ad hoc factual injury that balances the interests of the parties as well as any other relevant considerations.[125] Balancing claimant's economic interests, including any impairment of the owner's investment-backed expectations because of the regulation[126] against government's interests are usually a part of the balancing test. [127] This balancing test was developed by the U.S. Supreme Court in *Pennsylvania Central Transport, Co v. New York*, 438 U.S. 104 (1978) ("*Penn Central*").[128] The Court in *Penn Central* articulated that there may be other relevant factors that should be balanced as well[129] such as the nature of the governmental intrusion,[130] as well as if the regulation was necessary to effectuate the governmental purpose.[131]

A regulation that imposes non-organic pesticides, thus limiting an organic farmer's property use, would require the balancing test to determine if there had been a taking that requires just compensation.[132] Here a balancing of the party's interests requires consideration of the economic impact of losing organic certification,[133] including any interference with investment-backed expectations as a result of a state regulation.[134] These interests of the organic farmer would be balanced against the interest of the State of California to stop the spread of a citrus disease by stopping

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121 See *id.*
122 *See* CAL. CONST. art., 1 § 19 (West, WestlawNext through June 2008 amendments).
123 *See supra* Part III.A-B.
124 Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).
125 Landgate, Inc. v. Cal. Coastal Comm'n (1998) 17 Cal.4th 1006, 1016 [73 Cal.Rptr.2d 841].
126 Penn. Cent. Transp. Co., 438 U.S. at 124.
127 Landgate, 17 Cal.4th at 1016.
128 Penn. Cent. Transp. Co., 438 U.S. at 124.
129 *Id.*
130 *Id.*
131 *Id.* at 127.
132 Pa. Coal v. Mahon, 260 U.S. 393, 413 (1922).
133 Penn. Cent. Transp. Co., 438 U.S. at 124 (1978).
134 *Id.*

the insect that carries the disease.[135] Viable alternatives to damaging regulations may lead to a conclusion that the regulations are unnecessary, which may favor an organic farmer's argument that a taking has occurred.[136]

1. Economic Impact on Claimant and Impairment of Investment-Backed Expectations

The economic impact organic farmers would suffer would be negative if they became subject to a regulation that would preclude the sale of their products as organic, even for a single harvest.[137] Organic farmers would experience a significant loss in profit.[138] Without marketing partnerships in a competitive market due to the inability to provide the contracted organic produce, it would be difficult for an organic farmer to remain profitable.[139] All the time, money, and effort the farmers invest into growing produce on their land as organic are economic investments.[140] Losing the organic status even temporarily because of a regulation would create a devastatingly negative economic impact.[141]

There is a significant investment in becoming organically certified, any loss in organic certification would effect this investment in a negative way.[142] To gain the status of being called "organically produced" in the United States the requirements must be followed, as set forth in Title 7 of the United States Code.[143] Becoming an organic farmer takes an investment of time and money.[144] The National Organic Program requires that the products be:

> produced and handled without the use of synthetic chemicals . . . not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the 3 years immediately preceding the harvest of the agricultural products; and . . . be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent.[145]

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[135] *See HLB Profile*, *supra* note 14 (the interest of the State of California would be to protect the public from an insect that has the potential of negatively impacting a large part of California's agriculture because of the disease that insect carries).
[136] Penn. Cent. Transp. Co., 438 U.S. at 127.
[137] Interview with Tom Willey, *supra* note 110.
[138] *Id*.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *See* 7 U.S.C.A. § 6501 (West 2012).
[144] Interview with Tom Willey, *supra* note 110.
[145] 7 U.S.C.A. § 6504.

If one plant on an organic farm is found to have synthetic pesticides on it, the whole organic farm will have its organic status taken away.[146] Organic farmers may not use any pesticide that is found under the Federal Insecticide, Fungicide, and Rodenticide Act, they may only use botanical pesticides which "are natural pesticides derived from plants."[147]

A farmer who cultivates both organic and conventional crops must separate the conventional crops from the organic crops with a defined buffer zone to maintain certification.[148] Buffer zones between conventional and organic crops are not strictly defined, as inspectors for that particular property define the buffer zones.[149] A regulation dealing with organic citrus that interferes with a buffer zone could pose a threat to organic certification for other types of organic crops on the property.[150]

Organic produce tends to have higher prices compared to conventional produce.[151] Temporary suspension of an organic farmer's certification could lower that farmers profits, because it is sometimes difficult to break into the conventional market and the farmer may not be able to sell his/her crops at all.[152] The business relationships that organic farmers developed may be negatively affected if they cannot sell their organic produce to a partner as agreed.[153] In such cases, organic farmers may suffer the permanent loss of a buyer in a competitive market, as buyers may quickly replace the decertified supplier with another organic farmer not affected by the CDFA's control program.[154] If organic farmers could not sell their produce as organic, even for one harvest, they will likely not have the ability to contract with commercial produce buyers before the season begins.[155] Even if the organic farmers could contract with a

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[146] *See id.*

[147] 7 U.S.C.A. § 6502 (2),(16).

[148] *Id.* at § 6506 (West 2012).

[149] Interview with Tom Willey, *supra* note 110.

[150] *See generally* Bernstein, *supra* note 7 (explains how an organic farmer might lose all organic crops if just their citrus is made conventional since there will be no defined buffer zone between the conventional citrus and the rest of the organic produce).

[151] Interview with Tom Willey, *supra* note 110.

[152] *Id.*

[153] *See* Amanda M. Heyman, *Farmers' Guide to Organic Contracts*, FARMERS LEGAL ACTION GROUP (Aug. 2012), 6-9, 8-2, http://flaginc.org/topics/pubs/arts/FGOC2012.pdf (explains how contracts can "go wrong" when certification is affected).

[154] *See generally* Berestein, *supra* note 7 (explains how local restaurants would reconsider who they buy their organic food from if the organic farmers they buy from become subject to a loss of organic certification).

[155] *See generally* Heyman, *supra* note 153 (explains the options in the event that organic certification is lost when a farmer has already entered into a contract to sell the produce as organic. Organic contracts are entered into before the season begins and it would thus

commercial buyer before the season begins, they still could not demand as high a price as organic grown produce.[156]

Another negative effect of not being able to sell organic produce is the potential of a damaged reputation within the local organic buying community.[157] Organic farmers who grow and sell locally may face difficulties with public support for their products if the public knows their crops have been sprayed with pesticides.[158] One of the most appealing reasons to buy organic produce is the requirement that the produce be pesticide free.[159] Local customers may not want to buy from an organic farm that has been exposed to a state-mandated pesticide program.[160]

Part of the measure of the economic impact of a regulation on a claimant, as used in the balancing test, is the interference with a landowner's distinct investment-backed expectations.[161] Investment-backed expectations are primary and rightful uses to be expected by the owner as well as their enjoyment of the property.[162] Any forced synthetic pesticide application by the CDFA would be a limit to an organic farmer's property use and therefore an interference with the distinct investment-backed expectation to use their land for growing organic produce.[163] Investments unique to organic farmers include the organic certification application process, registration fees, and inspector's fees.[164]

Inspector fees and transitioning the production methods of the farm can become costly.[165] This transition period is the riskiest step in becoming organically certified,[166] because the farmer is growing according to organic standards but cannot sell crops as organic until three years have passed.[167] Therefore investments in transitioning do not return the de-

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be difficult to be able to find another conventional buyer in the event that organic certification is lost).

156 *See* Interview with Tom Willey, *supra* note 110.

157 *See* Amy Marchiana, *People Want Organic Food Because of What Isn't on it, Local Producers Say,* THE REPUBLICAN HERALD, Sept. 24, 2012, http://republicanherald.com/news/people-want-organic-food-because-of-what-isn-t-on-it-local-producers-say-1.1377892.

158 *See id.*

159 *See* 7 U.S.C.A.§ 6504 (West 2012).

160 *See* Marchiana, *supra* note 157.

161 *See* Pa. Coal v. Mahon, 260 U.S. 393, 414 (1922).

162 Cwynar v. City & Cnty. of San Francisco (2001) 90 Cal.App.4th 637, 664 [109 Cal.Rptr.2d 233].

163 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (1992).

164 *See infra* Part III.C.1.

165 Interview with Tom Willey, *supra* note 110.

166 *Id.*

167 *Id.*

sired profits from organic sales for those three years.[168] Also, if the farm was previously conventional, it will take time for the farm to receive an ecological balance without the use of pesticides or synthetic fertilizers which may initially cause yield and quality declines.[169]

The application and registration process is costly, ranging from a few hundred dollars to a few thousand dollars depending on the size, variety, and complexity of the operation.[170] In California, the required annual registration fee averaged eighteen percent of the organic gross sales in 2010,[171] which is in addition to annual inspection fees that range from $350-500.[172] When a farmer takes the necessary steps to become officially organically certified, they have made investments in being able to use their land with that certification.[173] These investment-backed expectations would suffer if the CDFA requires synthetic pesticides to be used on an organic farm.[174]

California has discretion to make exceptions for the organic certification prerequisite, such as the requirement of being pesticide free for three years prior to harvest.[175] This type of leniency is usually only available if the farmer is subject to any state or federal emergency pest or disease treatment program.[176] The CDFA indicated it was considering waiving the three year pesticide-free requirement during a town hall meeting in Riverside, California.[177] Waiving the three year pesticide-free requirement for organic certification might be a part of the solution if organic farmers become subject to a mandate requiring the spraying of synthetic pesticides on their crops.[178] Even if certification requirements are waived temporarily, meaning that certification can be gained in less than three years, the citrus that was subject to a synthetic pesticide could not be sold as organic for that harvest.[179] Even if some certification requirements are

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168 *Id.*
169 *Id.*
170 U.S. DEP'T OF FOOD & AGRIC., *Agricultural Marketing Service-FAQ: Becoming A Certified Operation*, CDFA.CA.GOV, http://www.ams.usda.gov/AMSv1.0/ (last modified Sept. 5, 2012) (to navigate the website to this information follow "National Organic Program," and then follow "Getting Certified").
171 CAL. DEP'T OF FOOD & AGRIC., *California Organic Program*, CDFA.CA.GOV, http://www.cdfa.ca.gov/is/i_&_c/organic.html (2012).
172 Jody Padgham, *Guidebook for Organic Certification* (Dec. 2005), 4, http://www.coopext.colostate.edu/boulder/ag/pdf/Moses.guidebook.organic.pdf.
173 *See* 7 U.S.C.A. sec. 6504 (West 2012).
174 *See id.*
175 7 C.F.R. § 205.672 (2012); 7 U.S.C.A. § 6504 (West 2012).
176 7 C.F.R. § 205.672.
177 Interview with Jeremy Larson, *supra* note 20.
178 *Id.*
179 *See* 7 C.F.R. § 205.672; 7 U.S.C.A. § 6504 (West 2012).

waived because of a state-mandated pesticide program,[180] it would not begin to compensate the loss organic farmers would suffer due to the temporary loss of organic certification.[181] Organic farmers would suffer a negative economic impact because of the impairment of their distinct investment-backed expectations of producing organic produce on their land as a result of the regulation.[182]

2. Nature of Government's Intrusion

When the nature of the regulatory taking is a permanent physical invasion, compensation is always required without the need for a factual injury or a balancing test.[183] A regulation that temporarily takes away organic certification may not be permanent, but when a regulation has a physical invasion aspect it favors organic farmers in the balancing test.[184] To deal with HLB-infected trees, the CDFA plans to spray synthetic pesticides at least 400 meters in a radius around the infected tree in residential areas,[185] and entire orchards that intersect with the 400 meter radius of the find site.[186] If an organic citrus grove is within that radius the CDFA will physically go onto the citrus grove and spray synthetic pesticides.[187] This entry onto the property would temporarily take away organic certification either for one harvest if the requirements are waived,[188] or for three years if Title 7 is followed strictly.[189] Here the CDFA's regulations are more intrusion-based and are thus more likely to be considered a taking.[190]

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[180] 7 C.F.R. § 205.672.
[181] *See supra* Part III.C.1.
[182] Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).
[183] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419-420 (1982).
[184] *Id.* at 426-427 (discussing how courts have invariably found a taking to have occurred when there is a physical invasion from permanent flooding of the plaintiff's land). There would not be a permanent taking if an organic farmer's certification was lost. Despite this, the fact that there is a physical invasion aspect of the CDFA's regulations places organic certification loss closer to the reasoning for upholding compensation in permanent physical invasion cases than temporary takings cases. *See id.*
[185] *See TWG Report for ACP*, *supra* note 56 at 10.
[186] *See id.*
[187] *See id.*
[188] 7 C.F.R. § 205.672 (2012).
[189] 7 U.S.C.A. § 6504 (West 2012).
[190] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

3. State of California's Interest in Protecting the Public

In the *Penn Central* Balancing Test, the economic interests of the claimant are weighed against the interests of the State.[191] The State's interest in the regulation has to be legitimate and substantially advance the public purpose of the regulation.[192] A regulation will advance the State's purpose and interest if it significantly mitigates any social harm that would otherwise result if the owner was allowed to have unregulated use of their land.[193] Even when there is a valid governmental interest, the regulation must be reasonably necessary in order to effectuate the governmental purpose.[194] A viable alternative to a damaging regulation would tend to show that the regulation is not necessary.[195]

The citrus industry in California is a billion dollar industry that would arguably affect the public as a whole if it collapsed.[196] The CDFA is likely to move forward with a plan that will consider the citrus industry as a whole versus the smaller organic citrus industry and not allow organic farmers to opt out of the non-organic treatment it deems to be effective.[197]

Even in the face of a State interest that benefits the public, there should be compensation to individuals whose property is damaged if the restriction on the property is not reasonably necessary to effectuate the governmental purpose.[198] If viable alternatives can be established, those alternatives may tend to favor an organic farmer that is trying to argue there has been a regulatory taking.[199]

i. Alternatives to Regulations in Order to Effectuate Government Purpose

The way the CDFA plans to go about effectuating its purpose of protecting the public by automatically spraying insecticides on any orchard that intersects within 400 meters around an infected/infested tree may not be reasonably necessary since there are alternatives that would not cause

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[191] Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).
[192] Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal.4th 952, 1019 [81 Cal.Rptr.2d 93].
[193] *Id.* at 959.
[194] Penn. Cent. Transp. Co., 438 U.S. at 127.
[195] *See* Santa Monica Beach, Ltd., 19 Cal.4th at 976.
[196] CAL. FOOD & AGRIC. CODE § 5911 (West 2012).
[197] Interview with Jeremy Larson, *supra* note 20.
[198] Palazzolo v. Rhode Island, 533 U.S., 606, 634 (2001).
[199] *See* Santa Monica Beach, Ltd., 19 Cal.4th at 978-982 (where a lack of alternatives are found this would tend to show that the regulation the State has enacted may not substantially advance its governmental purpose).

loss of organic certification to organic farmers.[200] The best alternative is that the CDFA could wait for an organic pesticide to be found which it deems effective at eliminating the Psyllid before mandating any pesticide treatment for commercial growers, or automatically spraying insecticides on any orchard that intersects within 400 meters around an infected/infested tree,[201] if within those 400 meters there is organic citrus.

There are also some biological alternatives that have proven to be helpful at controlling Psyllid populations.[202] *Tamarixia radiata*, a predatory wasp, is thought to be helpful with maintaining populations of the Psyllid, although the wasp may not completely eliminate an established Psyllid population. [203] The CDFA is likely going to raise thousands for release in California once more information on *Tamarixia radiata's* effect on the environment is completed.[204] The CDFA could wait for this environmental impact data and then analyze if the predatory wasp may be an effective alternative for organic farmers who do not want to use synthetic pesticides before any synthetic pesticides are mandated. The current regulations may not be reasonably necessary to effectuate the governmental purpose of stopping the spread of HLB that could collapse the citrus industry because of these viable alternatives.

4. Balancing Test Outcome

If the CDFA mandates the use of synthetic pesticides to prevent the spread of the Psyllid, there would be a large negative economic impact to organic farmer's investment-backed expectations.[205] If there is a physical nature to the governmental intrusion, such as the CDFA going onto an organic farmer's land and using synthetic pesticides, this would tend to show that there has been a regulatory taking even though it is not a categorical physical taking.[206] When all of these aspects are weighed against the interest of the State of California in protecting the billion dollar citrus

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[200] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

[201] *See TWG Report for ACP*, *supra* note 56 at 201 (even though current organic pesticides for the Psyllid are not effective as long as synthetic pesticides are the CDFA could allow organic farmers to apply organic pesticides as often as necessary until the CDFA can approve of a longer lasting organic alternative.) *See id.*

[202] CAL. AGRIC. NETWORK, *UC Scientists Release a Natural Enemy for the Asian Citrus Psyllid*, CALIFORNIAAGNET.COM (Dec. 27, 2011), http://www.californiaagnet.com/pages/landing_news?UC-Scientists-Release-a-Natural-Enemy-Of=1&blockID=576866&feedID=2523 [hereinafter *Natural Enemy for ACP*].

[203] *See id.*

[204] See i*d.*

[205] *See supra* Part III.C.1-2.

[206] *See supra* Part III.C.3.

industry, it is difficult to say how the balancing test should come out. The State interest in protecting the general welfare by protecting a huge California industry would be very difficult to outweigh.[207] Perhaps a key factor that tends to tip the scale in the organic farmers' favor is that the means may not justify the ends because there are other reasonable alternatives to the regulations discussed above that may not damage organic farmers.[208] Here we have only potential claimants and the factors may shift depending on the organic farmer's damage and whatever methods or regulations the CDFA decides to impose as HLB becomes a greater threat. Despite there being a basis for a regulatory taking[209] and a balancing test slightly favoring organic farmers,[210] there is an exception to the requirement of just compensation that may be difficult to overcome.[211]

IV. PUBLIC NUISANCE EXCEPTION TO COMPENSATION FOR A TAKING

Payment of just compensation for a regulatory taking is not required when the state is protecting the public from a nuisance.[212] The California Agricultural Code specifies that citrus diseases and any host they occupy are a public nuisance[213] that the CDFA has the police power to abate.[214] The California Food and Agricultural Code define a public nuisance as: any place, plant, or thing that is infected or infested with any pest, as well as any premise where any pest is found.[215] It is evident that where there is a public nuisance that the CDFA has the authority to abate, there is generally no compensation for damage to private property.[216] The CDFA would clearly be well within its power to abate a nuisance if a property was currently infested with the Psyllid or contained HLB-infected trees. [217]

The regulations put in place currently for the Psyllid/HLB eradication program do not truly abate a nuisance because the insecticides are poten-

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[207] *See infra* Part IV.
[208] *See supra* Part III.C.4.i.
[209] *See supra* Part III.A-B.
[210] *See supra* Part III.C.4.i.
[211] *See infra* Part IV.
[212] *See* CAL. CONST. art. 1, § 19 (c) (West, WestlawNext through June 2008 amendments).
[213] CAL. FOOD & AGRIC. CODE § 5762 (West 2012).
[214] CAL. FOOD & AGRIC. CODE § 5404(a) (West 2012).
[215] *Id. at* § 5404.
[216] CAL. CONST. art. 1, § 19 (c) (West, WestlawNext through June 2008 amendments).
[217] *See* CAL. FOOD & AGRIC. CODE § 5401.

tially applied to healthy trees.[218] If there is not a public nuisance at the time the regulations for the Psyllid are imposed because healthy trees are not considered a nuisance, then the nuisance exception may be overcome.[219] The California Agricultural Code requires the presence of a pest on the property, yet there are regulations that would allow the CDFA to spray entire orchards that intersect with the find site in a 400 meter radius.[220] The current regulation does not take into account that the whole area being treated might not have an infestation of the Psyllid.[221] If an organic property is sprayed with synthetic pesticides when there are no technical nuisances present, the CDFA would be causing damage to the property with no ability to apply the nuisance exception to paying compensation.[222]

California courts are reluctant to say that the State, while exercising its police power, is not responsible for damage or destruction of property caused by it, unless it falls into narrow circumstances such as: ". . . demolition of buildings to prevent the spread of conflagration. . . of diseased animals, of rotten fruit, of *infected trees*. . . ."[223] It may be difficult to convince California courts that the CDFA's preemptive measures are not abating a nuisance because of how fast HLB is known to have spread in Florida.[224] California courts have been liberal in the past with interpreting the CDFA's police power to abate a public nuisance as an exception to payment of compensation for any damage that resulted from the abatement.[225]

Farmer's Insurance Exchange v. State of California, 175 Cal.App.3d 494 (1985), concerned a CDFA program to eradicate the Mediterranean

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[218] Dep't. of Agric. & Consumer Serv. v. Bogorff, 35 So.3d 84, 88 (Fla. 2010) (holding that citrus trees within the 1900 foot radius of an infected citrus tree were not a nuisance and that the trees possessed no threat to the public. The court also found that when the state destroyed trees within the 1900 foot radius they needed to pay just compensation for that regulatory taking to the property owner).

[219] *See id.* at 89.

[220] *See TWG Report for ACP*, *supra* note 56 at 10.

[221] *See id* (the current recommendation requires spraying in a 400 meter radius regardless of whether or not the pest is present).

[222] *See* CAL. CONST. art. 1, § 19 (c) (West, WestlawNext through June 2008 amendments).

[223] Customer Co. v. City of Sacramento (1995) 10 Cal.4th 368, 383 [41 Cal.Rptr.2d 658] (emphasis added).

[224] *See* HLB Detected in L.A, *supra* note 6 (California courts have allowed the CDFA to abate insects pests in the past and have not required compensation for damage to properties).

[225] *See* Teresi v. State of Cal. (1986) 180 Cal.App.3rd 239, 243 [225 Cal.Rptr. 517].

Fruit Fly ("Med Fly") with widespread aerial spraying of pesticides,[226] following a declaration of a state of emergency by the Governor of California.[227] In the process, the paint on the plaintiff's car was damaged by aerial pesticides.[228] The court ruled that the CDFA was using proper police power to abate a nuisance, which rendered the CDFA immune to the California Constitutional requirement to provide compensation for a taking.[229] *Teresi v. State of California*, 180 Cal.App.3rd 239 (1986), also concerned the CDFA's Med Fly eradication program, pursuant to which the plaintiff's pepper crops were fumigated with a pesticide.[230] Within ten days all the peppers rotted as a result of the fumigation.[231] The court ruled that no compensation was due to the plaintiff because the CDFA was exercising proper police powers to abate a nuisance.[232]

The circumstances that led California courts to allow the CDFA to eradicate the Med Fly without having to pay compensation for any damage they caused differ significantly from the Psyllid/HLB problem present in California right now.[233] The Med Fly has the potential of infesting a large variety of fruit trees, while the Psyllid will only infest citrus plants.[234] The Med Fly has over 250 types of host plants and if allowed to infest could potentially prevent California from shipping fruit internationally and domestically due to restrictions of the destination state and country.[235] This pest has the potential of affecting the entire agricultural output of the State of California.[236] The insect is considered the most important agricultural pest in the world and does not compare to the Psyllid's range of host plants and the Psyllid's effect on world agriculture.[237] The Med Fly also travels in swarms,[238] which would make immediate pesticide application in those areas necessary to prevent them from

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[226] Farmers Ins. Exch. v. State of Cal. (1985) 175 Cal.App.3d 494, 498 [221 Cal.Rptr. 225].
[227] *Id.* at 500-501.
[228] *Id.* at 498.
[229] *Id.* at 502.
[230] Teresi, 180 Cal.App.3rd at 242.
[231] *Id.*
[232] *Id.* at 243-244.
[233] *See Infra* Part IV (these fact differences may lead to a different application of the nuisance exception to paying compensation for a regulatory taking).
[234] CAL. DEP'T. OF FOOD & AGRIC., *Mediterranean Fruit Fly Pest Profile,* CDFA.CA. GOV (Aug. 27, 2012), http://www.cdfa.ca.gov/plant/PDEP/target_pest_disease_profiles/mediterranean_ff_profile.html; *ACP Profile*, *supra* note 8.
[235] *Id.*
[236] *Id.*
[237] *Mediterranean Fruit Fly Pest Profile*, *supra* note 234; *ACP Profile*, *supra* note 8.
[238] ORKIN, *Mediterranean Fruit Flies,* ORKIN.COM, http://www.orkin.com/flies/fruit-fly/mediterranean-fruit-flies/ (2012).

laying eggs on fruit, making the fruit unfit for human consumption.[239] The Med Fly presented such an emergency that the Governor declared a state of emergency, allocating special emergency government funding. [240] There has not been any kind of special funding because of a Governor declared emergency for the Psyllid problem in California.[241] The Med Fly eradication effort was done during massive aerial pesticide spraying,[242] which is not necessary for the Psyllid.[243] The CDFA has been methodical about choosing which residential properties it will spray with pesticides to treat the Psyllid.[244] Treatment notification is given to residents prior to the CDFA spraying for the Psyllid.[245] The spraying on residential properties for the Psyllid is done on a property-by-property basis,[246] unlike the massive aerial Med Fly eradication efforts.[247]

HLB has not been found anywhere else in California besides Hacienda Heights at this point,[248] so there is time to devise alternatives that would not damage organic farmers. The Med Fly cases are not similar enough factually to assert that California courts would follow those cases outcomes with regards to compensation to organic farmers for a loss of certification as a result of the Psyllid eradication program.[249] Although Florida law would not be binding on an inverse condemnation action brought in California,[250] there are many Florida cases that are more factually similar to the Psyllid/HLB situation than the California Med Fly cases.[251] Florida courts have interpreted the police power to abate a citrus nuisance more narrowly than California courts have with the Med Fly litigation.[252] Florida's Citrus Canker cases present more of an analogues situa-

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[239] *See Mediterranean Fruit Fly Pest Profile*, *supra* note 234.

[240] Farmers Ins. Exch. v. State of Cal. (1985) 175 Cal.App.3d 494, 500-501 [221 Cal. Rptr. 225].

[241] *See Emergency Program for ACP and HLB*, *supra* note 54 (there is no mention of special funding in this emergency program as a result of a Governor-declared emergency).

[242] Farmers Ins. Exch. 175 Cal.App.3d at 498.

[243] *See Emergency Program for ACP and HLB*, *supra* note 54.

[244] *See ACP Treatment for Twelve Sites*, *supra* note 50.

[245] *Emergency Program for ACP and HLB*, *supra* note 54 at 4.

[246] *See id.*

[247] Farmers Ins. Exch., 175 Cal.App.3d at 498.

[248] *HLB Detected in L.A, supra* note 6.

[249] *See* Benjamin G. Shatz, *Gimme 5: What Every Lawyer Should Know About Stare Decisis*, 28 L. A. CNTY. B. ASS'N (2008), *available at* http://www.lacba.org/showpage.cfm?pageid=9375 (discussing how district courts in California are not bound by any other courts except the California courts with appellate jurisdiction over them).

[250] *See id.*

[251] *See infra* Part V.1.

[252] *See infra* Part V.1.

tion to the Psyllid eradication program and therefore presents a better precedent for California courts to follow.

V. RECOMMENDATIONS

A. Florida Citrus Canker Cases Provide the Most Practical Argument for Compensation for Organic Citrus Farmers, and Should be Applied to California Cases

Florida has endured many citrus diseases and viruses because of the vast amount of citrus Florida produces. [253] As a result, its Department of Agricultural and Consumer Services ("FDACS") has implemented many eradication programs for citrus diseases.[254] The eradication program that has arguably created the most legal constraint in Florida has been the Citrus Canker eradication program.[255] Citrus Canker is a bacterial disease that is highly contagious and affects all types of citrus.[256] This disease is spread by windborne rain, landscaping equipment, and people who transported the disease on their hands or clothing, or by moving exposed or infected trees.[257] Just like the CDFA, the FDACS has the power to control and eradicate plant diseases that pose a threat to agriculture and abate such diseases as a public nuisance.[258] Florida is also not required to pay compensation to citizens when property that is creating a public nuisance is seized or destroyed.[259] The FDACS adopted a regulation that removed any citrus tree within a 1,900-foot radius of a Citrus Canker infected tree.[260] The FDACS removed many healthy citrus trees as a result of this recommendation and for years did not offer or pay any compensation relying on its police power to abate a nuisance.[261]

The most recent Citrus Canker class action lawsuit, *Dep't. of Agric. & Consumer Serv. v. Bogorff,* 35 So.3d 84 (Fla. 2010) declared that a healthy tree is valuable,[262] healthy trees are not a dangerous nuisance to

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[253] *See* FLA. DEP'T OF AGRIC. & CONSUMER SERV., *Bureau of Pest Eradication and Control*, FRESHFROMFLORIDA.COM, http://www.freshfromflorida.com/pi/pec/pec.html (last visited Nov. 28, 2012).
[254] *See* id.
[255] FLA. DEP'T OF AGRIC. & CONSUMER SERV., *Citrus Canker Fact Sheet*, FRESHFROM FLORIDA.COM , http://www.freshfromflorida.com/pi/canker/faqs.html (2004).
[256] *Id.*
[257] *Id.*
[258] FLA. STAT. ANN. § 581.184 (West 2006).
[259] Dep't. of Agric. & Consumer Serv. v. Bogorff, 35 So.3d 84, 88-89 (Fla. 2010).
[260] Fla. Dep't. of Agric. & Consumer Serv. v City of Pompano Beach, 792 So.2d 539, 542 (Fla. 2001).
[261] *See id.* at 544.
[262] Dep't. of Agric. & Consumer Serv., 35 So.3d at 88.

the public, and therefore compensation was due when a healthy tree was removed because of the government regulation.[263] Even if the citrus tree was within the 1900-foot radius, there was no evidence that the tree itself was a nuisance: it was healthy and posed no threat because Citrus Canker was not present.[264] The Florida Supreme Court in *Corneal v. State Plant Bd.,* 95 So.2d 1 (Fla. 1957) also found that if a tree is being removed that has value there still needs to be compensation.[265]

The same reasoning that applied in the Florida class action lawsuits for the Citrus Canker eradication should be applied to the Psyllid/HLB eradication program in California.[266] Both the protocol in Florida for dealing with Citrus Canker,[267] and the protocol for dealing with HLB-infected trees in California[268] are similar; they both require treatment within a designated radius around an infected tree regardless if within that radius there is an infection or infestation actually present. The damage to the plaintiffs in the Florida class action suits was the removal of healthy trees.[269] The damage here would be temporary loss of organic certification for spraying synthetic pesticides on potentially healthy organic citrus.[270] Although the damage is not identical it is comparable. In both situations value in the property would be lost as a result of the government deeming a nuisance within a designated radius, when in fact parts of the radius are unaffected by an infestation or infection.[271]

If the healthy trees are sprayed on an organic farm this would result in damage (e.g. temporary loss of certification).[272] Without a true infestation or infected tree, the CDFA fails to show a public nuisance that

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[263] *Id.* at 89.
[264] *Id.*
[265] Corneal v. State Plant Bd., 95 So.2d 1, 5 (Fla. 1957).
[266] *See* In re Property Located at 14255 53rd Ave., S., Tukwila, King County Washington, 86 P.3d. 222, 228 (Wash. 2004) (the State of Washington was destroying trees that were infected or infested with the citrus long horned beetle within a one-eighth mile radius of where beetles had escaped from a quarantined area. The plaintiff's citrus trees were damaged by this regulation. The plaintiff argued that Florida's narrow application of a citrus nuisance should be applied to their case and that the court should find that a compensable taking had occurred. The plaintiff was unsuccessful and the court instead applied California case law to come to the holding that the State of Washington did not have to pay just compensation for the damage done to the plaintiff's trees because they were a public nuisance.
[267] Fla. Dep't. of Agric. & Consumer Serv. v City of Pompano Beach, 792 So.2d 539, 542-543 (Fla. 2001).
[268] *See TWG Report for ACP*, *supra* note 56 at 9-10.
[269] Dep't of Agric. & Consumer Serv., 35 So.3d.
[270] *See supra* Part III.C.1-2.
[271] *See supra* Part IV-V.
[272] *See supra* Part III.B.1-2.

would allow it not to pay compensation for their regulatory taking if an organic farm was damaged.[273] If the CDFA's policy for dealing with infested and infected trees remains unchanged, the CDFA will in effect be saying that the growing of healthy citrus trees is a public nuisance,[274] and that would be contrary to the California Food and Agricultural Code's definition of a public nuisance.[275] If there is no infestation on the trees to be sprayed within the 400-800 meters the CDFA should compensate organic farmers that suffer damage.[276] If the CDFA fails to pay compensation under such circumstances, organic farmers will have a basis for a claim against the CDFA for inverse condemnation.[277]

While the CDFA needs to protect the citrus industry, avoiding litigation and creating an equitable outcome for organic farmers should also be a goal. There should be compensation for the unique losses an organic farmer would face if forced to use non-organic pesticides or become subject to the spraying of non-organic pesticides. Any such compensation program should use, as a measure, the average profit loss of organic farmers forced to sell their crops as conventional for the time organic status is lost.

Both California[278] and Florida[279] have compensation programs for citrus disease eradication, even for eradication programs that satisfied the public nuisance exception.[280] In order to avoid inverse condemnation claims, and be fair and equitable to organic farmers, a robust compensation plan should still be put in place for organic farmers to reduce the loss they would face if subjected to non-organic pesticides. This would protect organic farmers from business losses, and allow the CDFA to abate an insect that is a threat with synthetic pesticides, if no organic alternatives can be found.[281] This would avoid inverse condemnation suits, and there would be a compensation plan that would recognize the harm to organic growers.

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[273] *See* CAL. CONST. art. 1, § 19 (c) (West, WestlawNext through June 2008 amendments).
[274] Dep't of Agric. & Consumer Serv., 35 So.3d at 88.
[275] *See* CAL. FOOD & AGRIC. CODE § 5401 (West 2012).
[276] *See* CAL. CONST. art. 1, § 19 (West, WestlawNext through June 2008 amendments).
[277] *See* CAL. CONST. art. 1, § 19 (c) (West, WestlawNext through June 2008 amendments).
[278] *See* CAL. FOOD & AGRIC. CODE § 8553 (West 2012).
[279] Patchen v. Fla. Dep't of Agric. & Consumer Serv., 906 So.2d. 1005, 1006 (Fla. 2005).
[280] *See supra* Part IV-V.
[281] *See supra* discussion in Part III.

B. Organic or Biological Solutions

California has a unique landscape that is conducive to keeping out agricultural pests.[282] Mountain ranges border both sides of California's main produce-growing area, the Central Valley.[283] This geography is more conducive to fighting agricultural pests than completely open terrain.[284] This natural barrier for agricultural pests and the fact that the CDFA has been successful in controlling many invasive pests after they arrived in California in the past provide hope for preventing the spread of HLB.[285] Successful CDFA programs include: the Curly Top Virus Control Program, which works to control the sugar beet leafhopper that spreads the virus to many important agricultural plants,[286] the Exotic Fruit Fly Projects, which have been successful at eliminating every infestation detected of the Mediterranean Fruit Fly that has the potential of destroying over 300 different types of fruit,[287] and the Light Brown Apple Moth Project which has suppressed and controlled a moth that kills apple trees.[288] Hopefully the CDFA's success in these types of programs can be duplicated in the Psyllid/HLB eradication program if HLB spreads beyond Hacienda Heights. The CDFA found a way to eliminate the invasive moths[289] and fruit flies while allowing people to use organic means.[290] An organic solution for the Psyllid problem in California would be the best solution in order to protect organic farmers while still protecting the citrus industry so that no farm looses their organic certification.[291]

Biological solutions such as *Tamarixia radiata*, a predatory wasp, have been proven to help control the population levels of the Psyllid.[292]

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[282] Interview with Tom Willey, *supra* note 110.
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] CAL. DEP'T OF FOOD & AGRIC., *Curley Top Virus: Program Details,* CDFA.CA.GOV, http://www.cdfa.ca.gov/plant/ipc/curlytopvirus/ctv_hp.htm (2012).
[287] CAL. DEP'T OF FOOD & AGRIC., *Mediterranean Fruit Fly Fact Sheet,* CDFA.CA.GOV (OCT. 23, 2008), http://www.cdfa.ca.gov/plant/factsheets/MedFlyFactSheet.pdf.
[288] CAL. DEP'T OF FOOD & AGRIC., *Light Brown Apple Moth Pest Profile*, CDFA.CA.GOV (Oct. 5, 2011), http://www.cdfa.ca.gov/plant/pdep/target_pest_disease_profiles/LBAM_PestProfile.html.
[289] UNIV. OF CAL. AGRIC. AND NATURAL RES, *Light Brown Apple Moth,* IPM.UCDAVIS.EDU (May 2009), http://www.ipm.ucdavis.edu/PMG/r302303011.html.
[290] CAL. DEP'T. OF FOOD & AGRIC., *Integrated Pest Management Analysis of Alternative Treatment Methods to Eradicate Mediterranean Fruit Fly,* CDFA.CA.GOV (Aug. 2012), http://www.cdfa.ca.gov/plant/pdep/treatment/alt-treatments/Medfly-alt-treatments.pdf.
[291] *See* 7 U.S.C.A. § 6504 (West 2012).
[292] *Natural Enemy for ACP*, *supra* note 202.

Before HLB may become an established problem in California, the CDFA could allow organic farmers to use biological controls if they are effective. Research shows that there is little to no environmental risk of the wasp and it may prove to be an organic solution to the Psyllid problem.[293]

VI. CONCLUSION

California stands to lose a great deal if it does not aggressively fight the spread of HLB.[294] Even if there is no organic alternative found, the CDFA may need to use its police power to eradicate the insect with non-organic means on organic farms. The Psyllid and HLB are serious problems, but that does not mean that organic farmers should bear the loss of damage done to their property without compensation. Florida case law presents the better precedent if organic citrus farmers file inverse condemnation suits for loss of certification. California courts should adopt this more narrow view of what a citrus nuisance is and provide compensation for organic farmers who suffer damage from a regulation that uses synthetic pesticides where there is not yet a nuisance present.[295] The damage to organic farmers may be an unfortunate result of the Psyllid and HLB eradication, but organic farmers should be compensated for this loss. Even if the CDFA regulations are correct in deeming uninfected trees within a designated radius of infected trees a public nuisance, there should still be a compensation plan put in place to reduce damage to organic farmers.

HLB is not an easy citrus disease to control. It has been found in multiple places in the world and none of those places have been completely successful in eliminating it once it becomes established.[296] With aggressive eradication and early detection California has a chance at fighting this problem. Florida was unable to stop the spread of HLB despite the FDACS working very hard to eradicate the Psyllid.[297] Only time will tell if California can stop the spread of HLB, saving it's citrus industry as we

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[293] See *id*.

[294] *See supra* discussion in Part I.

[295] *See supra* Part V.

[296] Susan E. Halbert & Keremane L. Manjunath, *Asian Citrus Psyllids (Sternorrhyndra: Psyllidae) and Greening Disease of Citrus: A Literature Review and Assessment of Risk in Florida*, 87(3) FLORIDA ENTOMOLOGIST, 253, 330 (2004), *available at* http://www.fcla.edu/FlaEnt/fe87p330.pdf.

[297] Richard Gaskalla, *Citrus Greening (Huanglongbing) Assessment*, FLA. DEP'T OF AGRIC. & CONSUMER SERV., (Oct. 31, 2005), http://www.freshfromflorida.com/pi/chrp/greening/hlbassessment10-05.pdf.

know it, while still protecting the interests of organic farmers in the process.

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