

No. _____

In the
Supreme Court of the United States

WILLIAM B. WALTON, et al.,

Petitioners,

v.

NESKOWIN REGIONAL SANITARY AUTHORITY,

Respondent.

**On Petition for Writ of Certiorari
to the Oregon Supreme Court**

**APPLICATION TO THE HONORABLE ELENA KAGAN
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO
THE OREGON SUPREME COURT**

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States, Circuit Justice for the Ninth Circuit, and encompassing states, including Oregon:

Pursuant to Supreme Court Rule 13.5, Petitioners William B. Walton, James Jefferson Walton, Jr., and Victoria K. Walton respectfully request an extension of time of 58 days to file their Petition for Writ of Certiorari in this Court up to and including October 18, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Walton v. Neskowin Regional Sanitary Authority*, 372 Or. 331 (2024) (attached as Exhibit 1). Petitioners did not seek rehearing. This means a Petition is presently due on August 21, 2024. This application for an extension of time is filed more than ten days prior to that date.

JURISDICTION

This case arises under the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, this case alleges the government took private property without just compensation. The lower court held that the case was barred by the statute of limitations because the time of the taking occurred while the owner had consented to the physical invasion. Petitioners allege the taking occurred later when both a *per se* physical occupation occurred and adversity was established between the parties. This Court has jurisdiction under 28 U.S.C. § 1257.

REASONS FOR GRANTING EXTENSION OF TIME

Good cause exists for the requested extension. Pacific Legal Foundation attorneys were just retained to represent the Waltons last week. Petitioner's Counsel of Record, Kathryn Valois, requires extra time to file a Petition in this case to fully review the entire record below, craft the petition, and meet other court deadlines. For example, since the Oregon Supreme Court issued its judgment, counsel has had oral argument at the Ninth Circuit in *Mendelson v. County of San Mateo*, No. 23-15494, and begun drafting a reply brief at this Court in *835 Hinesburg v. City of South Burlington*, No. 23-1045. Counsel also has forthcoming case obligations including filing another petition for writ of certiorari before this Court in *Lemon Bay Cove, LLC v. United States*, No. 23A1004, and filing an opening brief at the Ninth Circuit in *Iten v. Los Angeles County*, No. 24-2974. Moreover, Counsel has additional cases and professional obligations that require her time. Likewise, members of Petitioners' litigation team have a number of obligations in other cases. This is the Petitioners' first request for an extension of time.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant an extension of 58 days, up to and including October 18, 2024, within which to file a petition for writ of certiorari.

DATED: July 15, 2024.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kathryn D. Valois", is positioned above a horizontal line.

KATHRYN D. VALOIS

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CERTIFICATE OF SERVICE

A copy of this application was served via email and U.S. Mail to counsel listed below in accordance with Supreme Court Rules 22.2 and 29.3:

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Exhibit 1

Filed: May 23, 2024

IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAM B. WALTON, an individual;
JAMES JEFFERSON WALTON, JR.,
an individual; and VICTORIA K. WALTON, an individual,

Petitioners on Review,

v.

NESKOWIN REGIONAL SANITARY AUTHORITY,

Respondent on Review,

and

EVELYN A. HARRIS, Trustee of the Harris Living Trust et al.,

Defendants.

(CC 17CV10996) (CA A168358) (SC S069004)

On review from the Court of Appeals.*

Argued and submitted November 29, 2022.

Paul J. Sundermier, Saalfeld Griggs PC, Salem, argued the cause for petitioners on review. Jennifer C. Paul filed the brief. Also on the brief was Paul J. Sundermier.

Christopher T. Griffith, Haglund Kelley LLP, Portland, argued the cause and filed the brief for respondent on review. Also on the brief was Joshua J. Stellmon.

Kathryn D. Valois, Pacific Legal Foundation, Palm Beach Gardens, Florida, argued the cause for *amicus curiae* Pacific Legal Foundation. Christina M. Martin filed the brief.

Nicole M. Swift, Cable Huston LLP, Portland, argued the cause and filed the brief for *amici curiae* League of Oregon Cities, Association of Oregon Counties, and Special Districts Association of Oregon. Also on the brief were Clark I. Balfour and Nicole A.W. Abercrombie.

Before, Flynn, Chief Justice, and Duncan, Garrett, DeHoog, Bushong, James, and Masih, Justices.**

DUNCAN, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*Appeal from Tillamook County Circuit Court,
Jonathan R. Hill, Judge.
314 Or App 124, 498 P3d 325 (2021).

**Balmer, J., retired December 31, 2022, and did not participate in the decision of this case. Walters, J., retired December 31, 2022, participated at oral argument, but did not participate in the decision of this case. Nelson, J., resigned February 25, 2023, and did not participate in the decision of this case.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on Review.

No costs allowed.

Costs allowed, payable by: Petitioners on Review.

Costs allowed, to abide the outcome on remand, payable by:

1 DUNCAN, J.

2 In 2017, petitioners on review (plaintiffs) filed a complaint asserting an
3 inverse condemnation claim against respondent on review (defendant), a local sewer
4 authority. An inverse condemnation claim is a claim that a property owner can bring for
5 "just compensation" under the state and federal constitutions when a governmental entity
6 or its delegate has taken the owner's property for public use without instituting
7 condemnation proceedings.

8 Plaintiffs alleged that defendant had installed sewer lines on their property
9 and that the installation constituted a "taking" for which they were entitled to "just
10 compensation" under Article I, section 18, of the Oregon Constitution, and the Fifth
11 Amendment to the United States Constitution.¹ Defendant moved for summary
12 judgment, asserting that plaintiffs' claim was time barred because it was not brought
13 within the six-year limitations period established by ORS 12.080(3), which applies to
14 claims "for interference with or injury to any interest of another in real property."
15 According to defendant, plaintiffs' claim accrued when the sewer lines were installed,

¹ Article I, section 18, of the Oregon Constitution provides that "[p]rivate property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered[.]" The Fifth Amendment to the United States Constitution provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment's Takings Clause applies to the states through the Fourteenth Amendment. *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 131 n 7, 895 P2d 755 (1995) (citing *Nollan v. California Coastal Comm'n*, 483 US 825, 827, 107 S Ct 3141, 97 L Ed 2d 677 (1987)).

1 which was no later than 1995, and, therefore, the six-year limitations period expired in
2 2001, sixteen years before plaintiffs filed their complaint.

3 In response, plaintiffs made three arguments. First, they argued that,
4 because their takings claim was based on the takings clauses of the state and federal
5 constitutions, it could not be subject to a statute of limitations. Second, they argued that,
6 even if some types of takings claims -- specifically, "regulatory" takings claims -- can be
7 subject to statutes of limitations, claims like theirs -- which are "physical occupation"
8 takings claims -- cannot be. Third, they argued that, even if "physical occupation"
9 takings claims can be subject to statutes of limitations and ORS 12.080(3) applies, the
10 point at which their claim accrued was not when defendant installed the sewer lines, but
11 instead when defendant affirmatively denied plaintiffs "just compensation," which, they
12 alleged, occurred in 2014. Therefore, according to plaintiffs, the six-year limitations
13 period did not expire until 2020, three years after they filed their complaint.

14 The trial court granted defendant's motion and entered a judgment
15 dismissing plaintiffs' claim. Plaintiffs appealed, and the Court of Appeals affirmed.
16 *Walton v. Neskowin Regional Sanitary Authority*, 314 Or App 124, 126, 498 P3d 325
17 (2021). On plaintiffs' petition, we allowed review. For the reasons we explain below, we
18 hold that (1) plaintiffs' claim is subject to the six-year limitations period established by
19 ORS 12.080(3); (2) given the facts of this case, plaintiffs' claim accrued when defendant
20 installed the sewer lines; and (3) because plaintiffs did not initiate their claim within the
21 six-year limitations period, it is time barred. Therefore, we affirm the Court of Appeals'
22 decision and the trial court's judgment.

1 I. BACKGROUND

2 A. *Historical Facts*

3 When reviewing a trial court's ruling on a motion for summary judgment,
4 we view the summary judgment record in the light most favorable to the nonmoving
5 party, in this case, plaintiffs. *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336
6 Or 329, 332, 83 P3d 322 (2004). Viewed in that light, the relevant historical facts are as
7 follows.

8 Sometime before or during 1995, defendant, the Neskowin Regional
9 Sanitary Authority, installed two sewer lines on property that belonged to plaintiffs'
10 predecessor in interest, their father. According to plaintiffs, defendant "dug a trench in
11 [the] front yard and installed and buried a main sewer line and a feeder line." Defendant
12 did not have plaintiffs' father's permission to install the sewer lines, and it did not make
13 any payments to plaintiffs' father when it installed the lines.

14 Three years after the sewer lines were installed, plaintiffs' father made an
15 agreement with defendant about them. According to plaintiffs' complaint, "[o]n or
16 around November of 1998," defendant told their father that it needed an easement for the
17 sewer lines and their father granted defendant an easement "on the condition that"
18 defendant provide "a free hook-up to the [sewer system] when required." But defendant
19 "never prepared an easement document" and "never recorded an easement."

20 In 2014, defendant informed plaintiffs -- who, by that time, had acquired
21 the property from their father -- that the property's septic system had failed and they
22 needed to connect to the sewer system. Plaintiffs invoked the 1998 agreement and

1 requested a free connection to the sewer system. In an April 2014 letter, defendant
2 informed plaintiffs that it was denying their request.

3 B. *Procedural Facts*

4 In 2017, plaintiffs filed the complaint in this case, asserting an inverse
5 condemnation claim against defendant. As explained further below, an inverse
6 condemnation claim is a claim that a property owner can bring to obtain "just
7 compensation" when a governmental entity or its delegate has taken the owner's property
8 for public use without first initiating condemnation proceedings. *Dunn v. City of*
9 *Milwaukie*, 355 Or 339, 347, 328 P3d 1261 (2014) (so holding with respect to "just
10 compensation" under Article I, section 18, guarantees); *United States v. Clarke*, 445 US
11 253, 257, 100 S Ct 1127, 63 L Ed 2d 373 (1980) (so holding with respect to "just
12 compensation" under Fifth Amendment guarantees).

13 In their complaint, plaintiffs alleged that defendant had installed the sewer
14 lines on their property "without the legal acquisition of a part of the fee or an easement"
15 over the property and that the installation of the sewer lines constituted a "taking."
16 Plaintiffs further alleged that defendant is a "public sewer authority" with "statutorily
17 delegated authority to use the state's power of eminent domain to acquire real property
18 interests * * * pursuant to ORS 450.815(4)" and that defendant had installed the sewer
19 lines "for the public purpose of providing [defendant's] utility services."² Plaintiffs

² ORS 450.815(4) authorizes sanitary authorities to "[a]cquire by purchase, gift, devise, condemnation proceedings, or otherwise" real property necessary for the exercise of its powers.

1 asserted that, under Article I, section 18, and the Fifth Amendment, they were entitled to
2 "just compensation," which "is, at a minimum, the value of the * * * hook-up" to the
3 sewer system.

4 Regarding the timing of their complaint, plaintiffs asserted that, because
5 they were making "a direct claim for compensation under both constitutions as a *per se*
6 'physical invasion or occupation' * * * no state statute or court rule can limit the time
7 within which to bring an action for the remedy mandated by each constitutional
8 provision." In other words, plaintiffs asserted that their claim could not be subject to a
9 statute of limitations.

10 Plaintiffs' inverse condemnation claim was their only claim. Although
11 plaintiffs alleged that defendant had made an agreement with their father for a free
12 connection to the sewer system and that defendant had breached that agreement, plaintiffs
13 did not assert a contract or quasi-contract claim.

14 In its answer, defendant admitted that it is a public sewer authority with the
15 powers set out in ORS 450.815, that it had installed the sewer lines "on and under
16 property near or on Plaintiffs' property" no later than 1995, and that, in 2014, it had
17 informed plaintiffs that they needed to connect to the sewer system because the property's
18 septic tank had failed. Defendant denied all the other allegations in plaintiffs' complaint,
19 including the allegation that it had entered into an agreement with plaintiffs' father
20 regarding the sewer lines. Defendant raised several affirmative defenses and
21 counterclaims. As one affirmative defense, defendant asserted that, to the extent that
22 plaintiffs were relying on an oral agreement between defendant and their father, the

1 agreement was unenforceable due to the statute of frauds, ORS 41.580, which provides,
2 in part, that an agreement for the sale of an interest in real property is void unless written
3 and signed. As another affirmative defense, defendant asserted that plaintiffs had failed
4 to file their claim within the applicable statutory limitations period.

5 Thereafter, defendant moved for summary judgment on the ground that
6 plaintiffs' inverse condemnation claim was untimely. Defendant asserted that plaintiffs'
7 inverse condemnation claim was subject to ORS 12.080(3), which establishes a six-year
8 limitations period for actions "for interference with or injury to any interest of another in
9 real property." For support, defendant relied on two cases in which courts applied ORS
10 12.080(3) to takings claims. The first case was *Suess Builders v. City of Beaverton*, 294
11 Or 254, 268, 256, 656 P2d 306 (1982), where this court applied ORS 12.080(3) to a
12 "regulatory" takings claim in which the plaintiffs had alleged that the defendants had
13 "temporarily deprived them of the rental value of [their] property and caused a permanent
14 depression of its market value by designating the major part of the property as a future
15 park site in the city's comprehensive land use plan." The second case was *The Foster*
16 *Group, Inc. v. City of Elgin, Oregon*, 264 Or App 424, 441, 332 P3d 354 (2014), where
17 the Court of Appeals applied ORS 12.080(3) to a "physical occupation" takings claim in
18 which the plaintiffs had alleged that the defendant had constructed a road that encroached
19 on their property.

20 Defendant asserted that there was no dispute about the facts relevant to its
21 summary judgment motion, specifically, that plaintiffs had alleged an inverse
22 condemnation claim based on the installation of the sewer lines, that the lines were

1 installed no later than 1995, and that plaintiffs did not file their complaint until 2017.
2 Defendant contended that the six-year limitations period began to run no later than 1995
3 and, therefore, expired in 2001, sixteen years before plaintiffs filed their complaint.

4 Plaintiffs filed a response to defendant's summary judgment motion. They
5 did not dispute the facts that defendant had identified as relevant to its motion, but they
6 made three alternative arguments against the motion.

7 First, plaintiffs argued that, because takings claims are based on
8 constitutional provisions, they cannot be subject to any statutory limits, including
9 statutory time limits. They contended that "the legislature cannot pass statutes that
10 contravene the constitution, nor should the courts enforce [such] statutes[.]"

11 Second, plaintiffs argued that, even if some types of inverse condemnation
12 claims, like the "regulatory" takings claim in *Suess Builders*, are subject to ORS
13 12.080(3), "physical occupation" takings claims are not. Thus, plaintiffs contended,
14 *Suess Builders* was not controlling. They also argued that, although *Foster* involved a
15 "physical occupation" taking, the parties in that case did not dispute whether the six-year
16 limitations period under ORS 12.080(3) applied.

17 Third, plaintiffs argued that, even if "physical occupation" takings claims
18 are subject to ORS 12.080(3), the statute's six-year limitations period does not begin to
19 run until "the putative condemner refuses to pay just compensation after taking private
20 property for a public use." Therefore, according to plaintiffs, the limitations period for
21 their claim did not begin to run until defendant affirmatively denied plaintiffs "just
22 compensation" in the April 2014 letter.

1 After a hearing, the trial court granted defendant's summary judgment
2 motion. The trial court held that plaintiffs' claim was subject to the six-year limitations
3 period established by ORS 12.080(3) and that it accrued when the sewer lines were
4 installed, which was no later than 1995. Therefore, the six-year limitations period
5 expired in 2001, sixteen years before plaintiffs filed their complaint in 2017. The trial
6 court entered a limited judgment dismissing plaintiffs' inverse condemnation claim.³ It
7 later entered a supplemental judgment with a money award in defendant's favor.

8 Plaintiffs appealed both judgments. On appeal, the parties renewed the
9 arguments they had made in the trial court. The Court of Appeals affirmed on the ground
10 that, as the trial court had concluded, plaintiffs' inverse condemnation claim was time
11 barred. *Walton*, 314 Or App at 126. Plaintiffs petitioned for review, which we allowed.

12 II. DISCUSSION

13 We begin our discussion, in Section A, with an overview of the relevant
14 law: the law regarding a government's power of eminent domain; the state and federal
15 constitutional limits on that power, specifically, Article I, section 18, and the Fifth
16 Amendment, which require a government to pay "just compensation" for property that it

³ Although plaintiffs' inverse condemnation claim was their only claim, defendant raised counterclaims. The trial court's limited judgment dismissing plaintiffs' claim was authorized by ORCP 67B, which provides, "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, * * * the court may render a limited judgment as to one or more but fewer than all of the claims[.]" The limited judgment resolved plaintiffs' claim and made it possible for plaintiffs to appeal the trial court's summary judgment ruling while the parties continued to litigate defendant's counterclaims, which they did for a time before agreeing to stay the proceedings pending resolution of plaintiffs' appeal.

1 takes through an exercise of the power of eminent domain; and the processes through
2 which a property owner can obtain "just compensation." Then, in Section B, we apply
3 that law to address plaintiffs' three alternative arguments for why their inverse
4 condemnation claim is timely. For the reasons that we will explain, those arguments are
5 unavailing. Inverse condemnation claims, including those based on "physical
6 occupation" takings, can be subject to statutes of limitations, and plaintiffs' claim is
7 subject to ORS 12.080(3), which establishes a six-year limitations period. That period
8 began to run for plaintiffs' claim when the sewer lines were installed in 1995 and expired
9 in 2001. Therefore, plaintiffs' 2017 complaint was untimely.

10 A. *Relevant Law*

11 The state and federal governments have the power of eminent domain,
12 which is the power to take private property for public use without the property owner's
13 consent. *Dunn*, 355 Or at 346; *PennEast Pipeline Co. v. New Jersey*, 594 US 482, 487,
14 141 S Ct 2244, 210 L Ed 2d 624 (2021) ("Eminent domain is the power of the
15 government to take property for public use without the consent of the owner."). "The
16 power of eminent domain requires no grant of authority for its exercise, but instead is an
17 inherent attribute of sovereignty." *Dunn*, 355 Or at 346; *Georgia v. Chattanooga*, 264
18 US 472, 480, 44 S Ct 369, 68 L Ed 796 (1924) ("The power of eminent domain is an
19 attribute of sovereignty, and inheres in every independent State.").

20 The power of eminent domain is limited by the state and federal
21 constitutions. Article I, section 18, and the Fifth Amendment each provide that private
22 property shall not be taken for public use without "just compensation." *Dunn*, 355 Or at

1 347; *United States v. Carmack*, 329 US 230, 241-42, 67 S Ct 252, 91 L Ed 209 (1946).

2 This case involves the physical occupation of property. A government can
3 exercise its power of eminent domain to physically take property in two ways. *Dunn*,
4 355 Or at 347; *United States v. Dow*, 357 US 17, 21, 78 S Ct 1039, 2 L Ed 1109 (1958).
5 It can initiate condemnation proceedings, through which the amount of compensation due
6 to the owner is determined and a court order awarding the property to the government can
7 be obtained, or it can physically occupy the property without a court order. *Dunn*, 355 Or
8 at 347; *Dow*, 357 US at 21.

9 Usually, a government exercises its eminent domain power by initiating
10 condemnation proceedings before taking property. *Dunn*, 355 Or at 347; *Cereghino et al*
11 *v. State Highway Com.*, 230 Or 439, 443-44, 370 P2d 694 (1962) ("Ordinarily, when the
12 state takes private property for a public use and it cannot agree with the owner on the
13 value of the property, it institutes a condemnation proceeding in which the amount of just
14 compensation is determined and a judgment therefor entered in favor of the property
15 owner."); *First Lutheran Church v. Los Angeles County*, 482 US 304, 316, 107 S Ct
16 2378, 96 L Ed 2d 250 (1987) (observing that "the typical taking occurs when the
17 government acts to condemn property in the exercise of its power of eminent domain").
18 Such proceedings are sometimes referred to as "direct" condemnation proceedings.
19 *Knick v. Township of Scott*, 588 US 180, 186, 139 S Ct 2162, 204 L Ed 2d 558 (2019).

20 In some circumstances, a government exercises its power of eminent
21 domain by taking property without initiating condemnation proceedings. *Dunn*, 355 Or
22 at 347 (explaining that the power of eminent domain can be exercised *de jure* or *de*

1 *facto*). Those circumstances include, for example, circumstances where the government
2 physically occupies property that it mistakenly believes that it owns and circumstances
3 where the government's actions on its own property result in the "destruction, restriction,
4 or interruption of the common and necessary use and enjoyment" of a neighboring
5 property. *Morrison v. Clackamas County*, 141 Or 564, 568, 18 P2d 814 (1933); *see, e.g.*,
6 *Cereghino*, 230 Or at 443 (collection of surface water and dirt on the plaintiff's property
7 caused by the state highway commission's relocation of a highway constituted a taking);
8 *Morrison*, 141 Or at 569 (the plaintiff's complaint, alleging that the county's construction
9 of a jetty diverted river flow onto the plaintiff's property, causing the property's
10 "destruction," stated a cause of action for a taking).

11 When a government takes property without initiating a condemnation
12 proceeding, the property owner can bring an inverse condemnation claim. "An 'inverse
13 condemnation' claim is any claim against a governmental agency to recover the value of
14 property taken by the agency although no formal exercise of the power of eminent
15 domain has been completed by the taking agency." *West Linn Corporate Park v. City of*
16 *West Linn*, 349 Or 58, 64, 240 P3d 29 (2010) (internal quotation marks omitted); *Knick*,
17 588 US at 186 (an inverse condemnation claim is a claim "'against a governmental
18 defendant to recover the value of property which has been taken in fact by the
19 governmental defendant'" (quoting *Clarke*, 445 US at 257)).

20 The term "inverse condemnation" is not a constitutional or statutory term.
21 *Suess Builders*, 294 Or at 258 n 3; *Clarke*, 445 US at 257. Instead, it is a "popular" or
22 "shorthand" description of a claim to recover the value of property that has been taken

1 through an exercise of the power of eminent domain outside of a direct condemnation
2 proceeding. *Thornburg v. Port of Portland*, 233 Or 178, 180 n 1, 376 P2d 100 (1963)
3 ("Inverse condemnation is the popular description of a cause of action against a
4 governmental defendant to recover the value of property which has been taken in fact by
5 the governmental defendant, even though no formal exercise of the power of eminent
6 domain has been attempted by the taking agency."); *Clarke*, 445 US at 257 (The term
7 "'inverse condemnation' appears to be one that was coined simply as a shorthand
8 description of the manner in which a landowner recovers just compensation for a taking
9 of his property when condemnation proceedings have not been instituted.").

10 "[I]nverse condemnation" simply describes a proceeding that "is the
11 'inverse' or 'reverse' of a condemnation proceeding." *Clarke*, 445 US at 257; *see also City*
12 *of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 429, 60 P3d 557 (2002).
13 An inverse condemnation claim is denominated as "inverse" because "the taking occurs
14 before the initiation of condemnation proceedings, which is the inverse of the ordinary
15 sequence of events when a governmental entity exercises its power of eminent domain."
16 *City of Keizer*, 185 Or App at 429. Thus, *condemnation proceedings* are brought by
17 governmental entities before taking property, whereas *inverse condemnation proceedings*
18 are brought by property owners after a governmental entity has taken property. The two
19 types of proceedings differ both in who initiates them and when they are initiated.

20 "Actions to recover compensation for such a governmental taking long
21 preceded the ['inverse condemnation'] label." *Suess Builders*, 294 Or at 258 n 3 (citing,
22 *e.g., Morrison*, 141 Or 564); *Morrison*, 141 Or at 575 (holding that, where county's

1 construction of a jetty diverted river water onto the plaintiff's property, the plaintiff's
2 complaint seeking "just compensation" under Article I, section 18, stated a cause of
3 action).

4 A property owner can bring an inverse condemnation claim even if the
5 legislature has not provided for such a claim. *Morrison*, 141 Or at 574. As this court has
6 observed, "[i]t is the general rule, except where an exclusive remedy has been provided
7 by statute, [that] the owner of property, appropriated or injured for a public use without
8 just compensation having been made, may maintain an action at law for the damages
9 sustained thereby." *Id.* Such an action is distinct from a tort action, from which a
10 government may be immune. *Id.* ("We recognize the rule, * * * that a county of the state
11 of Oregon is not liable for ordinary torts or for the wrongful acts or omissions of its
12 officers, servants, or employees unless made so by statute or some constitutional
13 provision. But the present case [alleging flooding of the plaintiff's land], we think,
14 plainly comes within the provisions of the constitution ordaining that private property
15 shall not be taken for public use without just compensation and, therefore, the county is
16 made liable." (Citations omitted.)).

17 An inverse condemnation claim may be brought against "the state itself" or
18 "one of its lawfully constituted agencies, such as a county, a school district, the State Fish
19 and Game Commission, or the State Highway Department." *Tomasek v. Oregon*
20 *Highway Com'n*, 196 Or 120, 147, 248 P2d 703 (1952); *Loretto v. Teleprompter*
21 *Manhattan CATV Corp.*, 458 US 419, 432 n 9, 102 S Ct 3164, 73 L Ed 2d 868 (1982)
22 ("A permanent physical occupation authorized by state law is a taking without regard to

1 whether the State, or instead a party authorized by the State, is the occupant.").

2 "Successful litigation [of an 'inverse condemnation' claim] against the
3 governmental agency is a factual determination that there has been a 'taking' and in effect
4 forces the governmental agency to purchase the interest taken." *Hawkins v. City of La*
5 *Grande*, 315 Or 57, 67, 843 P2d 400 (1992) (quoting *Restatement (Second) of Property* §
6 8.1 comment d (1997)). "The dispositive issue, then, in an inverse condemnation claim is
7 whether property was taken, in fact, by the government even though no formal eminent
8 domain proceedings were initiated." *Dept. of Transportation v. Hewett Professional*
9 *Group*, 321 Or 118, 131, 895 P2d 755 (1995) (italics omitted).

10 There is no unitary test for what constitutes a "taking" of property under
11 either Article I, section 18, or the Fifth Amendment. *Dunn*, 355 Or at 348-49. Because
12 of the "nearly infinite variety of ways in which government actions or regulations can
13 affect property interests," there is "no magic formula" that "enables a court to judge, in
14 every case, whether a given government interference with property is a taking."
15 *Arkansas Game and Fish Comm'n v. United States*, 568 US 23, 31, 133 S Ct 511, 184 L
16 Ed 2d 417 (2012). But all takings of property involve the appropriation of the property
17 without the consent of the owner. *Dunn*, 355 Or at 346; *PennEast Pipeline Co.*, 594 US
18 at 487.

19 Although there is no unitary test for what constitutes a taking, both this
20 court and the United States Supreme Court have drawn some bright lines. This court has
21 "consistently found a taking when government has intentionally authorized a physical
22 occupation of private property that substantially has interfered with the owner's rights of

1 exclusive possession and use." *Dunn*, 355 Or at 348 (so stating regarding Article I,
2 section 18). Similarly, the Supreme Court has ruled that "a permanent physical
3 occupation of property authorized by the government is a taking." *Arkansas Game and*
4 *Fish Comm'n*, 568 US at 31 (so ruling regarding the Fifth Amendment). Thus, "[i]f the
5 nature of the governmental intrusion amounts to a 'permanent physical occupation of
6 property,' the inquiry ends, regardless of 'whether the action achieves an important public
7 benefit or has only minimal economic impact on the owner.'" *GTE Northwest, Inc. v.*
8 *Public Utility Commission*, 321 Or 458, 469, 900 P2d 495 (1995) (quoting *Loretto*, 458
9 US at 434-35 (so ruling under the Fifth Amendment)); *see, e.g., Loretto*, 458 US at 438
10 (holding that television company's installation of cable lines on the plaintiff's apartment
11 building constituted a taking).⁴

12 A government can acquire private property for public use without "taking"
13 the property, that is, without appropriating the property without the consent of the owner.
14 For example, a government can negotiate with a property owner to purchase property, in
15 which case the government has not "taken" the property because it has acquired the
16 property with the owner's consent. *Woodward Lbr. Co. v. Un. Comp. Com.*, 173 Or 333,

⁴ As explained, a permanent physical occupation of private property is a taking. The Court of Appeals has had the opportunity to apply that rule to the installation of sewer lines. *See Courter v. City of Portland*, 286 Or App 39, 48, 398 P3d 936 (2017) (stating that "if the city's pipes are occupying plaintiffs' property" outside the scope of the city's easement, "there has been a taking" for the purposes of Article I, section 18); *Ferguson v. City of Mill City*, 120 Or App 210, 214-15, 852 P2d 205 (1993) (holding that ordinance that required city property owners to grant city an easement for sewer lines and tanks was a taking for the purposes of Article I, section 18).

1 338, 145 P2d 477 (1944) (holding that where property owner and federal government
2 agreed upon purchase price and sale of property after the government threatened to
3 exercise its power of eminent domain, the property was acquired by "purchase" and not
4 by "eminent domain"); *see also In re Estate of Moore*, 190 Or 63, 67, 223 P2d 393 (1950)
5 (rejecting argument that Article I, section 18, precludes the government's receipt of
6 property by will or gift because Article I, section 18, applies only "to a 'taking' under the
7 power of eminent domain, and has nothing whatever to do with taking of title to real
8 property by devise"); *Janowsky v. U.S.*, 23 Cl Ct 706, 712-13 (1991), *rev'd and vac'd in*
9 *part on other grounds*, 989 F2d 1203 (Fed Cir 1993) (collecting cases and observing that
10 "when a citizen delivers property to the government pursuant to an agreement, an inverse
11 condemnation claim does not arise simply because the government does not pay; the
12 property owner's consent to the arrangement vitiates a claim that the government took the
13 property for public use within the meaning of the Fifth Amendment"); *see, e.g., id.* at
14 711-12 (property owners' allegations that FBI breached an implied-in-fact contract to
15 compensate owners for use of their property during an undercover investigation failed to
16 state a claim for inverse condemnation because owners had freely agreed to allow the FBI
17 to use their property; property owners' claim was contractual in nature). Thus, not all
18 government acquisitions of property for a public use result from an exercise of the
19 government's eminent domain power. Consequently, not all government acquisitions of
20 property for a public use are subject to Article I, section 18, and the Fifth Amendment.
21 To prevail on a takings claim, a plaintiff must show that their property was "taken," that
22 is, that their property was appropriated for a public purpose through the exercise of

1 eminent domain authority.

2 B. *Responses to Plaintiffs' Arguments*

3 In this case, plaintiffs brought an inverse condemnation claim, and the issue
4 on review is whether their claim is time barred. As mentioned, plaintiffs have made three
5 alternative arguments regarding that issue: (1) inverse condemnation claims cannot be
6 subject to statutes of limitations; (2) even if some types of inverse condemnation claims,
7 like the "regulatory" takings claim at issue in *Suess Builders*, can be subject to statutes of
8 limitations, "physical occupation" takings claims cannot; and (3) even if "physical
9 occupation" takings claims can be subject to statutes of limitations and the six-year
10 limitations period established by ORS 12.080(3) applies to them, the period does not
11 begin until "the putative condemner refuses to pay just compensation after taking private
12 property for a public use." We address those arguments in turn.⁵

13 1. *Whether inverse condemnation claims can be subject to statutes of*
14 *limitations*

15 Plaintiffs' first argument is that inverse condemnation claims cannot be
16 subject to statutes of limitations because they are constitutional claims. That argument is
17 unavailing for three reasons: (1) both this court and the Supreme Court have already
18 subjected takings claims to statutes of limitations; (2) Article I, section 18, is based on the

⁵ As recounted, in the trial court and Court of Appeals, plaintiffs made three arguments. We allowed review to address plaintiffs' third argument, relating to when an inverse condemnation claim accrues. However, because plaintiffs' three arguments are related and were fully litigated below, we address all three of them. See ORAP 9.20(2) (providing that the Oregon Supreme Court may consider issues that were before the Court of Appeals).

1 Indiana Constitution's Takings Clause and, prior to the adoption of the Oregon
2 Constitution, the Indiana Supreme Court had held that that clause could be subject to
3 statutory requirements; and (3) this court has long held that Article I, section 18, claims
4 can be subject to statutory limits.

5 First, plaintiffs' argument that, because state and federal takings claims are
6 based on constitutional provisions, they cannot be subject to statutes of limitations, is at
7 odds with decisions by this court and the Supreme Court. As mentioned, in *Suess*
8 *Builders*, this court held that the six-year limitations period established by ORS 12.080(3)
9 applied to a takings claim. *Suess Builders*, 294 Or at 268. Similarly, in *United States v.*
10 *Dickinson*, 331 US 745, 747, 67 S Ct 1382, 91 L Ed 1789 (1947), the Supreme Court
11 applied a six-year limitations period to the plaintiff's federal takings claim. *See* 28 USC §
12 1491(a)(1) (Court of Federal Claims has jurisdiction to "render judgment upon any claim
13 against the United States founded either upon the Constitution" or any federal law, or for
14 contract damages "in cases not sounding in tort"); *Knick*, 588 US at 189 (observing that
15 28 USC section 1491(a)(1) "provides the standard procedure" for bringing Fifth
16 Amendment takings claims against the federal government); 28 USC § 2501 (claims
17 brought under 28 USC section 1491(a)(1) are "barred unless the petition thereon is filed
18 within six years after such claim first accrues").⁶

⁶ We note that Congress has imposed statutes of limitations on other constitutional rights. *See* 28 USC § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court."); 28 USC § 2255(f) ("A 1-year period of limitation shall

1 Second, as to Article I, section 18, plaintiffs' argument is contradicted by a
2 case decided by the Indiana Supreme Court, which construed the Takings Clause of the
3 Indiana Constitution of 1851, on which Article I, section 18, was based: *New Albany &*
4 *S.R. Co. v. Connelly*, 7 Ind 32 (1855), *overruled in part on other grounds by Graham v.*
5 *Columbus & I.C. Ry. Co.*, 27 Ind 260 (1866). Because *New Albany* was decided before
6 the adoption of the Oregon Constitution, it informs our construction of Article I, section
7 18. *Putnam v. Douglas Co.*, 6 Or 328, 331 (1877), *overruled in part on other grounds by*
8 *State Highway Com. v. Bailey et al*, 212 Or 261, 319 P2d 906 (1957) ("The provisions
9 contained in our constitution and statute in relation to the taking of private property for
10 public use appear to have been taken from the Indiana Constitution and statute; and,
11 having adopted them after they had been judicially construed by the courts of that state, it
12 must be presumed that we adopted along with them the construction of those courts.").⁷

apply" to a motion to vacate, set aside, or correct a federal sentence by a person in federal custody.). The Oregon State Legislature has done the same. *See* ORS 147.515(1) ("A victim who wishes to allege a violation of a right granted to the victim in a criminal proceeding by Article I, section 42 or 43, of the Oregon Constitution, shall inform the court within 30 days of the date the victim knew or reasonably should have known of the facts supporting the allegation.").

⁷ Indiana decisions that predate the adoption of Oregon's constitutional Takings Clause are relevant to our analysis because Article I, section 18 -- formerly Article I, section 19, under the Oregon Constitution of 1857 -- was derived from Article I, section 21, of the Indiana Constitution of 1851. Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 -- Part I (Articles I & II)*, 37 Willamette L Rev 469, 486 (2001). *Compare* Or Const, Art I, § 19 (1857) ("Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in case of the State, without such compensation first assessed and tendered."), *with* Ind Const, Art I, § 21 (1851) ("No

1 In *New Albany*, the Indiana Supreme Court held that a statute that
2 prescribed procedures for bringing a claim for "just compensation" under the Indiana
3 Constitution was enforceable, stating that "where the statute pointed out a special
4 constitutional mode for the assessment of damages, in cases like the present, none but
5 that mode could be adopted to recover them." 7 Ind at 35. In doing so, the Indiana
6 Supreme Court relied on *Null v. White Water Valley Canal Co.*, 4 Ind 431 (1853), in
7 which it had held that a property owner's claim for compensation under the Indiana
8 Constitution of 1816 was time barred because it was not brought within a statutorily
9 prescribed two-year limitations period. *New Albany*, 7 Ind at 35 (citing *Null*, 4 Ind 431).

10 In *Null*, the court held that the legislature "had power to enact" the statute
11 of limitations and commented that "two years is a reasonable time for asserting a claim
12 for damages [and] a party is not necessarily entitled to any more." 4 Ind at 435.
13 Applying that conclusion, the court held that, if a claim "is not asserted in that time, it
14 shall be disregarded." *Id.* at 435.

man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.").

Article I, section 21, of the Indiana Constitution of 1851 was, in turn, an amended version of the takings provision contained in the Indiana Constitution of 1816. *See* Ind Const, Art I, § 7 (1816) ("[N]o man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives or without just compensation being made therefor."); *see also State v. Cookman*, 324 Or 19, 28, 920 P2d 1086 (1996) (relying on an Indiana Supreme Court decision construing the meaning of a clause in the Indiana Constitution of 1816 to inform the meaning of the parallel clause in the Oregon Constitution of 1857).

1 Thus, *New Albany* contradicts plaintiffs' argument that the legislature
2 cannot impose statutory requirements -- like limitations periods -- on constitutional
3 claims for "just compensation" under Article I, section 18. It shows that, prior to the
4 adoption of the Oregon Constitution, the Indiana Supreme Court had held that the Indiana
5 Constitution's Takings Clause on which the Oregon Constitution's Taking Clause was
6 based could be subject to statutory requirements. *New Albany*, 7 Ind at 35; *see also Null*,
7 4 Ind at 435 (so holding under the Indiana Constitution of 1816); *Nelson v. Fleming*, 56
8 Ind 310, 321 (1877) ("[W]here a party whose land had been appropriated to the [state]
9 failed to file his application for damages within the time thus limited, he must be
10 regarded as having waived any claim for damages, and that upon the lapse of the time
11 limited, no such claim for damages having been filed, the title to the land appropriated
12 vested in the State as thoroughly and completely as if damages had been assessed and
13 paid.").⁸

14 Third, also as to Article I, section 18, plaintiffs' argument that the
15 legislature may not impose statutory requirements on constitutional takings claims is
16 contrary to our cases holding that property owners seeking compensation under Article I,
17 section 18, must comply with statutes that prescribe the processes for obtaining such
18 compensation. *Kendall v. Post*, 8 Or 141 (1879), is illustrative. In *Kendall*, a property

⁸ Because *Nelson* was decided after the adoption of the Oregon Constitution, it is not evidence of the Oregon drafters' intent regarding Article I, section 18, but it confirms our understanding of *New Albany* and *Null*, which are relevant to the Oregon drafters' intent.

1 owner sought compensation for rocks and stone that a county road supervisor had taken
2 from the owner's land. *Id.* at 143-44. The road supervisor was authorized by statute to
3 take private property for road building and repair. General Laws of Oregon, Crim Code,
4 ch L, § 28, p 728 (Deady & Lane 1843-1872). If the road supervisor took a person's
5 property, the person could seek compensation through a process prescribed by a statute,
6 specifically, by making a written complaint "to the county court, at any regular meeting
7 within six months after the cause of such complaint shall exist." *Kendall*, 8 Or at 145
8 (quoting General Laws of Oregon, Crim Code, ch L, § 29, p 729 (Deady & Lane 1843-
9 1872)). The property owner argued that the statute was unconstitutional because it did
10 not provide for a jury trial regarding the amount of compensation. *Id.* at 146. This court
11 rejected that argument, distinguishing between claims for compensation under Article I,
12 section 18, and civil claims, to which the Article I, section 17, right to a jury trial applies.
13 *Id.* at 146. Regarding claims for compensation under Article I, section 18, this court held
14 that, "in the absence of special provision in the organic law, giving the right to have a
15 jury assess the damages, it is competent for the legislature to provide for assessments by
16 any other just mode," and that, if the property owner "felt aggrieved by the acts of the
17 supervisor, he should have applied to the county court, composed of the county judge and
18 the county commissioners, while transacting the county business." *Id.* (internal quotation
19 marks omitted); *see also Branson v. Gee*, 25 Or 462, 466-68, 36 P 527 (1894) (holding
20 that, under Article I, section 18, the state could appropriate private property for public use
21 "without compensation first assessed and tendered, but it must make provision by which
22 the party whose property has been seized can obtain just compensation for it" and that

1 property owner had to comply with statutory procedures for seeking compensation); *id.* at
2 467 (holding that statutory procedures did not violate federal Due Process Clause, even
3 though the property owner bore the burden of initiating them); *Cherry v. Lane County*, 25
4 Or 487, 489, 36 P 531 (1894) (following *Branson* and holding that property owner
5 aggrieved by exercise of eminent domain had to submit their claim to the circuit court as
6 required by statute). Thus, this court has long held that claims for compensation under
7 Article I, section 18, may be subject to statutory requirements.⁹

8 2. *Whether "physical occupation" takings claims can be subject to statutes of*
9 *limitations*

10 Plaintiffs' second argument is that, even if some types of takings claims --
11 like the "regulatory" takings claim in *Suess Builders* -- can be subject to a statute of
12 limitations, "physical occupation" takings claims cannot. Plaintiffs are correct that *Suess*
13 *Builders* addressed a "regulatory" takings claim; the issue was whether the defendants
14 had taken the plaintiffs' property by designating part of it as the site of a future park.
15 Plaintiffs are also correct that, under the law, "physical occupation" takings and
16 "regulatory" takings are treated differently in some ways. For example, what a plaintiff
17 must show to establish a "physical occupation" taking differs from what must be shown

⁹ In arguing otherwise, plaintiffs rely on *Morrison* and *Tomasek*, but those cases are not on point. They did not involve whether the state may impose procedural requirements on takings claims. In *Morrison*, this court held that, although a county may be immune from tort liability, Article I, section 18, requires it to pay "just compensation" for property taken in an exercise of eminent domain. 141 Or at 574. In *Tomasek*, this court held that a property owner's constitutional right to "just compensation" does not depend on whether the state has failed or refused to institute direct condemnation proceedings; a property owner may bring an inverse condemnation claim. 196 Or at 147.

1 in a "regulatory" takings case. *See Hall v. Dept. of Transportation*, 355 Or 503, 511-12,
2 326 P3d 1165 (2014) (observing that, under Article I, section 18, a "physical occupation"
3 taking results "when a governmental actor physically occupies private property or
4 invades a private property right in a way that substantially interferes with the owner's use
5 and enjoyment of the property, thereby reducing its value," and that a "regulatory" taking
6 can result when (1) a government regulation "restricts a property owner's right of
7 possession, enjoyment, and use," and that, as a result, "the property retains no
8 economically viable or substantial beneficial use"; or (2) a government zoning or
9 planning action reduces the property's value, and the property owner "'is precluded from
10 all economically feasible private uses pending eventual taking for public use,'" or "'the
11 designation results in such governmental intrusion as to inflict virtually irreversible
12 damage.'" (quoting *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 614, 581 P2d 50
13 (1978))); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,
14 535 US 302, 322-23, 122 S Ct 1465, 152 L Ed 2d 517 (2002) (observing that, under the
15 Fifth Amendment, whether the government's physical occupation constitutes a taking
16 "involves the straightforward application of *per se* rules," but whether the government's
17 regulation constitutes a taking "'necessarily entails complex factual assessments of the
18 purposes and economic effects'" (quoting *Yee v. Escondido*, 503 US 519, 523, 112 S Ct
19 1522, 118 L Ed 2d 153 (1992)). But plaintiffs are incorrect that "physical occupation"
20 takings claims cannot be subject to statutes of limitations.

21 As noted, the Supreme Court has applied statutes of limitations to "physical
22 occupation" takings claims. *Dickinson*, 331 US as 747.

1 As for Article I, section 18, as just discussed, prior to the adoption of the
2 Oregon Constitution, the Indiana Supreme Court held that claims for "just compensation"
3 could be subject to statutory requirements, including statutes of limitations. Those cases
4 involved physical occupation and appropriation of private property for public use. In
5 *New Albany*, the alleged taking was the construction of a railroad on the claimant's
6 property, and, in *Null*, the alleged taking involved the construction of a canal through the
7 plaintiffs' property and the diversion of the plaintiffs' water. *New Albany*, 7 Ind at 33;
8 *Null*, 4 Ind at 432. Thus, prior to the adoption of the Oregon Constitution, the Indiana
9 Supreme Court applied statutory requirements to "physical occupation" takings claims.

10 Similarly, the Oregon cases in which this court held that the plaintiffs had
11 to comply with statutory requirements when seeking "just compensation" under Article I,
12 section 18, include cases involving the physical appropriation of property. *Kendall*
13 involved the removal of gravel and dirt from the plaintiff's property for road construction
14 and repair, as did *Branson* and *Cherry*. *Kendall*, 8 Or at 143; *Branson*, 25 Or at 462;
15 *Cherry*, 25 Or at 488. In those cases, property was literally taken by the government, and
16 this court held that the property owners had to comply with the statutory procedures for
17 seeking compensation.

18 In light of *Dickinson*, and the Indiana and Oregon cases upholding the
19 application of statutory requirements on takings claims involving the physical occupation
20 and appropriation of property, we reject plaintiffs' argument that such claims cannot be
21 subject to statutes of limitations. Consequently, we conclude that ORS 12.080(3) applies
22 to "physical occupation" takings claims.

1 3. *Whether the limitations period on a takings claim does not begin to run*
2 *until a government entity refuses or ignores a request for compensation*

3 Plaintiffs' third argument is that, even if takings claims based on the
4 physical occupation of property can be subject to a statute of limitations, the limitations
5 period does not begin to run "until the entity with the power of eminent domain refuses to
6 pay or ignores a demand for compensation for what it took."

7 A limitations period begins to run when a claim accrues. ORS 12.010
8 (requiring actions to be commenced within limitations periods "after the cause of action
9 shall have accrued"). Under Oregon law, the general rule is that a claim accrues when a
10 plaintiff "has a right to sue on it." *Duyck v. Tualatin Valley Irrigation Dist.*, 304 Or 151,
11 161, 742 P2d 1176 (1987). That is, a claim accrues when all the facts necessary to prove
12 the claim exist. *U.S. Nat'l Bank v. Davies*, 274 Or 663, 666-67, 548 P2d 966 (quoting
13 Michael Franks, *Limitation of Actions* 11 (1959)). Similarly, under federal law, a claim
14 accrues when a plaintiff has "a complete and present cause of action," meaning that "the
15 plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension*
16 *Trust Fund v. Ferbar Corp. of Cal.*, 522 US 192, 201, 118 S Ct 542, 139 L Ed 2d 553
17 (1997) (internal quotation marks omitted).¹⁰ As we will explain, under both the state and
18 federal constitutions, a property owner may bring a "physical occupation" takings claim
19 when the physical occupation occurs. However, the reasons why an owner may bring

¹⁰ In addition to the general rule, there is a discovery accrual rule, which applies to some claims. As discussed later in this opinion, we need not decide whether plaintiffs' inverse condemnation claim is subject to a discovery accrual rule. *See* ___ Or at ___ n 11 (slip op at 29 n 11).

1 such a claim at that point differ under state and federal law.

2 Under the Oregon Constitution, a property owner has a right to "just
3 compensation," but not necessarily at the time that their property is taken. Again, Article
4 I, section 18, provides, "[p]rivate property shall not be taken for public use, nor the
5 particular services of any man be demanded, without just compensation; nor except in the
6 case of the state, without such compensation first assessed and tendered[.]" Thus, Article
7 I, section 18, does not require the state to pay for property before taking it for a public
8 use. Instead, as this court has explained, the state may appropriate property "without
9 compensation being first assessed and tendered, but it must make provision by which the
10 party whose property has been seized can obtain just compensation for it." *Branson*, 25
11 Or at 466; *see also Tomasek*, 196 Or at 147 ("[T]he assessment and tender of just
12 compensation is not a condition precedent to a taking. The taking may occur and the
13 amount of compensation be determined and paid later."); *Branson*, 25 Or at 467 (holding
14 that statutes that established procedure for compensation after taking did not violate
15 Article I, section 18, because the state "is not bound to make or tender compensation
16 before [the] actual appropriation [of private property]," and the provisions of the statutes
17 "afford[] an opportunity for the party aggrieved, whose property has been taken by the
18 [state], to propound his claim for compensation").

19 The state can delegate its eminent domain authority to other governmental
20 entities, and when it does, its delegates are also allowed to take property for public use
21 without first paying "just compensation." *Baker County v. Benson*, 40 Or 207, 215, 66 P
22 815 (1901) ("When the property is taken directly by the state, or by any municipal

1 corporation by state authority, it has been repeatedly held not to be essential to the
2 validity of a law for the exercise of the right of eminent domain that it should provide for
3 making compensation before the actual appropriation." (Internal quotation marks
4 omitted.)).

5 An Article I, section 18, claim for "just compensation" from the state or
6 other governmental entity is best understood as an assertion of a constitutional
7 entitlement. An owner can bring such a claim as soon as their property is taken. As
8 discussed above, the physical occupation of an owner's property constitutes a taking. The
9 physical occupation triggers the entitlement to "just compensation" and provides the basis
10 for a takings claim.

11 Plaintiffs argue that, before a property owner can bring a takings claim, the
12 owner must request compensation and be denied. We find no legal support for that
13 argument. The Indiana and Oregon cases that we have discussed indicate that, when an
14 owner's property is taken, the owner can seek compensation. We see no reason why, as
15 plaintiffs would have it, a property owner should be required to request compensation and
16 be denied before being able to bring a takings claim to obtain that same compensation.

17 Plaintiffs appear to suggest that, because Article I, section 18, allows the
18 state and other governmental entities to take property before paying "just compensation,"
19 a taking is not adverse to a property owner's interests until the owner requests and is
20 denied compensation. That is incorrect. A "physical occupation" taking, like the one
21 alleged here, is a substantial interference with an owner's "rights of exclusive possession
22 and use." *Dunn*, 355 Or at 348; *Hall*, 355 Or at 511 (explaining that "a *de facto* taking

1 results when a governmental actor physically occupies private property or invades a
2 private property right in a way that substantially interferes with the owner's use and
3 enjoyment of the property, thereby reducing its value"); *Tahoe-Sierra*, 535 US at 322-23
4 (explaining that a "categorical taking" results "[w]hen the government physically takes
5 possession of an interest in property for some public purpose"). It is necessarily adverse.
6 Therefore, we conclude that a property owner can bring a takings claim as soon as the
7 state or other governmental entity physically occupies the owner's property.¹¹

8 We reach the same conclusion regarding takings claims under the Fifth
9 Amendment, but for a different reason. Unlike Article I, section 18, the Fifth
10 Amendment does not expressly provide that a government may take property before
11 paying for it. And, in *Knick*, the Supreme Court recently held that, "because a taking
12 without compensation violates the self-executing Fifth Amendment at the time of the

¹¹ It is possible that accrual of a "physical occupation" takings claim could be subject to a "discovery rule." Generally speaking, under a "discovery rule," a cause of action does not accrue "until the claim has been discovered or, in the exercise of reasonable care, should have been discovered." *FDIC v. Smith*, 328 Or 420, 428, 980 P2d 141 (1999). But we need not determine whether a "physical occupation" takings claim is subject to a discovery rule because, in this case, there is no dispute that plaintiffs' father was aware of, or had reason to be aware of, the installation of the sewer lines by 1995.

Moreover, even if there was a dispute about whether plaintiffs' father was aware of, or had reason to be aware of, the installation of the sewer lines in 1995, plaintiffs themselves allege that their father entered into an agreement with defendants in 1998, and that allegation shows that their father knew about the lines by 1998. So, even assuming a discovery rule applies and that plaintiffs' father did not know, or have reason to know, of the sewer lines in 1995, plaintiffs' claim would have accrued in 1998, and the statute of limitations would have run by 2004, thirteen years before plaintiffs filed their claim.

1 taking, the property owner can bring a federal suit *at that time.*" 588 US at 194
2 (emphasis added). Therefore, a property owner can bring a takings claim alleging a
3 violation of the Fifth Amendment "as soon as the government takes [the property
4 owner's] property without paying for it." *Id.* at 190.

5 Plaintiffs make two arguments against that conclusion. The first is based
6 on a sentence in *Knick*, and the second is based on a subsequent Supreme Court case:
7 *Cedar Point Nursery v. Hassid*, 549 US 139, 141 S Ct 2063, 210 L Ed 369 (2021). We
8 address each of those arguments in turn.

9 First, plaintiffs point to a sentence in *Knick* in which the Court stated that
10 its holding did not "as a practical matter mean that government action or regulation may
11 not proceed in the absence of contemporaneous compensation." 588 US at 202. The
12 Court made that statement in response to a concern that its interpretation of the federal
13 Takings Clause would prevent governments from taking necessary actions because
14 property owners would be able to enjoin those actions. *Id.* at 201-02. In that context, the
15 Court opined that, because "just compensation" remedies are generally available to
16 property owners, there is, in most cases, "no basis to enjoin the government's action
17 effecting a taking." *Id.* at 201. Therefore, the Court continued, as long as post-taking
18 compensation is available, prospectively preventing the government from committing the
19 violation in the first place is unwarranted. *Id.* at 202.

20 Contrary to plaintiffs' argument, the Court did not suggest that the reason
21 the government may proceed with an uncompensated taking is because the availability of
22 post-taking compensation prevents the taking from being unconstitutional; that is, it did

1 not suggest that an uncompensated taking is not a constitutional violation unless and until
2 post-taking compensation is denied. To the contrary, the Court explained that, "[g]iven
3 the availability of post-taking compensation, barring the government from acting will
4 ordinarily not be appropriate." *Id.* at 202. "But that is because * * * such a procedure is
5 a remedy for a taking that violated the Constitution, *not because the availability of the*
6 *procedure somehow prevented the violation from occurring in the first place.*" *Id.* at 201
7 (emphasis added). To be clear, the Court stated, irrespective of the remedies available,
8 "the violation is complete at the time of the taking," and "a property owner may bring a
9 Fifth Amendment claim * * * at that time." *Id.* at 202. Thus, *Knick* does not support
10 plaintiffs' position that a federal takings claim includes as an element a denial of
11 requested compensation.

12 Plaintiffs' second argument is based on *Cedar Point Nursery*, which was
13 decided two years after *Knick*. But, as we will explain, *Cedar Point Nursery* did not
14 involve a question of when a property owner can bring a federal takings claim, and it did
15 not cite *Knick*, much less address *Knick's* holding regarding when a property owner may
16 bring a such a claim. Moreover, unlike plaintiffs here, the petitioners in *Cedar Point*
17 *Nursery* were not seeking compensation, they were seeking declaratory and injunctive
18 relief from future entries onto their property.

19 In *Cedar Point Nursery*, a California regulation that took effect in 1975
20 required agricultural employers to permit union organizers onto their property "for up to
21 three hours per day, 120 days per year." 594 US at 143; *see id.* at 166 (Breyer, J.,
22 dissenting) (noting that the access regulation was enacted in 1975). In 2015, union

1 organizers entered one petitioner's property under that regulation. *Cedar Point Nursery*,
2 594 US at 144-45. The union organizers also attempted to enter the other petitioner's
3 property, but that petitioner blocked them from entering. *Id.* at 145. Believing that the
4 union organizers would attempt to enter their properties again, the petitioners filed a
5 claim against the California Agricultural Labor Board for declaratory and injunctive
6 relief to prohibit the enforcement of the regulation against them, arguing that the access
7 regulation effected a *per se* physical taking that violated the Fifth Amendment to the
8 United States Constitution. *Id.* On review, the Court held that the access regulation
9 effected a *per se* physical taking, reasoning that "[w]henver a regulation results in a
10 physical appropriation of property, a *per se* taking has occurred." *Id.* at 149.

11 Plaintiffs point out that the access regulation that effected the taking in
12 *Cedar Point Nursery* was enacted in 1975, but that the petitioners did not initiate their
13 takings claim until 2015 upon the union workers' actual and attempted invasions pursuant
14 to that regulation. That gap, plaintiffs reason, demonstrates that the petitioners' takings
15 claim in that case could not have accrued at the time of the "taking" in 1975, because by
16 2015, a claim that accrued in 1975 would have been time barred. Thus, they maintain,
17 *Cedar Point Nursery* demonstrates that "it was not the *taking* of the right to exclude that
18 violated the Fifth Amendment -- it was the non-payment of just compensation" that
19 violated the Fifth Amendment and gave rise to an actionable takings claim in that case.
20 (Emphasis in original.)

21 Contrary to plaintiffs' assertion, *Cedar Point Nursery* does not indicate that
22 *Knick* is no longer good law. *Cedar Point Nursery* did not involve the issue whether the

1 petitioners' claim in that case was time barred. As mentioned, the *Cedar Point Nursery*
2 Court did not cite *Knick* or address *Knick's* holding about when a takings claim is
3 actionable. Moreover, *Cedar Point Nursery* did not involve a claim for "just
4 compensation" based on past interference with the petitioners' property rights; instead, it
5 involved claims for declaratory and injunctive relief. Plaintiffs seek a rule that a claim
6 for "just compensation" does not accrue unless and until the government refuses
7 compensation. Nothing in *Cedar Point Nursery* indicates that the Court considered such
8 a rule. Indeed, it does not appear that the petitioners in *Cedar Point Nursery* themselves
9 complied with such a rule because there is no indication that the petitioners were denied
10 any requested relief before they brought their takings claim in federal court. For all those
11 reasons, we conclude that *Cedar Point Nursery* did not alter the *Knick* Court's holding
12 regarding when a federal takings claim is actionable.¹²

13 C. *Application of the Statute of Limitations to Plaintiffs' Claim*

14 Having concluded that takings claims under Article I, section 18, and the
15 Fifth Amendment can be subject to statutes of limitations and that "physical occupation"

¹² That conclusion is supported by numerous federal court decisions issued since *Cedar Point Nursery* that have continued to apply *Knick* as good law. See, e.g., *St. Maron Properties, L.L.C. v. City of Houston*, 78 F4th 754, 762 (5th Cir 2023); *Fox v. Saginaw County, Michigan*, 67 F4th 284, 290 (6th Cir 2023); *Beaver Street Investments v. Summit County, Ohio*, 65 F4th 822, 826-27 (6th Cir 2023); *Kreuziger v. Milwaukee County, Wisconsin*, 60 F4th 391, 394 (7th Cir 2023); *Bruce v. Ogden City Corp.*, 640 F Supp 3d 1150, 1161 (D Utah 2022), *aff'd*, No. 22-4114, 2023 WL 8300363 (10th Cir Dec 1, 2023); *Knight v. Richardson Bay Regional Agency*, 637 F Supp 3d 789, 798-99 (ND Cal 2022); *Vargo v. Barca*, No. 20-CV-1109-JDP, 2023 WL 6065599, * 4 (WD Wis Sept 18, 2023).

1 takings claims can accrue when the physical occupation occurs, we apply those
2 conclusions to the facts of this case. As recounted above, the summary judgment record,
3 viewed in the light most favorable to plaintiffs, establishes that defendant installed the
4 sewer lines by 1995 and that it did so for a public purpose and without the consent of
5 plaintiffs' father, who owned the property at the time. Based on those facts, plaintiffs'
6 father could have brought an inverse condemnation claim by 1995. Therefore, plaintiffs'
7 claim accrued, and the six-year statute of limitations began running, in 1995. Because
8 that period expired in 2001, plaintiffs' 2017 claim is time barred.

9 In arguing against that conclusion, plaintiffs rely on the 1998 agreement.
10 They appear to contend that they had no basis for bringing their claim until defendant
11 breached that agreement. There are two problems with that argument.

12 First, as just discussed, any takings claim based on the installation of the
13 sewer lines accrued when defendant installed the lines, which was by 1995. At that point,
14 plaintiffs' father could have initiated a takings claim. So, the 1998 agreement would
15 matter only if it somehow tolled the running of the limitations period. But plaintiffs have
16 not made a tolling argument. That is, they have not argued that, if their claim accrued in
17 1995, it was somehow tolled in 1998. They have argued only that their claim did not
18 even accrue until 2014.

19 The second problem with plaintiffs' reliance on the 1998 agreement is that,
20 if, as they have alleged, their father gave defendant an easement over the property in
21 exchange for a free hook-up to the sewer system, then their father voluntarily transferred
22 a property interest to defendant in exchange for a payment. And, if he did that,

1 defendant's occupation of the property from the point of the agreement forward was not
2 an exercise of defendant's eminent domain authority. Consequently, that occupation is
3 not subject to Article I, section 18, or the Fifth Amendment. That is because, if a
4 government acquires property as a result of an agreement, then it has acquired the
5 property with the owner's consent. It has not exercised its eminent domain authority. *See*
6 *Woodward Lbr. Co.*, 173 Or at 338 (transfer of property interest for agreed upon price
7 was a purchase, not an exercise of eminent domain authority); *Janowsky*, 23 Cl Ct at 712
8 (property owner's claim that government breached contract to compensate owners for use
9 of property sounded in contract, not the Takings Clause). Therefore, if defendant
10 acquired plaintiffs' property pursuant to an agreement, its acquisition of the property is
11 not subject to the constitutional limits on the exercise of eminent domain power, and it
12 cannot be the basis for a takings claim under Article I, section 18, or the Fifth
13 Amendment.

14 Plaintiffs are understandably concerned by what they believe to be
15 defendant's breach of the 1998 agreement. The Court of Appeals addressed a similar
16 concern in *City of Ashland v. Hoffarth*, 84 Or App 265, 733 P2d 925 (1987). In that case,
17 the defendant brought a counterclaim for inverse condemnation against a city, alleging
18 that he had dedicated a 20-foot strip of land to the city in exchange for a promise of
19 payment and that the city had failed to make the payment. *Id.* at 269. The defendant

20 "alleged that he would not have dedicated the strip to the city had he known
21 that he would not be reimbursed for it and that, as a result of the city's
22 representation, the city obtained possession of the 20-foot-strip without
23 providing just compensation."

1 *Id.* The Court of Appeals concluded that the defendant failed to state a claim for inverse
2 condemnation because the city's actions did not constitute a taking. *Id.* at 270. The court
3 explained that, at best, the

4 "counterclaim alleges a promise by the city to pay for the strip in the future
5 and his reliance on that promise. The mere fact that as a result of the
6 promise the city now owns the strip and defendant has not been paid does
7 not show that there was a 'taking.' Defendant's remedy, if any, was
8 contractual."

9 *Id.* (citation omitted). We agree with the Court of Appeals' reasoning in *Hoffarth*. The
10 defendant's concern related to the breach of an agreement; it was not a claim that his
11 property had been taken without his consent. Consequently, he needed to bring a contract
12 or quasi-contract claim, not an inverse condemnation claim.

13 The same is true here. Plaintiffs' concern is that, as a result of the 1998
14 agreement, they are entitled to a free sewer connection and that defendant has refused to
15 provide them with that connection. That concern relates to the breach of an agreement.
16 But, again, plaintiffs have not raised a breach of contract claim or a quasi-contract claim,
17 which would have different accrual dates than their takings claim.

18 III. CONCLUSION

19 For the reasons explained above, we conclude that plaintiffs' inverse
20 condemnation claim is subject to the six-year limitations period set out in ORS 12.080(3),
21 that the limitations period began to run when defendant had installed the sewer lines, and
22 that, because plaintiffs' claim was not filed within the limitations period, it is time barred.

23 The decision of the Court of Appeals and the judgment of the circuit court
24 are affirmed.