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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASES

Water Rights Not Taken When Government Denies Pipeline Across BLM Land
Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003)

In an interesting but quirky case, the Federal Circuit recently put some meat on the bones of the *Palazzolo* ripeness ruling, and clarified government authority over public lands.

The court waded into a dispute over Nevada water rights and denied a takings claim that was based solely on the government's refusal to permit construction of a pipeline across federal land. Owners of the Fish Springs Ranch in western Nevada contracted with Washoe County to sell their water rights to benefit the Reno-Sparks metropolitan area. The county sought a right-of-way permit from the Bureau of Land Management to construct a pipeline. When a neighboring U.S. Army depot and an Indian tribe objected that the diversion might harm their water supplies, the Secretary of the Interior halted review of the project in 1994 until the applicants addressed these objections.

After failing to gain the support of the neighboring landowners, the county and ranch owners filed suit alleging that the denial of the right-of-way application constituted a taking of their water rights. Although the government questioned whether the Secretary's 1994 order was a final decision, the Federal Circuit found the claim ripe. Citing *Palazzolo*, the court held "there was no further 'reasonable and necessary step' Washoe County could have taken" to allow BLM to consider its application. Given the "inalterably adverse" position of the Army and the Tribe, the court concluded it was "known to a reasonable degree of certainty" that the permit would not be granted.

On the merits, the Federal Circuit recognized that a taking of water rights might occur where the government has physically diverted water for its own use or where it denies all meaningful access to the claimant's property. The court held, however, the government merely "den[ied] permission to use the government's own land to exploit those rights." Because the claimants had "no right to build on federal land," the court ruled that no private property right was truly at stake and denied the claim.

Arizona Downzoning Win Secured
Emmett McLoughlin Realty, Inc. v. Pima County, 58 P.3d 39 (Ariz. Ct. App. 2002)

Back in November 2002, Arizona planners rejoiced when the state appellate court struck down a 1998 property rights law that barred counties from downzoning property without first obtaining the owner's consent. We have since learned that the landowners' expected appeal was not timely filed, so that victory is now secure.

OUTRAGE OF THE MONTH (UPDATE)

A Red Under Every Bed?

In February, we described the proposed agenda of the "Preserving the American Dream" conference, which was recently convened in our Nation's capital by the property rights movement. In an on-the-scene update, Philip Langdon of the *Hartford Courant* reports that the conference was marked by over-the-top rhetoric and unseemly proposals. Langdon writes:

> "David Strom of the Taxpayers League of Minnesota, urged opponents of smart growth to 'be relentless in undermining the credibility of your opponents.' Strom depicted pro-transit leaders as practitioners of of social engineering. * * * 'We made it sound like they were a bunch of commies.' Strom told smart-growth opponents to wage merciless attacks. 'We often make the mistake of assuming this is a battle over who has the better facts,' he said. Quite the contrary, whether smart-growth policies are adopted will hinge, he asserted, on whether voters can be persuaded that the typical smart-growth leader is 'a pointy-headed intellectual fascist' trying to ruin people's lives."

Not to be outdone, Jon Caldara from the Independence Institute urged anti-smart-growth forces to avoid looking like "cranky white men" by casting smart growth as harmful to minorities and women. While it comes as no surprise that the property rights movement is substituting rhetoric for facts, Langdon deserves kudos for laying the strategy bare in dramatic fashion. His article appears at http://www.ctnow.com/news/opinion/commentary/hc-plclangdon0302.artmar02.story

ON THE HORIZON

The Kennedy/O'Connor Shuffle

Five years ago, it was conventional wisdom that Justice Kennedy was the key swing vote in takings cases before the U.S. Supreme Court. His moderating concurrence in *Lucas*, his dissent from the takings ruling in *Eastern Enterprises*, and other writings offered hope to public-side litigators that he would sympathize with their arguments and join Justices Stevens, Souter, Ginsburg, and Breyer to form a winning majority.

Justice O'Connor, on the other hand, was viewed by many as entrenched in the claimant's camp, along with the Chief Justice and Justices Scalia and Thomas. She joined the majority opinions in *Nollan, Lucas,* and *Dolan* without qualification. She dissented in *Keystone,* and she wrote separately in *Preseault* to emphasize her view that the takings claims there might have merit. She joined the concurrence by Justice Scalia in *Suitum* suggesting that transferable development credit programs might work a taking. In *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, she joined Justice Thomas in a dissent from a denial of certiorari calling for consideration of whether *Dolan* applies to legislatively imposed fees. And she joined Justice Scalia in a dissent from a cert. denial in *Stevens v. City of Cannon Beach,* which argued that the state court's application of the public trust doctrine raised serious takings concerns. Such cert. denial dissents are relatively rare and generally reflect the conviction of a "true believer."

In view of this history, it was not uncommon for public-side takings lawyers to talk in terms of "writing to Justice Kennedy" in the hope of securing a Kennedy-led, pro-government majority. Although he sometimes is a tough vote for government counsel to secure, he always seems to be in play. Justice O'Connor, on the other hand, often seemed out of reach.

The times, they are a-changin'. In *Palazzolo,* Justice O'Connor wrote separately to challenge Justice Scalia's assertion that notice of a land-use restriction at the time of purchase is irrelevant to takings analysis. In *Tahoe*, she joined the majority to reject a takings challenge to protections for the Lake, an opinion that quoted extensively from her *Palazzolo* concurrence. Most recently, in *Brown* she provided the fifth vote to reject a takings challenge to Interest-on-Lawyers'-Trust-Accounts (IOLTA) programs, even though she joined the *Phillips* majority in deeming that interest to be the client's private property.

Justice O'Connor arguably has supplanted Justice Kennedy as the key swing vote in takings cases. The common theme in her rulings appears to be a pragmatic desire to uphold government action that clearly promotes the public good, a theme reflected not only in *Brown* and *Tahoe* but also in her dissent in *First English*, which involved protections against deadly floods. On the other hand, she has displayed considerable sympathy for widows-in-wheelchairs claimants like Mrs. Suitum. Government counsel should keep that in mind when deciding which takings cases to take up to the High Court.

EYE ON WASHINGTON

UPDATE ON *TAHOE-SIERRA*

The *Tahoe-Sierra* litigation, which yielded last year's landmark ruling from the U.S. Supreme Court, has finally ended. On February 28, the Ninth Circuit disposed of the remaining claims, ruling that the challenges to the 1987 Regional Plan were barred by principles of res judicata because they were substantially similar to claims previously dismissed as barred by the applicable statute of limitations. The court further ruled that certain claims brought by landowners subject to various mitigation provisions were not ripe for failure to pursue administrative relief. Assuming the landowners do not once again seek certiorari (unlikely, in our view), the long-running *Tahoe-Sierra* litigation is now over.

QUOTE OF THE MONTH

Fulfilling the Public-Use Requirement

In view of the arguments by some that governments violate the public-use requirement whenever they transfer condemned property to private entities for redevelopment, consider this language from the IOLTA case, which involved a transfer of the claimants' interest to a private, nonprofit foundation:

> Even if there may be occasional misuses of IOLTA funds, the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment.

Brown v. Legal Foundation of Washington, 123 S. Ct. 1406, 1417 (2003)