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Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel

Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASES

Ninth Circuit Rejects Takings Claim in *San Remo* But Revives "Substantially Advance" Test in *Chevron*

San Remo Hotel L.P. v. San Francisco City & County, 2004 WL 785322 (9th Cir. April 14, 2004)
Chevron USA, Inc. v. Lingle, 2004 WL 720175 (9th Cir. April 1, 2004)

Two rulings from the Ninth Circuit this month are a decidedly mixed bag. Two weeks ago, the court gave San Francisco attorneys a key victory in their long-running battle to defend the city's hotel conversion ordinance against a takings challenge. But just two weeks earlier, the court second-guessed government officials by ruling 2-1 that a Hawaii rent-control statute aimed at gas stations worked a taking because it did not substantially advance the state's interest in reducing gas prices to consumers.

At issue in *San Remo* was whether the hotel could relitigate a takings claim in federal court after a nearly identical claim had already been raised and rejected in state court. Although San Remo attempted to "reserve" its federal claim in state court, the Ninth Circuit ruled that a litigant could use a reservation to protect only against claim preclusion. Issue preclusion remains a bar to relitigating in federal court specific issues already decided in state court. The court thus issued a strong rebuttal to the notion that claimants deserve two bites at the takings apple. Kudos to San Francisco attorney Andrew Schwartz for an excellent brief and argument. CRC filed a supporting amicus brief on behalf of several municipal groups.

The *Chevron* case addressed a Hawaii law that regulates the maximum rent an oil company can charge its dealer stations. Chevron alleged that the statute failed to substantially advance a legitimate state interest, and a district court granted summary judgment for the company in 1998. The Ninth Circuit agreed with the standard but remanded for further factual determinations. After the district court again ruled for Chevron based on its finding that the legislation did not advance the purpose of limiting gasoline prices in the state, Hawaii argued (among other things) that the decision was contrary to *Eastern Enterprises*, a case in which five justices appeared to cast doubt on the viability of means-ends inquiries under the Takings Clause. But the Ninth Circuit reaffirmed its prior holding that the "substantially advance" test calls for intermediate scrutiny and "requires a 'reasonable relationship' between a legitimate public purpose and the means used to effect that purpose."

Chevron breathes new life into a test that courts have rarely employed to find a taking outside the context of compelled dedications of land. Given that seven Justices have joined opinions in recent years raising questions about the validity of the test, the issue calls out for clarification by the U.S. Supreme Court.

ON THE HORIZON

Lake Tahoe Scenic Review Ordinance Not a Taking

The Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 2004 WL 718954 (D. Nev. Mar. 29, 2004)

Whole books could be written on the takings precedent emerging from Lake Tahoe. Scene of some of the most significant takings battles of the past decade, the beautiful Tahoe region is spawning still more litigation. This time, a U.S. District Court in Nevada rejected a facial takings challenge to a regional scenic review ordinance designed to regulate the appearance of residential housing along the lake's majestic shoreline.

Although the ordinance has not yet been implemented and no permits have been denied under the plan, the complaint alleged lost property values of $100 million, a figure derived by estimating a 50 percent reduction in value for reduced views. Taking this figure at face value, the court noted that the Tahoe Regional Planning Agency has been exercising "tremendous power" conferred by Nevada, California, and the federal government since 1980. In such a highly regulated environment, the court found no interference with reasonable investment-backed expectations.

The court also considered whether the regulation was "substantially related to a legitimate government interest." Applying an intermediate level of scrutiny, the court found that the ordinance was substantially related to curbing scenic degradation while allowing landowners three distinct levels of review, depending upon the impact of the development proposal. We will keep readers informed of any appeal or as-applied challenges in this latest round of Lake Tahoe litigation.

OUTRAGE OF THE MONTH

Administration Plan to Drill in Mesa Draws Fire

It takes a lot to get ranchers, hunters, and environmentalists to agree on anything, but the Bush administration's plan to drill for natural gas in New Mexico's Otero Mesa has done just that.

The 1.2 million acre plain in Otero County, home to herds of pronghorn, migratory songbirds, and the endangered Aplomado falcon, is revered by hunters and naturalists alike. New Mexico Governor Bill Richardson has called the grassland region the "West's ANWR," a reference to recurring battles over oil and gas exploration in the Alaska National Wildlife Refuge. Concerns over lost wildlife habitat and contamination of groundwater and forage have united ranching and environmental groups that are usually at odds with each other.

The planning process for the Otero Mesa began in 1998 and originally called for setting aside much of the land. The Bush administration plan released in January protects half as much land as earlier drafts. The plan has prompted allegations of cronyism because the two companies that stand to gain most from gas development have ties to Vice President Cheney and Interior Secretary Gale Norton.

QUOTE OF THE MONTH

"At last! We finally got to be number one. Praise the Lord!"

Jack Shockey, president of Citizens for Property Rights, responding to recent data showing formerly-rural Loudoun County, Virginia, to be the fastest growing county in the nation.

EYE ON WASHINGTON

CFC Rejects Claim Alleging Taking of Fishing Trawler

Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360 (2004)

A former owner of a fishing vessel is not entitled to compensation for loss of value and related property interests resulting from passage of the American Fisheries Act (AFA), the U.S. Court of Federal Claims held in February. Congressional action, the court held, reduced the value of the vessel by no more than 50 percent, well below the threshold generally required to find a regulatory taking. Most importantly, Judge Francis Allegra distinguished the court's ruling in *American Pelagic*, in which it held that singling out a vessel for regulation could give rise to a temporary taking, finding the plaintiff's claims here "wholly lacking in the proof of targeting and animus that the court earlier found persuasive."

Built in 1968, the *Arctic Trawler* was one of the first American factory trawlers to fish for pollack off the coast of Alaska. Overcapitalization of the fishery in the 1990s, however, sapped the vessel's profitability and prompted the National Marine Fisheries Service to limit access to boats that had been active in the fishery in recent years. In 1995, the owners elected to fish in Russian waters, but they returned the *Arctic Trawler* to Alaska in 1997 and put the boat up for sale. The owners entertained offers in the $2 million range, but were unable to close a deal. Congress passed the AFA in October 1998, further limiting licenses to fishery and buying out nine named factory trawlers for as much as $10 million. Because the *Arctic Trawler* had no domestic catch history after 1995, it was neither included in the buyout nor permitted to reenter the fishery. The owners then sold the vessel for $750,000, and filed suit alleging a taking.

The court first determined that the *res* at issue was the vessel itself, not the value of the *Arctic Trawler*'s fishing rights or buyout benefits the owners might have received under the AFA but did not. The court ruled that the regulatory changes limiting access to the fishery were reasonably foreseeable and that the vessel's owners gambled and lost by removing the ship from Alaskan waters and allowing its domestic catch history to lapse. Finding the AFA to be a comprehensive fishery reform that neither interfered with investment-backed expectations nor improperly targeted the vessel, the court rejected the takings claim.

High Court Rejects Three SWANCC Cases

To the great disappointment of the development industry, the Supreme Court recently denied certiorari in three cases that narrowly interpret its 2001 *SWANCC* decision limiting federal authority over isolated wetlands. The Fourth Circuit's *Deaton* (332 F.3d 698) and *Newdunn* (344 F.3d 407) decisions and the Sixth Circuit's *Rapanos* (339 F.3d 447) decision thus remain the leading precedents on wetlands regulation under the Clean Water Act.