Community Rights Counsel

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FEATURE CASE

New Mexico Supreme Court Rules for Feds On Forage Rights Issue in Reg-Take Skirmish

In a case that involved extensive amicus participation by local officials, environmental groups, ranchers, and the property rights movement, the Supreme Court of New Mexico ruled that under state law, a water right does not include a right to forage. Accordingly, ranchers on public land in New Mexico cannot claim that their water rights include a property right to graze cattle on federal public lands. See *Walker v. United States*, 2007 N.M. Lexis 314, No. 29,544 (N.M. June 21, 2007).

The case involves the Walkers' forty-acre ranch, which has two adjacent grazing allotments covering more than 17,000 acres in the Gila National Forest. The allotments were authorized by a ten-year permit issued in 1995 by the U.S. Forest Service. In 1996, however, the Service determined that drought conditions and overgrazing had decimated the grass on the allotments, and it directed the Walkers to remove cattle to allow the pastures to recover. When the Walkers refused, the United States brought a successful trespass action. The Walkers then filed a $10 million suit in the U.S. Court of Federal Claims (CFC), alleging that the permit revocation constituted a taking of their forage and grazing rights. The CFC certified to the New Mexico Supreme Court the issue of whether a vested water right includes a right to forage under state law.

The New Mexico high court assumed arguendo that the Walkers have vested water rights, and ruled that these rights do not carry with them a right to forage or graze. After setting forth an historical overview of the development of water law in New Mexico, the court concluded that water rights in that state are separate from property rights in adjacent land, and are established and exercised by beneficial use (in contrast to the riparian doctrine that applies in many eastern states). Water rights in New Mexico are not tied to a particular location but instead constitute a right to use a particular amount, a feature inconsistent with the Walkers' contention that water rights are linked to the land. The court further ruled that none of the cases, statutory provisions, and customary practices cited by the Walkers establish that a land interest is incident to a water right.

More and more, western economies are coming to depend on tourism and other activity that depends on environmental protection, as opposed to extractive industries. *Walker* and other rulings that assist in the proper management of our western national forests are welcome additions to the jurisprudential landscape.

CASE ROUNDUP

Airports, Rent Control, and Ecologically Sensitive Land

In our July 2006 newsletter, we reported on the dreadful ruling from the Nevada Supreme Court in *McCarran Int'l Airport v. Sisolak* (Nev. 2006), sustaining a takings challenge to county height restrictions designed to prevent airplanes from crashing into buildings near the airport. Thankfully, on July 23, 2007, the Ninth Circuit respectfully disagreed, a ruling that should help limit the damage by confining *Sisolak*'s impact to Nevada. In *Vacation Village, Inc. v. Clark County*, 2007 WL 2080288 (9th Cir. 2007), the court stated: "We respectfully disagree with our colleagues on the Nevada Supreme Court concerning their interpretation of federal takings jurisprudence. No Fifth Amendment taking of the Landowners' property occurred under the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)." The court reached this conclusion in the context of a bankruptcy proceeding, and the court ultimately deferred to the State court's reading of its own Constitution. But its disapproval of the ruling is good news for municipalities in other states.

The City of Rafael's mobile home rent control ordinance fell victim to a takings challenge in *MHC Financing, LTD v. City of San Rafael* (N.D. Cal. July 26, 2007). In a confused and confusing opinion, the court concluded that the ordinance effected a regulatory taking under Penn Central and a taking for private use. Expect an appeal.

Finally, in *OFP, LLC v. State of New Jersey* (N.J. App. Div. Aug. 10, 2007), a State appeals court affirmed the trial court's rejection of a takings challenge to the State's innovative 2004 Highlands Water Protection and Planning Act, concluding that the claim is unripe due to the claimant's failure to seek a hardship variance.

EYE ON WASHINGTON

The Self-Proclaimed Ideologue Strikes Back

In 1999 Victor Wolski, a former staff attorney with a so-called property rights group called Pacific Legal Foundation, announced to the world that he is a doctrinaire libertarian. In an interview with the National Journal, he proclaimed: "Every single job I've taken since college has been ideologically oriented, trying to further my principles . . . [of] limited government, individual liberty, and property rights."

So it should come as no surprise that Wolski, now a judge on the U.S. Court of Federal Claims, would twist longstanding precedent to advance his agenda. He did exactly that in *Bailey v. United States*, No. 02-1078L (Aug. 10, 2007), in which he ignored binding Federal Circuit case law to keep alive a regulatory takings challenge to a denial of a permit to build on federally protected wetlands— a challenge brought by someone who didn't even own the property at the time of the denial.

In 1989, Bailey purchased land in Lake of Woods, Minnesota, that was zoned "natural resource." In 1993, the U.S. Army Corps of Engineers advised Bailey that the land contains wetlands, and he would need a federal permit prior to filling. In 1998, the county approved a fourteen-lot subdivision, now known as Sunny Beach, and rezoned the land to residential. Starting in late 1998, Bailey sold off several of the lots to people expecting to build homes on them. In 2000, the Corps determined that most of Sunny Beach's 13.2 acres is wetland (13 of the 14 proposed lots) and filling would degrade the water quality of the adjacent lake. It denied the permit to fill and ordered Bailey to restore portions of the wetlands he already had filled to build a road on the property. In 2001, Bailey repurchased three of the lots to ward off a state court lawsuit by the purchasers, who could no longer build their homes.

Bailey then sued the federal government, alleging a regulatory taking of his land due to the permit denial, restoration order, and related actions. He also filed a parallel action in Minnesota federal court challenging the validity of these actions, which he lost. The government moved for summary judgment arguing, among other things, that (1) Bailey did not own all the property allegedly taken at the time of the permit denial, and (2) Bailey may not dispute the validity of the restoration order in a regulatory takings challenge to that order.

On the ownership question, Wolski acknowledges that Federal Circuit precedent "sounds pretty conclusive on the subject." But Wolski refused to follow this binding precedent because, in his view, for regulatory takings claims "the owner at any particular time is the one who is inconvenienced by the restriction," regardless of who actually owned the property at the time of the alleged taking.

As to the unlawfulness of the restoration order, the government invoked two Federal Circuit precedents holding that a regulatory takings plaintiff must concede that lawfulness of the challenged government action. Wolski bizarrely ruled that alleged invalidity might somehow be relevant to the takings analysis in blatant disregard of binding precedent.

It is unclear when the government will be able to appeal, but we hope the Federal Circuit makes quick work of this ruling.

OUTRAGE OF THE MONTH

What Are They Smoking?

What do the property rights movement, airport restrooms, and U.S. Senator Larry Craig have in common?

Well, the Associated Press reports that the American Land Rights Association is calling for a boycott of the Minneapolis-Saint Paul Airport because, in its view, the airport police who arrested the senator in a men's room sting operation are responsible for weakening private property rights. As ALRA put it in its press release: "By ambushing Senator Larry Craig, the Airport Police have effectively declared war on the West." If you (like us) are wondering how a sting operation in a public airport restroom undermines private property and constitutes a declaration of war on the West, email your inquiries to alra@pacifier.com