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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Adverse Possession As a Taking?

The First Circuit rejected a takings claim on procedural grounds last month, but it left standing a bizarre district court assertion that the government can cause a taking through adverse possession. In *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 2003 WL 21730581 (1st Cir. July 28, 2003), the state argued that adverse possession is a background principle of state law that, by definition, cannot cause a taking. The First Circuit, however, assumed arguendo that a taking could result and instead dismissed the case because the claimants failed to bring a state action within the statute of limitations.

Echo Lake, a man-made reservoir in Rhode Island, was created in 1860. In 1964, the state purchased a lot abutting the lake and constructed a public boat ramp the next year. Pascoag took ownership of the reservoir in 1983. For 32 years, the public used the state's ramp as an access point for boating, fishing, and other recreational activities, but starting in 1997 Pascoag banned public access to the lake. The state asserted it had acquired property rights in the reservoir through adverse possession.

The Rhode Island Supreme Court held that the state acquired the lake area around the ramp by adverse possession, as well as a prescriptive easement over the lake surface for boating and recreation. Pascoag filed a federal takings claim in October 2001, and the district court properly dismissed the action for failure to seek a timely state remedy under *Williamson County*. In doing so, however, the court said in dicta that governments must generally compensate for takings occurring through adverse possession or prescription, stating: "It does not matter how the State takes property, only whether the Constitution mandates that the State pay compensation." *Lucas* made clear, however, that no taking occurs where the challenged government action simply mirrors background principles of property law. In affirming the dismissal, the First Circuit unfortunately let the district court's troubling reasoning pass without comment. Although the disturbing dicta should be given no precedential effect, how this will shake out remains to be seen.

EYE ON WASHINGTON

Evolving Reciprocities

"We sure get a kick out of it when the sheep are around." That's not a comment one expects to hear from residents of a resort development. But Walecia Konrad of *The New York Times* recently reported that more and more builders are realizing that by conserving open space around their development projects, they can actually increase land value and enhance homebuyer enjoyment. *See* http://www.nytimes.com/2003/08/01/realestate/01LAND.html (registration required)

As Konrad put it, "the ultimate second-home amenity is a slice of wilderness." These open areas not only provide scenic views of bighorn sheep and other wildlife, but also shield residents from strip malls or other unattractive development. People are willing to pay more for these benefits, with studies conducted in California showing that property values within a mile of open space increase by 8-10 percent.

This is good news for states and municipalities facing takings challenges to open space protections. These studies support the argument that regulations restricting development of a portion of land (for example, in a wetlands area) benefit the developer by enhancing the property's overall value. The case that first recognized the concept of a regulatory taking -- *Pennsylvania Coal Co. v. Mahon* (1922) -- introduced the notion of "reciprocity of advantage" as a justification of various laws. More recently, the Supreme Court reaffirmed the reciprocity theory in *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987), explaining that "while each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." And in *Tahoe-Sierra*, the court cited the reciprocity of advantage enjoyed by property owners subject to a common land use planning program designed to protect Lake Tahoe, which provides much of the land value in the Tahoe Basin.

Thanks to nature-lovers everywhere, the defense of reciprocity of advantage is gaining strength. Let's hear it for those who enjoy watching sheep from the front porch.

OUTRAGE OF THE MONTH

Rightly Criticizing for the Wrong Reason

In an August 1 speech on judicial nominees before the American Constitution Society, Senator Hillary Clinton criticized the Federalist Society for arguing that the 1954 ruling in *Brown v. Board of Education* created a "Constitution in Exile" that needs to be restored. And she implied that the Bush Administration is committed to appointing federal court nominees who would revive the Constitution in Exile and, among other things, undermine *Brown*. She's right to warn of the effort to revive this so-called Constitution in Exile, but wrong about the alleged connection to *Brown*.

Chief Judge Douglas H. Ginsburg of the D.C. Circuit coined the phrase "Constitution in Exile" in a 1996 book review to describe the non-delegation doctrine and a host of other legal theories he believes courts have wrongly neglected. In addition to the non-delegation doctrine, Chief Judge Ginsburg highlighted an expansive takings jurisprudence and a revitalized approach to substantive due process as part of the Constitution in Exile whose return he is working to achieve.

In 1999, Chief Judge Ginsburg attempted to resurrect the Constitution in Exile by using an extreme application of the non-delegation doctrine to strike down clean air protections that prevent thousands of premature deaths each year. That decision was short lived, however, because Justice Antonin Scalia authored a unanimous opinion reversing the ruling, a repudiation aptly characterized by former Solicitor General Seth Waxman as a "thoroughgoing rebuke of the D.C. Circuit's little escapade."

Given the threat posed by the Constitution in Exile theory to environmental safeguards and other community protections, as well as its promotion of radical takings theories, we welcome public exposure of its many flaws. But Senator Clinton erred badly in linking the project to *Brown*. Elsewhere in the speech, she reprised her "vast right wing conspiracy" rhetoric to suggest that the conspiracy (presumably including the Bush Administration and its judicial nominees) would, among other things, return us to the days "before *Brown* when people were told that in this country we should try to integrate our schools and provide equal opportunity in fact, not just in theory." But when asked about *Brown*, nominees have tripped over themselves to explain why their views are consistent with that ruling. While some nominees are open in their desire to revise precedents in takings and other areas, there is no evidence that any of them would urge a reconsideration of *Brown*. Given *Brown*'s preeminent place in our law and society, it is no small thing to accuse your political opponents of seeking to undermine it.

The Constitution in Exile theory no doubt deserves its own Outrage column, but credible opposition to the theory is undermined by ill-informed allegations. When evaluating judicial nominees, we should focus on threats that are real, not imagined.

QUOTE OF THE MONTH

"There are two things wrong with almost all legal writing. One is style. The other is content. That, I think, about covers the ground."

Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 38 (1936).

ON THE HORIZON

The Federal Circuit's Treatment of Economic Impact

Coming months should bring clarification as to how the Federal Circuit will consider the economic impact portion of *Penn Central*'s multi-factor test.

Earlier this year, the Federal Circuit made clear that, in accordance with *Tahoe-Sierra*, it would apply *Penn Central* to any takings claim that does not involve a 100 percent devaluation of the claimant's land. *See Cooley v. United States* (Fed. Cir. April 1, 2003) (*Lucas* per se rule inapplicable to a 98.8 percent loss in value). Just last week, the United States (supported by a CRC amicus brief) filed its opening brief with the Federal Circuit in *Rose Acre Farms*, where the trial court ruled that federal protections against *Salmonella* food poisoning worked a taking even though the claimant's value loss was only 10-25 percent (depending on the definition of the relevant parcel). Also pending before the Federal Circuit is *American Pelagic Fishing Co. v. United States*, an appeal of a trial court ruling that federal legislation revoking fishing permits constituted a temporary taking of a fishing trawler. The case raises important issues regarding how to gauge economic impact and economically viable use when addressing restrictions that allegedly deny profitable use on a temporary basis.

We expect rulings in these cases from the Federal Circuit in the first half of next year.