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Community Rights Report

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Community Rights Counsel

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FEATURE CASE

Federal Statutes as Background Principles

One key question raised by the 1992 *Lucas* ruling is whether the "background principles" that immunize government officials from takings liability include federal law (not just state law) and statutes (not just common law). Some in the so-called property rights movement have insisted that the background principles defense is limited to state common law. Others have argued that the defense is broader and may encompass statutes and federal law in appropriate circumstances.

The Federal Circuit applied the broader view in *American Pelagic Fishing Co. v. United States*, No. 03-5101 (Fed. Cir. Aug. 16, 2004), overturning a $37 million takings verdict handed down by the U.S. Court of Federal Claims. American Pelagic alleged that riders to appropriations bills worked a taking because they cancelled its federal permits to fish for mackerel and herring in the "Exclusive Economic Zone" (EEZ) in the Atlantic Ocean, which extends 200 nautical miles from the U.S. coast.

The appeals court made short work of the claimant's allegation that the riders effected a taking of the fishing permits themselves, ruling that no one can possess a property right in these permits because the government retains the right to revoke them. Turning to American Pelagic's main contention – that the riders took the use of the vessel for fishing in the EEZ – the court stated that the issue reduced to whether the right to fish in the EEZ is "a legally cognizable property interest such that it was a stick in the bundle of property rights that American Pelagic acquired" when it purchased the vessel. American Pelagic argued that it was, because the use of the vessel to fish was allowed not only under traditional property and nuisance law, but also the federal regulatory regime under which the permits were issued.

The Federal Circuit disagreed. The court first reaffirmed the important principle set forth in *Lucas* that owners of personal property have less of an expectation to be free from regulation than landowners, in view of the high degree of government control over commercial dealings involving personal property. It then concluded that background principles of federal law prevented American Pelagic from acquiring the right to fish in the EEZ when it bought the vessel. Specifically, it ruled that through the 1976 Magnuson Act, a 1983 proclamation by President Reagan, and 1986 amendments to the Act, the United States asserted sovereignty over the natural resources of the EEZ. Because these laws were in place when American Pelagic purchased its vessel, the court concluded that they served as background principles that inhered in the vessel's title and precluded takings liability for any subsequent restriction on EEZ fishing.

Congrats to U.S. DOJ, the Maine Attorney General's Office, which filed an amicus brief on behalf of several States, and our friends at the Georgetown Environmental Law & Policy Institute, which represented *amici* Oceana and Ocean Conservancy.

OUTRAGE OF THE MONTH

Billboard Companies Use Litigation to Intimidate Local Governments

Ogden Nash got it right when he wrote: "I think that I shall never see, a billboard lovely as a tree." But protecting scenic beauty and community character comes at a price these days – lawsuits from the billboard industry. For example, last year Lockridge Outdoor Advertising sued the City of Oldsmar, Florida, in federal court challenging the constitutionality of the city's billboard ordinance. Oldsmar is a city of just 10,000 residents and unaccustomed to defending itself in federal court.

That's just what the billboard industry is counting on, according to an editorial in the *St. Petersburg Times*. Although courts routinely uphold properly constructed sign ordinances, companies bring takings and other lawsuits hoping that the expense, time, and sheer intimidation factor of defending these cases will force communities to reach settlements that either allow existing billboards to remain in place, or give companies rights to erect new road-side signs. One Georgia company, Granite State Outdoor Advertising, specializes in challenging community sign ordinances across America and then selling the permits it wins through settlement to other billboard companies. The *Times* editorial singles out Atlanta attorney E. Adam Webb for special mention due to his nationwide campaign to replace scenic vistas with billboards. He finds the work so lucrative that he does nothing else in his solo practice.

Communities enact sign ordinances to protect their vistas from the visual blight of unwanted billboards and reduce distractions that threaten public safety on the road. Here's hoping they continue to stand firm in defending their laws against challenges from the billboard industry.

EYE ON WASHINGTON

Another Takings Challenge to a National Security Initiative

With the third anniversary of September 11 approaching, the Federal Circuit recently addressed yet another takings challenge to a U.S. national security initiative, *El-Shifa Pharmaceutical Industries Co. v. United States*, No. 03-5098 (Fed. Cir. August 11, 2004). In *El-Shifa*, the claimants sought $50 million in compensation, arguing that the United States took their property when U.S. armed forces destroyed a pharmaceutical manufacturing facility in Sudan. President Clinton ordered the cruise missile strikes in response to the 1998 truck bomb attacks on U.S. Embassies in Kenya and Tanzania that killed more than 200 people. The President explained that the U.S. response was designed to disrupt al-Qaeda's terrorist network and destroy parts of its infrastructure, and that the plant was being used to produce chemical weapons for terrorists. The claimants denied any links between the plant and terrorist activity.

The U.S. Court of Federal Claims dismissed the complaint for failure to state a claim. The Federal Circuit affirmed, holding that courts have no authority to review a President's designation as "enemy property" the property of aliens located outside the United States. Such decisions, in the court's view, are nonjusticiable political questions.

El-Shifa is akin to several other takings challenges to national security measures discussed in our September 2001 and October 2002 newsletters. We hope those who promote sweeping federal takings bills keep the broader ramifications of their efforts in mind.

QUOTE OF THE MONTH

In a regulatory takings case, the court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession."

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (1985)

ON THE HORIZON

Michigan Supreme Court Overturns *Poletown*: *County of Wayne v. Hathcock*, 2004 WL 1724875 (Michigan, Jul. 30, 2004)

There are few more famous cases in property law than the Michigan Supreme Court 1981 ruling in *Poletown Neighborhood Council* v. *Detroit*. As a generation of law students knows, the ruling permitted Detroit to condemn large portions of the Poletown neighborhood and give this land to General Motors for use as an assembly plant. Well, property case law books now have to be updated, because last month the Michigan Court overruled *Poletown*.

In *County of Wayne v. Hathcock*, Wayne County sought to assemble 1,500 acres of land near the Detroit airport for a high-tech office park. A handful of landowners rebuffed the County's efforts to buy their land, so the County started condemnation proceedings. The trial and intermediate appellate courts in *Hathcock* upheld the condemnations as promoting a valid public use as defined by *Poletown*. The Supreme Court, however, called *Poletown* "a radical departure from fundamental constitutional principals" and declared, "we must overrule [it] in order to vindicate our constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor – not creator – of fundamental law."

Notwithstanding its blistering rhetoric, the Court left open three avenues for the use of eminent domain. A government can condemn property needed for a road, a railway, pipeline, or other "vital instrumentalities of commerce," or when the property will be owned by a private entity but still publicly regulated or publicly accessible, or when the property is dangerous or harmful to the public. This leaves room for a fair number of urban revitalization projects in struggling neighborhoods, and most likely for things like waterfront redevelopment schemes, in which public access to a place-specific amenity is central.

Poletown was celebrated by government officials for its ringing endorsement of the power of local governments to help bring jobs and hope to downtrodden communities. For many others, however, *Poletown* has stood for an excess of government power. Indeed, the decision has further fueled a campaign by anti-eminent domain activists who are trying, state by state, to shrink public use, and therefore eminent domain, to its narrowest possible scope.

Condemnation authority, like any government power, can be abused, but government officials must stand up to the sweeping anti-eminent domain challenges being brought across the country. Otherwise, *Hathcock* could signal an unwarranted, broad-based crippling of constitutionally granted government power.