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# Takings Watch

*CRC's Monthly Update on Regulatory Takings*

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## FEATURE CASE

### Ohio Supreme Court Trashes Parcel-as-a-Whole Rule

*State ex rel. R.T.G., Inc. v. State*, No. 01-748 (Ohio, Dec. 18, 2002)

We certainly expected the property rights movement to use every trick in the book to distinguish the very favorable *Tahoe* ruling. What we didn't expect is for judges to ignore the ruling altogether. But in a radical departure from *Tahoe* and decades of other precedent, the Ohio Supreme Court has ordered the state to compensate a mining company for the value of coal rights it claimed were taken to protect a village's drinking water supply. The fractured plurality opinion expressly refused to apply U.S. Supreme Court precedent on the severability of coal rights from other property interests, ruling that the Ohio Takings Clause affords takings claimants greater protection than the similarly worded federal Takings Clause.

Because surface mining threatened the sole source aquifer that supplies drinking water for the Village of Pleasant City, Ohio, the state declared 833 acres unsuitable for mining, much of which was owned by RTG in fee simple or through purchase or lease of mineral rights. RTG filed a takings challenge to compel the state to appropriate its coal interest in the restricted area.

In finding a discrete and severable property interest in coal rights, the Ohio Supreme Court rejected decades of takings precedent, including *Penn Central*, *Keystone,* and *Tahoe*. Without explaining why, the court held that the Ohio Constitution provides greater protection than the Fifth Amendment. The court then ruled that the mining ban worked a taking of all RTG property in the affected area regardless of whether surface rights or adjacent parcels retained value. What's more, the court basically ignored the potential effect of mining on the region's aquifer, simply holding that "mining itself is not a nuisance."

This is a stunning departure from established law that reopens debate in Ohio on the parcel-as-a-whole rule and casts into doubt whether background principles of Ohio nuisance law are broad enough to protect against environmental degradation. The State has sought reconsideration, and CRC has moved for leave to support the request. The decision can be viewed at: http://www.sconet.state.oh.us/rod/documents/0/2002/2002-Ohio-6716.doc

## EYE ON WASHINGTON

### Honey, I Shrunk the Docket

During his controversial tenure as Chief Judge of the Court of Federal Claims (CFC), Loren Smith had two major projects: re-writing takings law to undermine health, safety, and environmental protections, and expanding the prestige and perks of judgeships on the CFC, through efforts such as his implementation of a uniquely cushy "senior status" system for CFC judges. The *Tahoe* decision dealt a serious blow to project one. Project two came under direct attack at the CFC's fall Judicial Conference when George Washington Law Professor Steven Schooner released a study attacking Smith's reforms and concluding, more surprisingly, that the court itself is unnecessary.

Schooner makes no bones about favoring "the Court's elimination," arguing that its "judges lead a charmed existence" because "a federal district court judgeship bears more than eight cases for each case allocated to a CFC judgeship." Schooner also notes that the court's "inefficient" life tenure system "serves to accelerate individual judges' paths to senior status," leading to the court's current 1 to 1 relationship between active and senior judges. By way of comparison, the ratio for active to senior judges in the federal district courts is 2.3 to 1. Thus, the CFC has "an abundance of senior judge resources" to complement the under-worked active judges. Finally Schooner observes that the court has a "hodge-podge of jurisdiction" and thus "has lost its claim of specialization" and yet "falls short as a generalist court as well." For all these reasons, Schooner concludes that "[i]t's time for Congress to contemplate a federal judiciary without the Court of Federal Claims."

We have not verified Schooner's analysis and cannot vouch for his conclusions. We can say this, however: the President and Congress plainly need to consider Schooner's findings before filling the 5 active judge seats that are currently vacant. Responding to similar workload issues that have been raised by Senators Charles Grassley (R-IA) and Jeffrey Sessions (R-AL) about the D.C. Circuit, *The Washington Post* recently editorialized in favor of getting a formal opinion from the Judicial Conference of the United States on the need for new judges before the judicial nominations process begins. This is a wise suggestion that should be expanded to include the need for new appointments to the CFC.

Our thanks to the Georgetown Environmental Law and Policy Institute for providing us with a copy of the Schooner report.

# OUTRAGE OF THE MONTH

## Hold Your Nose Around These Takings Claims

It's bad enough when mining companies, developers, and other landowners abuse the Takings Clause for financial gain. But it is both short-sighted and hypocritical when municipalities and other public agencies do the same.

Officials in Kings County, California, advise that takings challenges are being brought against county protections prohibiting the use of certain kinds of sewage sludge as fertilizer on farms. Although the county still allows the application of "Exceptional Quality" sludge (an oxymoron if there ever was one), sludge that contains excessive pathogens and other contaminants that threaten public health are banned, subject to appropriate amortization periods. One might expect aggressive applicators to sue, and they have. But a large sanitation district also has sued the county under the Takings Clause. And the real parties in interest behind the applicators' lawsuits are large urban municipalities that want cheap disposal of their sewage sludge.

We hope that the public agencies pushing these suits come to their senses before they establish takings precedent that will come back to haunt them in the future.

### Nevada County Takings Measure Bites the Dust

In our June 2002 issue, we reported that Measure D, a sweeping takings referendum, qualified for the ballot in Nevada County, California. Thankfully, in the November elections county voters rejected the measure 57%-42%. For a comprehensive analysis of the battle over Measure D and other efforts by the Wise Use movement in the County, go to: http://www.yubanet.com/artman/publish/article_1349.shtml

# ON THE HORIZON

## The *Agins* "Substantially Advance" Test in the Ninth Circuit

In *Chevron USA Inc. v. Cayetano* (No. 02-15867), the United States Court of Appeals for the Ninth Circuit will once again address the question of whether the "substantially advance" test is a legitimate theory of takings liability.

Ever since *Agins v. City of Tiburon* (1980) -- where the Supreme Court wrote that government regulation works a taking where it "does not substantially advance legitimate state interests" -- courts and commentators have been debating whether this means-end inquiry is appropriately conducted under the Takings Clause or better viewed as a due process inquiry. In articulating the "substantially advance" test, *Agins* did not rely on takings precedent, but rather on a single due process case. In *Eastern Enterprises v. Apfel* (1998), a majority of the Court -- Justice Kennedy in concurrence and four others in dissent -- concluded that normative evaluations about the wisdom of government action should take place under the Due Process Clause, not the Takings Clause. The following year in *Del Monte Dunes*, the Court affirmed an award of compensation for a regulatory taking, but ironically not a single Member of the Court was willing to endorse the jury instruction's means-end theory of liability used in that case.

The *Chevron* claimants challenge Hawaii's Act 257, a measure designed to control retail gasoline prices by limiting the rent that gasoline wholesalers may charge to gas station lessees. The State must overcome law-of-the-case and law-of-the-circuit arguments raised by an earlier ruling in the case, but its briefs set forth a compelling case for rejection of the previous ruling or, at a minimum, the use of a deferential standard of review to evaluate the challenged statute.

No matter how the current panel rules, expect the losing party to seek en banc review. Down the road, the case also might present the U.S. Supreme Court with a chance to clarify this troubling area by consigning the means-end inquiry to its rightful place in due process analysis.

### QUOTE OF THE MONTH

"The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. [citing *Agins*] This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act."

*Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).