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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

$2B Takings Award for La. Oyster Fishermen "Shocks the Conscience"

Avenal v. State, 2003 WL 22501685 (La. App. 4 Cir. 10/15/03)

Oyster fishermen in Louisiana stand to receive an unprecedented windfall from the state's courts, a result of two class-action lawsuits alleging that the value of their state-issued oyster bed leases was wiped out by a successful coastal restoration plan. Thus far state courts have awarded some 200 claimants more than $2 billion, an amount equal to one eighth of the state's budget. The awards, the largest in U.S. history, are worth more than the total value of all oysters harvested in Louisiana since the state created its leasing program in 1902. By way of comparison, in the 1803 Louisiana Purchase, the United States bought more than 800,000 sq. mi. of land extending from the Mississippi River to the Rocky Mountains, doubling the size of the country, for about $15 million, or roughly $230 million in today's dollars.

"This is the most ridiculous thing, this is when the legal system doesn't work. This is totally skewed. If it were me, I wouldn't pay it," said Gov. Mike Foster on his radio program.

The restoration plan, which ironically was supported by the oyster industry, involved diverting freshwater to reduce artificial salinity in Breton Sound caused by Mississippi River levee systems. The change in water salinity has improved oyster conditions in some areas, but reduced oyster viability in the areas of the claimants' leases. The U.S. Court of Federal Claims previously rejected an identical takings claim, ruling that the oyster harvesters had no property interest in the artificial salinity levels caused by the levee systems. The Federal Circuit affirmed, holding that the claimants had no reasonable investment-backed expectations because they had warning of, and indeed supported, the freshwater diversion project.

The *Avenal* claimants found a warmer reception in state court, which by a 3-2 vote affirmed a $1.3 billion dollar jury award. Dissenting Judge Love wrote that the award "shock[s] the conscience." In a bizarre move, the court set damages not at the value of the leases (which cost about $2 per acre) or even the value of the oysters themselves, but chose instead the estimated replacement cost of restoring or creating in another location suitable water bottom conditions sufficient to support oysters. The award includes more than $21,000 per acre to "restore" their leases by adding some six inches of cultch material—crushed shells and other debris to which oysters attach themselves. Ironically, this amount of cultch was never present on most of these leases in the first place.

Avenal, and a related case awarding roughly $600 million in compensation, are being appealed.

OUTRAGE OF THE MONTH

Court Rejects Company's Efforts to Force State Buyout of Oil Leases

It would take considerable chutzpah for a venture oil company that has no income, no partners, and has never produced a drop of oil to seek a state buyout of oil and gas leases that most likely contain no mineral resources. But that's exactly what took place in the case of *Coastal Petroleum Co. v. State*, No. 02-4712 (Fla. Dist. Ct. App, Dec. 3, 2003) (per curiam). In a sharply-worded order, however, a Florida appellate court this month saw through the company's ruse and held that denial of an offshore drilling permit did not give rise to a taking.

The Coastal Petroleum Company acquired leases to potential oil resources in the Gulf of Mexico just north of Tampa Bay in 1941. The company made little effort to develop the resource and in 1976 entered into an agreement that obligated it to seek the necessary environmental permits before drilling. Although the Florida Department of Environmental Protection initially granted a permit in 1996, this permit was invalidated by a state court, which ruled that the environmental risks of drilling far outweighed the speculative potential of recovering oil from the lease. The company in turn filed a takings claim.

In 50 years of doing business, Coastal Petroleum has never produced any oil or made a profit, yet it sought hundreds of millions of dollars in compensation for its "losses." Circuit Judge Ralph Smith Jr. correctly rebuffed this transparent attempt to get rich off the back of Florida's taxpayers. In rescinding the permit, the court said, the state had merely exercised its contractual right to insist that the company secure permits under existing environmental laws.

ON THE HORIZON

Friedenburg v. New York Dep't. of Envtl. Conservation
2002 WL 32310111 (N.Y. App. Div. Nov. 24, 2003)

A New York appellate court dealt a blow to the state's wetlands protection efforts last month, ignoring the state's arguments on relevant parcel and background principles to hold that development restrictions on a tidal wetland in the Village of Southampton worked a taking under the *Penn Central* balancing test.

Gwendoline Londino purchased four waterfront lots with a single deed in 1962 for $121,830. Two of the lots were sold for development in 1966 for $165,000 and the third lot was sold in 1990 for $660,000. The owners sought a permit to build a single family home on the remaining 2.5 acres, but the state denied the request, finding that the project's sewage system would release effluent containing pathogenic bacteria into Shinnecock Bay and nearby wetlands. Londino's estate challenged the permit denial as a taking.

After rejecting a categorical taking under *Lucas*, the court focused its attention on what it called a "near total or substantial decrease in value" of the remaining land and the fact that the property was purchased prior to enactment of the regulations. But the court failed to even acknowledge the state's argument that the 2.5 acres was one of four lots originally purchased for investment, and that the land had already returned $825,000 through the sale of the first three lots. What's more, the court declined to address the state's assertion that the regulation was not a taking due to background principles of state law regarding nuisance and public trust. In awarding compensation, the court cited the Federal Circuit's decision in *Florida Rock* to support its conclusion that there was no reciprocity of advantage or shared benefit that justified the regulation.

The state is considering an appeal to New York's high court, and we will keep you apprised of any further developments.

QUOTE OF THE MONTH

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

EYE ON WASHINGTON

$600 Million Takings Claim Pits Old West Against New

When Defenders of Wildlife hoisted its logo over the door of a renovated black marble building in Washington, D.C. that formerly served as the headquarters of the National Mining Association, few missed the image's potent symbolism. But Old West policies like the Mining Law of 1872, which remarkably still allows people to maintain royalty-free claims to mineral resources on the public lands, die hard. Now a $600 million takings claim over mineral rights in the Siskiyou Mountains stands as an equally vivid symbol of the continued debate between resource protection and resource extraction.

Walt Freeman owns 161 mining claims that he says entitles him to dig for nickel, iron, and chromium in the Siskiyou region of southern Oregon. Boasting more than 300 plant species, some of which are found nowhere else in the world, the Siskiyou National Forest is considered one of the most biologically rich areas in North America. Federal agencies have thus far blocked the project to protect the environment, and Freeman believes he should be paid handsomely to give up his claims.

Under the 1872 Mining Law, even if Mr. Freeman does develop his claims, he will pay no royalties and has little responsibility to account for the environmental harm his operations could cause. Congress has attempted to reform the law since the 1970s but mining interests have prevented any significant changes to rules set up to encourage pioneers to settle the West. What's more, the Bush administration recently reversed a Clinton-era ruling limiting the amount of public land acres available by right to claimants for processing ore and dumping often toxic mine waste.

The Supreme Court rejection of a takings challenge where federal law extinguished a mining claim in *United States v. Locke* (U.S. 1985) gives us hope that the government will prevail. Mr. Freeman's claim, if successful, could seriously impede the ability of the natural resource agencies to protect public lands under federal land laws and other laws without incurring huge liability for takings claims.