February 2004
Vol. IV, No. 2

Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASE

Court Awards $14 Million in ESA Takings Case

Although habitat protection under the Endangered Species Act has sparked much controversy over the years, landowners alleging regulatory takings under the Act have met with little success—until now. On December 31, the U.S. Court of Federal Claims awarded water users in the Tulare Lake Basin of California $14 million plus interest in a takings challenge to efforts by state and federal officials to protect the winter-run chinook salmon and delta smelt, two species of fish considered in danger of extinction. *Tulare Lake Basin Water Storage Dist. v. United States*, 2003 WL 23111365 (Fed. Cl. Dec. 31, 2003). The damage award follows the court's previous decision finding a physical taking of the farmers' water rights, which we discussed in our first issue of *Takings Watch* in May 2001.

At the center of the litigation are two projects that transport water from northern California for farm irrigation in the southern portion of the state. Although the government did not consumptively use the water at issue, but instead only restricted the farmers' use, the court ruled that the government had "seized" the water. The court thus sidestepped a *Penn Central* analysis to find a physical taking, while also rejecting arguments that several background principles of state law, including the public trust and reasonable use doctrines, that deprive the claimants of any right to use the public's water in a way that injures wildlife.

The government has not yet decided to appeal the case, which is the first significant decision holding that protections under the Endangered Species Act constitute a taking. If the decision stands, the government could also face up to $1 billion in liability for a claim over similar water restrictions in the Klamath Basin in Oregon and Northern California that were aimed at maintaining lake levels for two endangered species of sucker fish. "It does potentially set a very expensive precedent for the federal government," University of California Berkeley law professor Joseph Sax told the *LA Times*. *See* http://www.redding.com/news/state/past/20040129state065.shtml.

Expansion of the court's disturbing physical takings analysis beyond the context of water rights could also have troubling implications for workaday land-use protections. We plan to file a brief next month in *Stearns Co., Ltd. v. United States,* a similar CFC case holding that federal permitting regulations worked a physical taking of a mining company's right to mine in a National Forest.

OUTRAGE OF THE MONTH

The Fundamental Right to Ranch?

William Myers, a nominee to the Ninth Circuit, is a quiet man, not the kind central casting would send down if you asked for a wild-eyed radical. But his views on property rights are off the charts.

Myers believes property rights are "fundamental rights." Now, property rights *are* fundamental in the sense of being important. But the term "fundamental right" as used in constitutional law is a term of art that describes rights such as the core right to free speech. It connotes the strictest of constitutional scrutiny and tolerates impairment only where the challenged government action is the least restrictive alternative to promote a compelling state interest. Nothing in the Constitution, our traditions, or Supreme Court precedent suggests that property rights are fundamental in this sense.

Yet Myers thinks they are. He argued to the Supreme Court that "the Constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech," and that "[e]very bit as much as a regulation that restricts speech, the regulation of private property here must be held under the strong light of Constitutional scrutiny." And because he was both client and counsel on this brief, it's difficult for him to explain this position away as the backwash of zealous advocacy.

The President says he wants judges who interpret, not make, the law. But his vetting process let another clunker slip through the cracks. For more information on Myers, visit http://www.communityrights.org/CombatsJudicialActivism/JEP/MyersReport.asp.

ON THE HORIZON

Principled State *Amici* Defend Federal Authority

In last month's issue, we mentioned that in *Alaska Department of Environmental Conservation v. U.S. EPA* (2004) (*AEC*), 13 States filed an amicus brief opposed to the position of the State of Alaska and in favor of EPA. This intriguing development by these State AGs was by no means an isolated occurrence, and we expect similar briefs to be filed in future cases.

In *AEC*, a bipartisan coalition of the 13 State *amici* -- Vermont, California, Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Wisconsin, and the Pennsylvania Department of Environmental Protection -- successfully argued that EPA had authority to trump Alaska's determination specifying pollution control technology under the Clean Air Act. While recognizing that it might seem "counterintuitive" for States to take a position against another State, they insisted that EPA's oversight role "provides a necessary backstop and contributes to consistent application of the Act," and promotes the interest of all States "by assuring that each State carries out its obligations under the Act."

Likewise, in *South Florida Water Management District v. Miccosukee Tribe of Indians* (No. 02-626), a coalition of 14 States argued against the water district, contending that the Clean Water Act allows federal authorities to manage water diversions even where the source of the diversion is not the original source of the pollutants in the water. "[B]ecause watersheds do not respect political boundaries," they argued, "downstream States have a substantial interest in protecting their water bodies through the uniform processes and remedies provided by the Act against the transfer of pollutants originating in upstream States."

State *amici* similarly supported federal authority in the 2001 *SWANCC* wetlands case and in the 2000 *Morrison* case involving the Violence Against Women Act, and even more remarkably they argued against sovereign immunity under the Family and Medical Leave Act in the 2003 *Hibbs* case. We applaud these visionary efforts by the States to look beyond the knee-jerk, federal-state power struggle, and to support the national floor of minimum protections that every community deserves.

QUOTE OF THE MONTH

"[T]he true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, or to protect a State's treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law."

Egelhoff v. Egelhoff (2001) (Breyer, J., dissenting) (arguing that appropriate limits on preemption promotes federalism).

EYE ON WASHINGTON

And Now, A Word From Our Readers at the Forest Service

An official from the U.S. Forest Service takes exception to our December 2003 blurb on Walt Freeman's $600 million takings challenge to federal efforts to block mining in the environmentally-fragile Siskiyou region of southern Oregon.

In response to our assertion that Mr. Freeman would have "little responsibility" for the environmental harm caused by his proposed operations, Mike Doran of the Forest Service's Minerals and Geology Management office wrote to remind us that Mr. Freeman would be required to post a bond and prepare a reclamation plan. We thank Mr. Doran for noting these requirements. But the more pressing issue for us, and we hope for the Forest Service, is whether these legal responsibilities are adequate to the task. A 2003 report by the Mineral Policy Center concludes that taxpayers could be liable for more than $12 billion in clean-up costs at hardrock mining sites because bond requirements fall far short of actual reclamation and closure costs. *See* http://www.mineralpolicy.org/publications/pdf/PuttingAPriceOnPollution.pdf. Moreover, reclamation occurs only after the fact and often cannot repair the damage mining does to environmentally-fragile lands like those in the Siskiyou region. The U.S. Environmental Protection Agency estimates that mining has polluted 40 percent of the headwaters of all western waterways, and it ranks the mining industry as the nation's worst toxic polluter. *Id.*

As applied to hardrock mining on public land, the text of the General Mining Law has remained essentially unchanged since its signing in 1872. That's why former Interior Secretary Bruce Babbitt lampooned the law in a press conference by signing a new patent with a quill pen, much as Ulysses S. Grant signed the law itself. Many thoughtful people continue to view the General Mining Law as a hopelessly antiquated relic in need of serious reform. *E.g.,* John Leshy, *Mining Law Reform Redux, Once More*, 42 Nat. Resources J. 461 (2002). For those who want more information about mining in the fragile Siskiyou National Forest, including a breathtaking array of photographs of the area, visit www.siskiyou.org.