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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

U.S. Court of Federal Claims Rejects Takings Challenge to Mining Protections

Appolo Fuels, Inc. v. United States, 2002 WL 31889325 (CFC, Dec. 18, 2002)

The U.S. Court of Federal Claims denied compensation last month to a mining company that contended its coal was taken as a result of a permit denial designed to protect drinking water and the environment. The summary judgment decision in *Appolo Fuels* stands in stark contrast to last month's Feature Case, *RTG v. State*, in which the Ohio Supreme Court held that similar protections worked a taking even though the proposed mining threatened an important aquifer.

Appolo Fuels, a Kentucky coal mining company, acquired coal rights in some 2,600 acres, including coal seams within the Little Yellow Creek watershed that spans the border of Kentucky and Tennessee. The company began mining portions of the property in 1989 and sought additional permits to mine within the watershed area in 1994. In 1996, the Office of Surface Mining approved a petition of the National Parks and Conservation Association and the city of Middlesboro, Ky., prohibiting surface mining in about half the watershed because of potential harm to Middlesboro's water supply, the Cumberland Gap Historical Park, and endangered species. The OSM granted Appolo the right to conduct underground mining on tracts both within and outside the petition area, but the company sued, claiming that the surface mining restrictions worked both a categorical and partial regulatory taking.

The court began its analysis by rejecting Appolo's argument that the relevant parcel should include only its surface mineable coal reserves within the watershed, concluding that the parcel-as-a-whole rule requires inclusion of other property interests both within and outside of the watershed. Although the value of two of Appolo's leases dropped by 78 and 92 percent, Judge Christine Miller rejected Appolo's categorical taking claim because the relevant parcel retained economically viable use. The court also denied the company's partial taking claim, ruling that "plaintiff held no legitimate expectation that it could mine in the area unfettered by regulation." Judge Miller further ruled that water pollution was an "abatable nuisance" under Tennessee law and that "OSM exercised its police power to protect its citizens from a nuisance."

The *Appolo Fuels* court's insightful analysis and fidelity to precedent demonstrates the aberrancy of the Ohio Supreme Court's decision in *RTG*. Unfortunately, earlier this month the Ohio court denied the state's motion for reconsideration. For a cogent *Columbus Dispatch* editorial denouncing the *RTG* decision, go to www.communityrights.org/legalresources/crcbriefs/RTG/CD1-13-03.asp.

EYE ON WASHINGTON

Welcome to the Team, Roger!

We thought we were dreaming when we read recently in the *National Law Journal* that Roger Marzulla -- founder and General Counsel of Defenders of Property Rights and a mainstay of the property rights movement -- helped *defeat* a multi-billion dollar regulatory takings claim brought by Coastal Petroleum against the State of Florida based on Florida's cancellation of oil leases. But Mr. Marzulla's welcome defection is simply the latest in a lengthy list of prominent conservatives who have argued against an unduly expansive application of the Takings Clause and other constitutional provisions.

As we've previously reported, Solicitor General Theodore Olson personally defended the moratorium upheld in *Tahoe*. Conservative pundit James Kilpatrick recently opined in favor of the government in the pending takings challenge to Washington State's IOLTA program. In his book, *Narrowing the Nation's Power*, Reagan-appointee and respected legal historian Judge John Noonan created a stir last year with a scathing criticism of the Rehnquist Court's federalism jurisprudence. And Judges J. Harvie Wilkinson III and Bobby R. Baldock, both Reagan-appointees, have denounced anti-environmental judicial activism.

Perhaps it would be asking too much for Richard Epstein to renounce his takings treatise, but with the arrival of the New Year, hope springs eternal.

IOLTA TRANSCRIPT

A transcript of the oral argument before the U.S. Supreme Court in the IOLTA case is available at http://www.communityrights.org/PDFs/Briefs/WLFORALARG.pdf.

OUTRAGE OF THE MONTH

Massachusetts Cigarette Disclosure Law Goes Up in Smoke

Philip Morris v. Reilly, 312 F.3d 24 (1st Cir. Dec. 2, 2002) (en banc)

The First Circuit ruled last month en banc that a Massachusetts law requiring tobacco companies to give the state detailed lists, including relative amounts, of the ingredients of cigarettes and tobacco products sold in the state was an unconstitutional condition that took the companies' property in violation of the Fifth Amendment.

The law, which allowed for public disclosure of these ingredient lists in the interest of reducing risks to public health, "essentially destroys the tobacco companies' trade secrets," Judge Juan Torruella wrote in the lead opinion. In a blatant example of judicial second-guessing of reasonable legislative determinations, Torruella concluded: "I simply am not convinced that the Disclosure Act . . . really helps to promote public health." Torruella noted that while two other states, Minnesota and Texas, require some disclosure of additives to tobacco products, neither makes complete product content and ingredient ratios available to the public.

The decision's rejection of what seemed settled law is surprising and disturbing. As far back as 1919, the U.S. Supreme Court held that manufacturers who sell goods in the stream of commerce can be required to disclose the ingredients. In *Corn Prods. Refining Co. v. Eddy*, the Court said "it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold." Likewise, in *Ruckelshaus v. Monsanto Co.* (1984), the Court held that the government could disclose trade secrets submitted by a company in exchange for the ability to sell a product to the general public. So long as the company is aware of the government's ability to reveal the information and the regulation is rationally related to the government's legitimate interest in protecting public health, under *Monsanto* there is no taking.

The original three-judge panel in the case, which included a senior judge and district court judge, rejected Philip Morris's takings claim. In an unusual rehearing en banc with only three judges participating, Judge Selya concurred in the result but rejected Torruella's reasoning, and Judge Lipez dissented. Because the three judges on the en banc panel could not agree on a rationale, the precedential effect of the ruling is questionable. The state has until March to decide whether to petition the U.S. Supreme Court for review.

ON THE HORIZON

Las Vegas Landowners Roll the Dice Once More

On February 10, the Nevada Supreme Court will hear oral argument in *County of Clark v. Tien Fu Hsu*, a $22 million takings challenge to height restrictions on 38 acres of land next to McCarran International Airport in Las Vegas.

In imposing the height controls, the County did nothing more than implement the Federal Aviation Administration's minimum standards designed to avoid catastrophic collisions in the event of an emergency deviation from normal flight paths. There is no evidence that any plane will ever invade the claimants' land, much less that any overflights would be so low and frequent as to meet the standard for an overflight taking set forth in *Causby* and *Griggs*. And it is undisputed that the challenged rules do not interfere with the existing, profitable use of the land as a trailer park. Nevertheless, the state trial court awarded the claimants $22 million for a per se, physical-invasion taking.

On appeal, CRC submitted an amicus brief supporting the County on behalf of the American Planning Association. We hope the Nevada Supreme Court follows the high court of Texas, which rejected a similar claim last year in *City of Austin v. Travis County Landfill*, 73 S.W. 3d 234 (Tex. 2002). Watch for a ruling in *Clark County* later this year.

QUOTE OF THE MONTH

"[Ripeness doctrine] responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer. As the Court said in *MacDonald,* 'local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other.'"

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997) (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986)).