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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Victory in *Stearns v. United States* (Fed. Cir. 2005)

We opened our amicus brief in *Stearns v. U.S.* by stating: "Takings law can give rise to difficult cases, but this is not one of them." On January 28, the Federal Circuit proved us right by issuing a seven-page ruling unanimously reversing a dreadful opinion by Senior Judge Loren Smith of the U.S. Court of Federal Claims.

The lower court had concluded that the federal surface mining laws worked a *physical* taking of Stearns's land in the Daniel Boone National Forest in Kentucky simply because the Interior Department exercised jurisdiction over that land. Interior did nothing more than require Stearns to apply for a "compatibility determination" to ensure that its mining would be consistent with recreational, economic, and other interests. Trial testimony showed that the application process is "essentially a rubber stamp," with Interior having granted an unbroken string of 18 straight applications for mining in that area. Nevertheless, Judge Smith concluded that the imposition of a requirement to seek approval constituted a physical taking of Stearns's right to mine.

The Federal Circuit made short work of this theory, rejecting it as "little more than an incredible attempt to transform a regulatory taking claim into a per se physical taking." Writing for the appeals court, Judge Clevenger stressed that because the government did not require Stearns to submit to a physical occupation of its land, there was no physical taking.

The court then concluded that any regulatory takings claim would remain unripe until Stearns went through the application process: "The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." (citing *United States v. Riverside Bayview Homes* (U.S. 1985)).

CRC filed an amicus brief on behalf of the National League of Cities and the International Municipal Lawyers Association. Kudos to Katherine Barton and her colleagues at the U.S. Department of Justice. A copy of the opinion is available at http://www.fedcir.gov/opinions/04-5031.pdf

ON THE HORIZON

Supreme Court Update

The High Court has three property rights cases pending before it, cases that could make this Term one of the most significant in takings history. Community Rights Counsel is filing amicus briefs in all three. Here's what's happening:

In *Lingle v. Chevron U.S.A., Inc*. -- which raises the issue of whether the *Agins* "substantially advance" test is a viable standard for regulatory takings liability -- Chevron filed its merits brief on January 14. It is supported by eight amici, including Pacific Legal Foundation, National Association of Home Builders, and Cato Institute. Oral argument is scheduled for February 22, the same day as *Kelo* (see below). The Court has granted 10 minutes of argument time to the United States as amicus in support of Governor Lingle.

In *Kelo v. City of New London* -- which raises the issue of whether the Fifth Amendment's "public use" provision prohibits the use of eminent domain for economic development -- New London filed its opening brief on January 21. It is supported by more than a dozen amici. Oral argument will be held February 22. As in *Lingle*, Community Rights Counsel, along with the State and Local Legal Center, filed an amicus brief on behalf of the National League of Cities and other state and local government groups (available at http://www.communityrights.org/PDFs/Briefs/Kelo.pdf).

In *San Remo Hotel v. San Francisco* -- which raises the issue of whether a takings claimant, who files in state court as required by *Williamson County*, gets a second bite at the apple in federal court on issues already resolved in state court -- San Remo filed its opening merits brief on January 21. It is supported by several amici, including the Home Builders and Ohio Representative Steve Chabot. San Francisco's brief is due February 28. Argument will be held March 28.

QUOTE OF THE MONTH

"[T]he idea that courts had the power to supervise legislative expropriations would have been unfamiliar to the members of the Congress who drafted the so-called Takings Clause."

Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-called Takings Clause*, 53 Hastings L. J. 1245 (2002) (explaining why courts should respect legislative decisions to use eminent domain).

OUTRAGE OF THE MONTH

Kelo Myths

The Institute for Justice, counsel for the landowners in *Kelo v. City of New London*, has waged an extensive public relations campaign to push its position that the Constitution prohibits community officials from using eminent domain to acquire land needed for economic redevelopment. This media blitz is filled with myths and distortions too numerous to list, but among the most pernicious falsehoods is IJ's suggestion that local officials who back economic development projects do so as a sop to politically connected private developers. IJ and its supporting amici portray these community leaders as having a ravenous appetite for increased tax revenues so they can secure reelection by creating more government programs for political allies.

In its amicus brief in support of New London, Community Rights Counsel took dead aim at this nonsense. We explained that local governments do not exist to enrich a select few, but to solve problems and provide services that all citizens need and demand. And we stressed that the millions of dollars provided by economic development projects mean more money for vital government services across the board, including more police officers and firefighters, increased support for senior citizens, better pre-natal care, adolescent pregnancy prevention, more teachers and better-equipped schools, more effective child-abuse prevention, and so on.

IJ's media campaign also ignores the tremendous job benefits that come from redevelopment projects. In *Kelo*, after decades of economic decline, New London suffered another serious blow in 1996 when the Navy closed a large defense facility, throwing 1,500 more people out of work. Through the Fort Trumbull redevelopment project, this city of 25,000 residents hopes to create up to 2,500 new jobs. Without the use of eminent domain, a small handful of holdouts will doom the project, condemning the community to the hopelessness of unemployment and the social ills that come with it, including spousal abuse, poverty, crime, alcoholism, and suicide.

The holdouts in *Kelo* and other eminent domain cases sometimes have sympathetic stories to tell, and the burdens imposed by eminent domain should not be ignored. In some situations, reasonable people can disagree about how best to balance the equities. But if we're going to debate these choices, let's have an honest public debate that openly acknowledges the human misery that will result if job creation and economic development are no longer deemed to be a "public use" under the Constitution. The caricature of New London officials as revenue grabbers disserves the discussion.

EYE ON WASHINGTON

Happy Holidays, Roger and Nancie

In a surprising and disappointing development finalized quietly during Christmas week, the Bush administration decided to settle -- rather than appeal -- *Tulare Lake v. United States*, putting $16.7 million into the pockets of a handful of California farmers and their lawyers, Roger and Nancie Marzulla, co-founders of Defenders of Property Rights.

Tulare Lake involved a challenge to federal protections for endangered salmon and delta smelt that resulted in reductions of water available to certain farmers under their contracts with the state of California. The Court of Federal Claims found a taking even though the reductions at issue ranged from 8 to 22 percent of the claimants' allocated water, losses that came nowhere close to the near-complete wipeout generally needed to show a regulatory taking under Supreme Court precedent.

As Roger Marzulla boasts, *Tulare Lake* is the first case ever where a court has found that enforcement of the Endangered Species Act violates the Takings Clause. And as explained in a March 2004 memo written by the National Oceanic and Atmospheric Administration to the Department of Justice urging appeal, the Tulare Lake case is already making it more difficult for NOAA to enforce endangered species protections for salmon. Yet the government decided to settle rather than appeal the case to the Federal Circuit.

As takings guru Joe Sax told the *Contra Costa Times*, "it was a terrible thing that the government didn't appeal [Tulare Lake], partly because it's wrong and partly because government is usually quite zealous about trying to protect the Treasury against claims that are disputable." And as the *Stearns* case indicates (see Feature Case), the Federal Circuit has shown itself willing and able to reverse baseless rulings by the Court of Federal Claims. On the bright side, the settlement must have Roger and Nancie Marzulla believing anew in a federal Santa Claus.