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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Federal Circuit Issues Key Decision on Permanent Physical Occupations: *Boise Cascade Corp. v. United States* (Fed. Cir. 2002)

On July 19, the Federal Circuit Court of Appeals handed down an important ruling limiting the scope of physical takings. In *Boise Cascade Corp. v. United States*, 2002 WL 1586329, the court rejected a timber company's argument that the presence of spotted owls and occasional intrusions of government biologists on Boise's timber lands constituted a taking. In so doing, the Court carefully distinguished between temporary invasions and permanent occupations, narrowing its more expansive decision in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

Since the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) -- which holds that a government-authorized, permanent physical occupation of land is a *per se* taking -- lower courts have struggled with the concepts of "permanency" and "occupation." In *Hendler*, the Federal Circuit held that monitoring wells installed by the government on property neighboring a Superfund site were permanent physical occupations within the meaning of *Loretto*. The ruling contained sweeping language declaring that "'permanent' does not mean forever or anything like it." Rather, the court defined "permanent" as "a term of finite duration" that could extend for "less than one year." Other courts criticized *Hendler*'s definition of permanent as "contorted" and "in clear conflict with Supreme Court precedent, particularly *Loretto*." *E.g., Juliano v. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth.*, 983 F. Supp. 319, 327-28 (N.D.N.Y. 1997).

Boise Cascade limits *Hendler* to its facts and relegates its troubling discussion of permanency to the status of discredited dicta. In the wake of *Boise Cascade*, *Hendler* now stands only for the proposition that "when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred." *Boise Cascade* reaffirms that to be successful under *Loretto*, a *per se* claim must involve a genuinely permanent occupation, one that forever denies the owner any power to control the use of the occupied land. Moreover, the court clarified that the government could not be liable for a physical taking based on endangered species protections because it "has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land."

The *Boise Cascade* court also reaffirmed the principle established in *United States v. Riverside Bayview Homes, Inc.* (U.S. 1985) that no taking occurs where the government merely requires a landowner to obtain a permit before engaging in a particular land use. The court rejected Boise Cascade's contention that normal delays in the permitting process can give rise to a taking, and its bizarre assertion that *Riverside Bayview* was somehow undercut by the Supreme Court's recent ruling in *Tahoe-Sierra*.

Government attorneys should find *Boise* to be very helpful precedent when defending against *Loretto*-styled physical occupation claims. Kudos to Kathryn Kovacs and her colleagues at the U.S. Department of Justice on this important victory.

QUOTE OF THE MONTH

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship . . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 491-92 (1987), *quoted in Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania,* 799 A.2d 751 (2002).

EYE ON WASHINGTON: Takings Alerts

Need to stay abreast of the latest takings developments as they happen? Earthjustice Senior Legislative Counsel Glenn Sugameli runs a low traffic listserve aimed at attorneys and planners defending against takings claims. To sign up or for more information, contact Glenn Sugameli, Earthjustice, gsugameli@earthjustice.org or 202-667-4500 x 221.

OUTRAGE OF THE MONTH

For several months, the American Bar Association's Committee on Ethics and Professional Responsibility has been considering whether to issue new ethical guidance for judges regarding the dubious practice of accepting free seminars at resort locations funded by corporate litigants or ideological philanthropists, seminars that frequently present a slanted view of the issues. Although CRC has been at the forefront of investigating and criticizing this practice, we have played no role in the ABA's substantive deliberations.

So we were more than a little surprised to learn that Leonidas Ralph Mecham, Executive Director of the Administrative Office of the U.S. Courts, recently sent a memo to the Chief Justice of the United States and members of the Judicial Conference accusing the ABA of "relying almost entirely" on CRC in formulating its ethics opinion and accusing CRC of opposing judicial junkets to "advance the interests of its financial contributors."

We're flattered that Mr. Mecham would think that the 400,000-member ABA needs to rely "almost entirely" on our five-person shop. But his memos to the Chief Justice need some rudimentary factchecking. In follow-up correspondence, the ABA forcefully refuted the notion that CRC or any other organization has played a role in the formulation of the ethics opinion. Indeed, the ABA does not discuss such deliberations with any outside group except for the judges that serve on the Ethics Committee's judicial advisory board.

Moreover, Mr. Mecham's assertion that CRC's judicial watchdog activities seek to advance the interests of its financial contributors is, simply put, Orwellian. We have exposed these trips because they advance the interests of those who fund them at the expense of the appearance of impartiality. CRC's funding comes entirely from independent foundations that care about environmental protection, land use policy, and judicial independence. And our clients include groups like the American Planning Association and the National Governors Association, not organizations typically viewed as having a particularly nefarious philosophical and economic agenda. Our goal is to promote a judiciary that is independent, impartial, and above reproach.

Mr. Mecham seems bent on opposing any additional ethical restrictions on judicial junkets, an opposition so vehement that he shoots first and asks questions later. We won't hold our breath waiting for an apology.

ON THE HORIZON:

Developers Challenge Long Island Pine Barrens Act

Despite previously failed efforts in state and federal court, developers are once again challenging New York State's protections for the Long Island Pine Barrens. In *Dittmer v. County of Suffolk*, the Second Circuit has an opportunity to uphold an important environmental statute and end a cycle of litigation that threatens to chill the region's planning efforts.

Enacted in 1993, the Long Island Pine Barrens Maritime Reserve Act established a comprehensive planning framework for the Barrens, an ecologically unique area that is also the sole source of drinking water for 2.5 million Long Island residents. The District Court dismissed two of Dittmer's three claims in 1999 and granted summary judgment for the State on the last claim in February 2002. On appeal, Dittmer reasserts his equal protection and due process claims, and raises for the first time the frivolous argument that the Act is an unconstitutional bill of attainder.

Dittmer is a prime example of how developers sometimes embark on costly and protracted litigation schemes designed to chill and frustrate government planning efforts. A good decision from the Second Circuit could stop such lawsuits from taking up years of the community's time and energy in the future.