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# Community Rights Report

*CRC's Monthly Newsletter*

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## FEATURE CASE

### Under Odd Parcel Definition, City Quarry Ban Might Work a Taking
### *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882 (5th Cir. May 21, 2004)

In an unusual decision, the Fifth Circuit reversed a district court opinion to hold that an ordinance banning limestone quarries within city limits would work a categorical taking under the Texas Constitution, unless the quarrying is deemed to be a nuisance. The ruling is especially disturbing because the ban applies only to 48 of the claimant's 298-acre parcel.

The City of Tehuacana, Texas boasts a population of just over 300. It passed an ordinance in 1998 that forbids certain mining activities within city limits due to property damage, dust, smoke, and loss of springs and water wells caused by quarry blasting. Vulcan Materials held mineral leases on 48 acres within the city limits and on an additional 250 acres of adjacent land beyond the city's borders unaffected by the law. On motion for summary judgment, the district court rejected Vulcan's multi-million dollar takings challenge to the restrictions on its 48 acres because it held the activities constitute a nuisance under Texas law and Vulcan did not suffer a complete loss of value. The court noted that Vulcan owned other property and could still theoretically extract limestone from the tract without blasting, although such means were more labor intensive and expensive.

Rejecting this analysis, the Fifth Circuit attempted to determine how the Texas Supreme Court would rule and held that property beyond the reach of the regulating body's jurisdiction should not be considered part of the relevant parcel. Defining the relevant parcel as only the 48 acres within the city limits, the court found that the ordinance effectively prohibits all mining on the parcel and held that it would work a categorical taking of Vulcan's mineral rights unless the mining was a nuisance. The court remanded to the district court for a trial on whether quarrying within city limits could be considered a nuisance.

Because the court makes numerous "*Erie* guesses" as to what the Texas Supreme Court would hold, the Fifth Circuit noted that its ruling "is likely to have limited precedential value." Nonetheless, the court's segmentation analysis is troubling, and it will be interesting to see how the background principles question is ultimately resolved.

## EYE ON WASHINGTON

### Federal Circuit Rejects Takings Challenge to ESA Protections
### *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. April 19, 2004)

The Federal Circuit recently rejected a temporary takings challenge that arose when the U.S. Fish & Wildlife Service denied a logging permit under the Endangered Species Act to protect nesting habitat for the northern spotted owl.

The Seibers own 200 acres of timber land in Oregon. Forty acres of that parcel were designated as protected owl habitat under the Act. In 1999, the Seibers applied for a federal incidental take permit to allow for logging on the 40 acres. The Service initially denied the permit, and the Seibers sued, alleging a taking. In 2002, the Service revisited the property and determined that a permit was no longer required because the land was no longer a protected habitat under the Act. The Seibers nevertheless pursued a temporary takings claim.

Rejecting a lower court ruling for the government on ripeness, the Federal Circuit held that under *Cooley v. United States*, 324 F.3d 1297 (Fed. Cir. 2003), a permit denial is a final decision even if the agency permits the applicant to revise their application. On the merits, the Court rejected the Seibers' claim that the permit denial constituted a physical taking under *Loretto*, stating that "regulatory restrictions … do not constitute physical takings." The court declined to decide whether *Agins* presents a distinct takings test based on the lack of a legitimate governmental interest, noting that "even if it did, it is indisputable in this case that the [Act and its permit] process serve a legitimate public purpose." Although the court left open the possibility that a similar regulation might result in a temporary categorical taking, it ruled, citing *Lucas*, that "such a thing did not occur here because the Seibers did not lose all value in their parcel as a whole." Lastly, the court held that the Seibers failed to establish a taking under *Penn Central* because they did not provide evidence that the two-year delay in harvesting a portion of their 200-acre property had any economic impact.

Kudos to Kathryn Kovacs, Kelly Johnson, and Katherine Barton who represented the government, and the Georgetown Environmental Law & Policy Institute, which filed an amicus brief in the case.

## OUTRAGE OF THE MONTH

### Death Threats Down By the Bayou

Smart Growth makes some people's blood boil, especially, it seems, in Louisiana.

Last month George Hopkins, Jr., former councilman and member of Advocates for Smart Growth in St. Tammany Parish, received a death threat soon after filing suit challenging the parish's approval of Timber Branch II, a controversial subdivision near the Tchefuncte River. Hopkins argued that the subdivision did not meet environmental standards in the parish's recently completed land use plan, New Directions 2025.

According to the *New Orleans Times-Picayune*, Advocates for Smart Growth claimed that "the project will damage nearby Little Tchefuncte River and Timber Branch, and the development will destroy an important pine savannah habitat." The lawsuit was filed on May 26, and Hopkins received the anonymous death threat the very next day.

Is there something in the water in Louisiana? In 2001, we reported that a lobbyist for the Louisiana Home Builders went into U.S. Senator Jim Jeffords's office and shouted he wanted to kill the senator. Jeffords's decision to become an Independent tolled the death knell for federal takings legislation being pushed by developer lobbyists, and evidently caused this Louisiana lobbyist to go over the top. According to *The Washington Post*, this and other death threats prompted the Capitol Police to provide Jeffords extra security.

Leaders of the so-called property rights movement sometimes claim to be engaged in a holy war. It's time to turn down the rhetoric. We trust state law enforcement officials will give the latest death threat the investigation it deserves.

### QUOTE OF THE MONTH

"Property is that which is peculiarly yours, whether it is your money, your wife, your children, your house, your car, or your real estate."

Don Gerdts, Property Rights Council of America, in Albany *Times-Union*, April 11, 1992

## ON THE HORIZON

### Court Nixes Patients' State Law Remedy
### But Two Justices Urge Future Fix

On June 21, the Supreme Court ruled in *Aetna Health Inc. v. Davila* that a federal benefits law completely preempts, and thus compels removal of, lawsuits brought in state court under state law by patients against HMOs for injuries due to unreasonable decisions not to provide insurance coverage for treatment recommended by the doctor. Community Rights Counsel filed an amicus brief in support of the patients (see our January 2004 issue), arguing that the state law claims were independent from the federal Employee Retirement Income Security Act (ERISA) and thus should not be removed from state to federal court. The Court disagreed, unanimously. It's the kind of ruling that makes you thankful there are only nine Justices on the Court.

The HMO industry is hailing the ruling as a victory for consumers because they say it will lower premiums, but it's bad news for patients who suffer harm when their health plans unfairly refuse to pay for needed medical services. If the patients sue in federal court, ERISA limits their recovery to reimbursement for the benefits they were denied; they may not recover compensation for any resulting physical harm. Ten states had passed statutes similar to the Texas law, and the ruling invalidates them all.

But the battle might not be over. Justices Ginsburg and Breyer wrote separately to "join the rising judicial chorus" urging the Congress or the Court to "revisit what is an unjust and increasingly tangled ERISA regime." They lamented the "regulatory vacuum" created by sweeping ERISA preemption coupled with cramped readings of ERISA's remedial provisions, and recommended "fresh consideration" by Congress or the Court of prior determinations that preclude make-whole relief. The issue remains very much on the horizon.

It's disappointing, from a federalism perspective, that the Court so readily allowed these cases to be snatched out of state court, thereby negating the state court's prior investment of resources and precluding that court from voicing an opinion on the case. But because ERISA preemption seems to be a world unto itself, we're hopeful that the ruling does not have much spillover effect on preemption doctrine generally.