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Community Rights Report

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Community Rights Counsel

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FEATURE CASE

California Court says *Tulare Lake* is All Wet

Allegretti & Company v. County of Imperial, 138 Cal.App. 4th 1261 (Mar. 28, 2006)

In *Allegretti & Company v. County of Imperial*, the California 4th District Court of Appeal rejected a farm company's claim that limits imposed on the amount of water drawn from an underground aquifer constituted a compensable taking of its water rights, signaling a possible critical shift in takings jurisprudence. The case is another welcome departure from the Court of Federal Claims' dreadful *Tulare Lake* decision of 2001.

Allegretti & Company owned property that overlies groundwater basins used for agricultural irrigation. The company wished to re-drill an existing inoperable well to add approximately 200 acres of additional farmland to its existing 1600 acre operation, and filed an application for a conditional use permit with Imperial County to re-drill the well. In 1997, the County issued the permit, but imposed a withdrawal limit of 12,000 acre/feet per year from all of Allegretti's wells on the property.

Allegretti sued, alleging that the County's permit restrictions and requirements constituted a physical or, alternatively, a regulatory taking. The careful and thorough opinion by Judge Terry O'Rourke affirmed the lower court's finding that the permit with the use restriction did not constitute a physical or regulatory taking, concluding that under California law, "overlying water rights … confer no right of private ownership."

Allegretti had argued that the County's regulation amounted to a physical taking because the permit denied access to the water, just as if the County had diverted the water elsewhere. The plaintiff's argument was based in part on the similar case of *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed.Cl. 313 (2001), a controversial decision about water resources in the drought-plagued Klamath basin. *Tulare Lake* found a compensable taking when government wildlife regulators diverted water resources to preserve endangered aquatic species. The case was a victory for property rights advocates and opened the door for agribusiness to demand significant compensation from the government for restrictions on water deliveries.

The *Allegretti* decision may signal a shift away from *Tulare Lake* in favor of the government's ability to enforce essential environmental safeguards. The *Tulare Lake* decision has been criticized by another Federal Claims Court judge as "wrong on some counts, incomplete on others." However, *Allegretti* was the first case to state directly, "We disagree with *Tulare Lake*'s conclusion." We happily agree with *Allegretti*'s conclusion.

EYE ON WASHINGTON

Supreme Court Update

Clean water and cooperative federalism won a victory in the Supreme Court's recent ruling in *S.D. Warren Co. v. Maine Board of Environmental Protection* No. 04-1527 (May 15, 2006). The bulk of the unanimous decision involves a sensible explication of the meaning of the word "discharge" in the Clean Water Act. We were heartened by the last section of the opinion, by Justice Souter, which looks at what actually happens to water quality when dams or other obstructions interfere with stream flow. "Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns." (Slip op. at pp. 14). We hope that the Court will continue to give weight to real-life impacts on water quality and will "respect the States' concerns" in the forthcoming *Rapanos* and *Carabell* cases by allowing continued federal oversight of wetlands, which is what the states themselves want.

In another opinion issued the same day, *DamlierChrysler Corp. v. Cuno* No. 04-1704 (May 15, 2006), the Court declined to bring clarity to its confusing dormant Commerce Clause jurisprudence. The case arose when taxpayers challenged an Ohio tax credit and tax exemption program to encourage companies to invest in the state. The Sixth Circuit held that the tax credit violated the dormant commerce clause by discriminating against similar investments made outside Ohio's borders.

The Court did not rule on the dormant Commerce Clause claims, but rather decided that the plaintiffs lacked standing. The unanimous opinion by Chief Justice Roberts explained that, among other standing shortfalls, the taxpayers did not suffer a unique injury. He invoked the need to maintain a strict separation of powers as a reason for stringently scrutinizing taxpayer standing claims. In her concurrence, Justice Ginsburg noted that one can agree with limits on taxpayer standing without supporting broad limits on standing that threaten to bar the courthouse doors to environmental plaintiffs. We hope her colleagues agree.

ON THE HORIZON

Pressure Builds for a Ban on Judicial Junkets

Fueled by a remarkable series of revelations by CRC in recent weeks, there is growing bi-partisan support in Congress and in the judiciary for banning corporate-funded judicial junkets.

In the last month, CRC has released the results of a year's worth of investigative research, documenting in three separate releases that: (1) despite years of growing outrage, corporate-funded judicial junkets increased by more than 60% over the past decade; (2) a significant number of judges have taken junkets in recent years and not reported these trips on their annual financial disclosure forms, as required by federal law; and (3) the two main groups hosting judicial junkets – Foundation for Research on Economics and the Environment (FREE) and the Law and Economics Center (LEC) – have misled the public, media and participating judges about the nature of their operations and the extent of their corporate funding, according to tobacco and oil company documents.

CRC's work has generated news stories in outlets including the Associated Press and The Washington Post. The New York Times and USA Today have editorialized in favor of a junkets ban. This work has contributed to growing, bi-partisan support in Congress for banning judicial junkets. In January, Senator Patrick Leahy (D-VT) introduced legislation that would ban junkets while providing a fund for judges to pay their own way to needed continuing legal education programs. In April, Senator Charles Grassley (R-IA) and Representative James Sensenbrenner (R-WI) responded to evidence that judges were not adequately reporting junkets with a sweeping and controversial proposal to create an Inspector General for the judicial branch.

Earlier this month, the judiciary announced that it was responding to this Congressional pressure by forming a new task force, headed by Maine Judge Brock Hornby, which will reconsider the adequacy of rules governing private judicial trips. Just this week, Chief Judge Joel Flaum of the Seventh Circuit warned that the judiciary disregards public and Congressional unrest about junkets at its own peril. These developments all point in the same direction: towards a long-overdue ban on judicial junkets.

OUTRAGE OF THE MONTH

California Schemin'

California property rights activists, backed by a New York millionaire, are trying to vitiate state and local governments' ability to create reasonable land use and environmental regulations.

Riding the wave of discontent at the Supreme Court's *Kelo v. New London* decision, the California Protect Our Homes Coalition has gathered the required signatures to place a constitutional amendment sharply limiting the use of eminent domain on a state-wide ballot in November 2006 (pending signature verification). But amid the paragraphs redefining the condemnation power is a requirement that governments compensate landowners for downzoning, height restrictions and other land use provisions. A recent Protect Our Homes Coalition press release on the amendment makes no mention of this particular provision, instead focusing attention purely on its eminent domain aspects. Voters who think that they are signing a petition or casting a vote to change the state's eminent domain laws might be in for a very unpleasant surprise if governments have to start paying people to obey zoning and environmental laws that benefit the community at large.

The California League of Cities has decried the amendment, noting that "Provisions in this initiative would … significantly erode environmental protections, [and] limit the ability to restrict sprawl and protect open space…." The initiative "is an assault on our environment and taxpayers dressed up as eminent domain reform."

The California initiative received $1.5 million from a New York millionaire and developer named Howard Rich. Rich also contributed $295,000 to a ballot initiative in Missouri and $230,000 to an initiative in Idaho that combine eminent domain changes with a pay-to-obey-the-law provision. "Wherever there are initiatives on property rights, we'll be there....We're taking an issue that people feel really strongly about, but really are powerless to do anything about, and putting it on the ballot," Rich told an Idaho newspaper recently. But in fact, people are anything but powerless to make changes in eminent domain laws. Twenty states have changed their eminent domain laws in the last year in response to public outcry at the *Kelo* decision. They didn't need out-of-state millionaires pushing their pet causes to do so.

Similar "Protect Our Homes" measures are circulating in Arizona, Nevada and Montana, and CRC reported on ballot measures like this in Washington and South Carolina in our February 2006 newsletter.