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Community Rights Report

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Community Rights Counsel

Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASE

Federal Circuit Rejects Multi-million Dollar Takings Challenge to Wetland Mitigation Requirement

Takings claims sometimes are filed not to recover money, but to intimidate government officials. The merits of such cases often are inversely proportional to the amount of compensation requested. The weaker the claim, the more bluster required. So it should come as no surprise when large claims prove to be paper thin.

In *Norman v. United States*, No. 05-5039 (Fed. Cir. Nov. 18, 2005), the claimants sought more than $34 million in a takings challenge to a 1999 permit condition requiring protection of about 220 acres of wetlands in exchange for permission to fill other wetlands. The claimants needed the permit to pursue a large-scale development project on a 2280-acre ranch in Reno, Nevada. Represented by prominent figures of the so-called property rights movement, Roger and Nancie Marzulla (founders of Defenders of Property Rights), the claimants walked away from the case empty-handed, after a series of unanimous rulings from the trial court and the Federal Circuit emphatically rejecting their claims.

The Federal Circuit made short work of the case. Although the claimants stressed that the government significantly increased its original estimate of the amount of wetlands on the site, the appeals court concluded that this fact alone was not dispositive. It also ruled that neither *Loretto* nor *Dolan/Nollan* apply to the permit condition because there is no compelled dedication of land, and even if *Dolan/Nollan* applied, the wetland mitigation has an appropriate nexus to the wetland destruction that will result from the development. The appeals court easily rejected the claimants' other arguments, concluding that the relevant parcel is the entire ranch because the claimants treated the whole ranch as a single economic unit. The opinion includes very helpful discussions of expectations, economic impact, and the benefits of wetlands to flood control.

The property rights movement is forever pushing the edge of the envelope with its radical liability theories. Thankfully, most courts know when to push back.

OUTRAGE OF THE MONTH

The Washington Farm Bureau vs. the Farmers?

On November 15, the Associated Press reported that the Washington Farm Bureau announced a campaign for a property-rights initiative similar to Oregon's infamous Measure 37, which was recently struck down by an Oregon Circuit Court. Measure 37 required state and local officials either to waive certain land use controls or pay landowners when those regulations reduced the value of their property by any amount.

This "any-value-loss" trigger for taxpayer-subsidized compensation is as extreme as it gets in the takings debate. It threatened not only to gut Oregon's acclaimed urban growth boundaries and other planning measures, but also to establish a gargantuan corporate welfare system for developers, timber companies, and others who seek to exploit every square inch of their property without regard to the harm suffered by the surrounding community. And it is based on a radical notion of takings that has been emphatically rejected by the Supreme Court.

What makes the Washington Farm Bureau campaign especially outrageous is that the key plaintiffs in the Oregon suit to invalidate Measure 37 are themselves farm bureaus, farmers, and ranchers. These landowners argue that their businesses and property would be severely harmed if local officials waived agricultural zoning laws and other longstanding land use controls, thereby destroying watersheds and other vital natural resources. Measure 37 also would result in subdivisions immediately adjacent to their farms and ranches, bringing homeowners who might well file nuisance suits to curtail inconveniences caused by nearby farm and ranch operations.

Before the Washington Farm Bureau goes much further with its campaign, it might want to consult with the Oregon farm bureaus and farmers who actually lived under Measure 37, unless, of course, it is more interested in advancing an ideology than the interests of its members.

ON THE HORIZON
Not All Ventures Lead to Gains

Early next year, the Supreme Court will decide whether to hear a takings case arising out of a Montana ban on using cyanide to mine gold and silver. The petitioners, a group of disappointed mining companies and investors, are asking the Court to decide if the loss of an "opportunity" to receive a mining permit constitutes a compensable taking.

In 1992, the Seven Up Pete Venture (a mining company subsidiary) approached the State of Montana about receiving an operating permit for a mine that would use cyanide heap-leaching to extract about 15 million ounces of gold and silver near Lincoln, Montana. Cyanide heap-leaching requires spraying a cyanide solution over a pile of ore. As the cyanide permeates the pile, it attracts gold and silver like a magnet, and the gold and silver is later extracted from the holding pond into which the cyanide solution drains. But the cyanide solution often finds its way into groundwater, wells, and creeks. A report by the Montana Environmental Information Center listed more than 40 mining-related cyanide leaks, spills, and seepages between 1982 and 1998. Two spectacular leaks put tens of millions of gallons of cyanide solution into Montana waters.

The Venture submitted its permit application at the end of 1994, and agreed that the State would rule on the application by the end of January 2000. But before the State ruled, Montana voters passed Initiative 137, which banned all new cyanide heap-leach mining. Mines with an existing permit were allowed to continue the practice. The Venture sued, saying that, with I-137, the State had taken its "opportunity for a favorable ruling on its mining permit application." The Montana Supreme Court in *Seven Up Pete Venture v. Montana*, (327 Mont. 306 (2005)) held that there was no compensable property right in the "opportunity" to receive a permit. No property right meant no taking.

Our office dictionary defines "venture" as "an undertaking involving uncertainty as to the outcome, esp. a risky or dangerous one" or "a business enterprise or speculation in which something is risked in the hope of profit; a commercial or other speculation." The Venture's multi-million dollar gamble and subsequent loss is not the same as a compensable taking, especially in view of the obvious risks to the public posed by its cyanide-laced proposal. The Montana Supreme Court recognized the difference. We hope the U.S. Supreme Court does the same and declines to grant cert.

EYE ON WASHINGTON
Cane Tennessee, Inc. v. United States, Case No. 96-237 L (Fed. Cl. Oct. 27, 2005)

The U.S. Court of Federal Claims handed the U.S. Department of the Interior a significant victory in a regulatory takings case that has been embroiled in litigation for nearly five years. Cane Tennessee sought compensation for an alleged taking of 10,000 acres of land in the Cumberland Plateau region of Tennessee that Cane purchased in 1979 for coal mining. After a request by a citizen's group and a subsequent review of the property, the Interior Department designated a portion of Cane's property as unsuitable for mining under the federal Surface Mining Control and Reclamation Act of 1977.

In prior proceedings, the court determined that the entire 10,000 acre parcel would be used in determining whether a taking had occurred. The court had also previously concluded that Cane's challenge failed two of the three *Penn Central* factors to determine whether a regulatory taking has occurred: the character of the governmental action did not require a finding of a taking, and the owner's investment backed expectations were unreasonable as a matter of law. The sole remaining issue was whether the economic impact of the regulation on Cane's property caused a sufficiently serious financial loss.

In making this determination in its October 2005 ruling, the court reviewed testimony from experts for both Cane and Interior on the value of the land. Cane argued that all economically viable use of the property had been destroyed. In reviewing the law, the court rejected Cane's argument that the original cost or the intended use of the land be the basis for a value determination, stating that the proper determination of the economic impact of a regulation "is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action."

The court reviewed three acceptable methods of determining market value before and after a taking. Because Cane's experts failed to support their opinion with objective methods of valuation, the court determined that the property retained significant market value after Interior's action. The ruling is a welcomed reaffirmation of the before-and-after test for determining economic impact under *Penn Cenrtal*.