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FEATURE CASE

Victory in Western Water Rights Case

In *Colvin Cattle Company, Inc. v. United States*, 2006 U.S. App. LEXIS 27057 (Fed. Cir. 2006), the Federal Circuit affirmed the Court of Federal Claims' dismissal of a claim by Colvin Cattle for an alleged taking of its stockwatering and grazing rights. The case marks another failed test case for the so-called Wise Use movement, a political movement challenging the federal government's ownership and management of public range lands.

Colvin leased a tract of public land adjacent to its ranch for grazing purposes in 1969. It paid annual grazing fees, but in 1995 it challenged the federal government's authority to manage the land, alleging that the state was the legitimate owner of the land. After Colvin had been in arrears for two years, the federal government canceled the lease and assessed trespass damages, though Colvin continued to graze on the land for four more years. Colvin then sued the federal government, alleging that its appropriated water right includes an associated right to graze on public lands, and that the government's interference with its ability to graze therefore constituted a taking.

The Federal Circuit flatly rejected this argument, reaffirming that "water rights do not have an attendant right to graze" and that "no governmental action restricting Colvin's ability to graze on federal land can affect its water right in a manner cognizable under the Fifth Amendment." The outcome in this case portends the likely result of similar cases now pending in the Court of Federal Claims.

OUTRAGES OF THE MONTH

The Worst of the Takings Ballot Initiatives Bite the Dust

On November 7, voters rejected three of the four regulatory takings initiatives on state ballots, nixing those in California, Idaho, and Washington while approving an Arizona measure. The California, Idaho, and Arizona measures combined regulatory takings with eminent domain, whereas the Washington initiative was a pure reg-take measure (like the infamous Measure 37 in nearby Oregon). The victory in Idaho, long considered a bastion of the property rights movement, was surprisingly one-sided, with the opposition garnering three-quarters of the vote.

Defeat of California's draconian Proposition 90 was especially welcome. The measure was so ill-conceived that many traditional supporters of takings bills opposed it, including California's Chamber of Commerce, Association of Realtors, Farm Bureau, Small Business Association, and Business Roundtable. Conservative taxpayer groups also opposed the measure, not to mention countless local government groups and public interest organizations. For a complete listing of this impressive coalition, go to http://noprop90.com/coalition/index.php.

Notwithstanding these significant victories for common sense, many in the media are portraying the election results as a win for the property rights movement, largely on the strength of the nine pure anti-*Kelo* initiatives that passed (Florida, Georgia, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, and South Carolina). But several of these measures simply tighten procedural protections for homeowners or provide greater compensation in ways that reflect a thoughtful balancing of competing interests. More information on these measures, including the text and vote percentage, is available at http://www.ncsl.org/statevote/prop_rights_06.htm.

Although support for the eminent domain measures reflects strong public concern with the ruling in *Kelo*, the property rights movement was unable to translate that concern into support for extreme measures on regulatory takings. The voters in California and Idaho saw through efforts to use *Kelo* as a smokescreen to gut land use planning and other vital community protections. Even Oregonians are suffering severe "Buyer's Remorse" from their decision to adopt Measure 37 in 2004, according to the latest polls.

Much of the funding for the takings measures came from out-of-state libertarians and land developers. Howard Rich, a real estate tycoon from Manhattan, spent nearly $11 million to support takings initiatives, other anti-regulatory measures, and so-called "judicial accountability" initiatives designed to intimidate state court judges. Several efforts spearheaded by Rich failed to make the ballot due to fraud in the collection of signatures. On election day, Rich's millions and his extreme agenda couldn't stand up to the common sense of the voters. Of the nine Rich-supported measures, only one succeeded (the Arizona measure).

We should be prepared for future efforts by extremists like Rich to hoodwink the voters.

ON THE HORIZON

Supreme Court Oral Arguments in the Global Warming Case

On Wednesday November 29, the U.S. Supreme Court will hear oral argument in *Massachusetts v. EPA* (No. 05-1120), which presents the question of whether EPA has authority under the federal Clean Air Act to regulate global warming emissions from new cars and trucks. The Court also will face the issue of whether EPA may decline to regulate these emissions for reasons having nothing to do with the Act's health-based standard that governs vehicle controls, and whether Massachusetts and the other petitioners have standing to challenge EPA's decision not to regulate.

CRC filed amicus briefs on behalf of several municipal groups, the American Planning Association, and several cities supporting the petitioners' petition for certiorari and on the merits. The briefs explain why a more active federal presence in efforts to combat global warming would advance federalism and promote state and local prerogatives, how global warming is harming and will continue to harm local governments across the country, and why this injury confers standing upon the petitioners. In particular, the brief describes in detail how global warming causes or worsens flooding, storm surges, wildfires, deadly heat-waves, smog, droughts, and other calamities that threaten local communities across the country.

Briefs in the case are available at www.communityrights.org (click on *Mass. v. EPA*). Expect a ruling in the Spring of 2007.

EYE ON WASHINGTON

The Judicial Conference (Finally) Addresses Judicial Junkets

It seems like such a simple point. Corporations and other special interests should not be permitted to lobby federal judges by offering them expense-paid trips to vacation resorts and then conducting educational "seminars" on issues of concern to the special interests. And federal judges, as public servants, should be held to the same ethical standards as federal attorneys, which prohibit them from accepting large travel gifts offered because of their official position.

If only it were this easy.

In 1998, when CRC broke the story that a Montana-based group was teaching judges how and why to strike down environmental laws at weeklong trips to a resort-style dude ranch, it seemed like the reform of the judiciary's rules governing these junkets would be right around the corner. The *Washington Post* reported the story in a front-page exposé , ethics experts and Members of Congress expressed outrage, and then a funny thing happened: nothing. The federal judiciary decided to retain its existing ethical guidelines.

In 2001, after CRC released our *Nothing for FREE* report and ABC News' 20/20 did a hidden-camera exposé showing judges lounging at resorts on the corporate dime, Chief Justice Rehnquist devoted an entire speech to the topic, declaring that the real problem was that critics of these trips - not the corporate lobbyists hosting them - were undermining public confidence in the judicial branch. Finally, in 2004, after CRC released our *Tainted Justice* report, Senator Patrick Leahy started to move legislation to ban these junkets, and the judiciary promised to reexamine the ethics rules governing junkets. It subsequently proceeded to *weaken* these already too-weak rules.

So we were not expecting much when the federal judiciary recently announced new rules on junkets. With expectations low, we were pleasantly surprised by a revised set of rules that indicate the judiciary is – finally – taking this issue seriously. The new policy distinguishes between acceptable and suspect types of judicial education programs. It requires sponsors and judges to disclose important information about trips in the suspect category. And perhaps most importantly, all the information disclosed is to be made immediately available to the public on the judiciary's website.

The legislation introduced by Senator Leahy to ban junkets, and to establish a new Judicial Education Fund to allow judges to pay their own way to needed educational programs, remains as important as ever. But the new ethics rules are a big change in the judiciary's response to this issue, and they will give the public real-time information on these trips. Although there is still work to be done, the new Chief Justice and the Judicial Conference deserve credit for finally giving the issue the attention it deserves.
