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Court Denies Regulatory Taking in Designated Port Area

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Takings 101

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." Courts will generally find a right to compensation when the government 1) directly appropriates private property; 2) physically occupies private property; and 3) imposes a regulatory constraint on the use of property so severe as to deprive an owner of all economically beneficial use.

The first and second categories might also be called "eminent domain" or "condemnation." Eminent domain is "the inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking."[1] Condemnation is "to determine and declare that certain property is assigned to public use."[2] Inverse condemnation is "an action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings."[3]

An example of a physical taking is the *Loretto v. Teleprompter Manhattan CATV Corporation* case. In *Loretto*, the government required landlords to allow installation of cable television in their rental properties. In that instance, the government gave itself the right to occupy a portion of the private property without paying for the privilege.

The third category of takings is considered a regulatory taking. As noted above, mere regulation of property is not enough for a court to find a taking. The regulation must deprive an owner of all economically beneficial use. For instance, in *Lucas v. South Carolina Coastal Council*, the court found that a zoning ordinance prohibiting all development on a property owner's land resulted in a regulatory taking.[4]

If the regulation merely decreases the value of the property, it will not necessarily result in a taking. The court will perform a multi-factor balancing test outlined in *Penn Central Transportation Co. v. New York City*[5] to determine whether or not there has been a taking. The factors include: 1) the extent to which the regulation interferes with investment-backed expectations; 2) the economic impact of the regulation on the claimant; and 3) the character of the government's interest, or the social goals being promoted by the government.

In this edition of *The SandBar*, we have focused on various takings issues. The cases range from more "traditional" takings cases involving land use regulations to more novel cases, including a case in which fishermen alleged a taking when their fishing licenses were rendered useless by an area being designated as a national wildlife refuge. Please enjoy and feel free to contact us with any questions or comments.

Endnotes

1. BLACK'S LAW DICTIONARY 233 (2d Pocket ed. 2001).
2. *Id*. at 123-124.
3. *Id*. at 124.
4. 505 U.S. 1003 (1992).
5. 438 US 104 (U.S. 1978).

Regulatory Takings Issue

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Court Finds Regulatory Taking of Developer's Property

Bailey v. United States, 2007 WL 2317493 (Ct. Fed. Cls. Aug. 10, 2007)

Sarah Spigener, 3L, University of Mississippi School of Law

The Court of Federal Claims held that a private property owner may seek compensation for a regulatory taking of property at any time the regulation continues to be enforced, even if the regulation existed prior to the purchase of the property or a previous owner had been awarded compensation for the same regulatory taking.

Background

In 1989, Gary Bailey bought land bordering the Lake of the Woods in Minnesota. Bailey initially planned to build a marina or a harbor on the property, so he applied to the United States Army Corps of Engineers (Corps) for a dredging permit. In 1990, the Corps approved the permit; however, Bailey never began the project. Three years later, the Corps informed Bailey that he would need a different permit to complete the project because the property was located in a wetlands area and suggested that Bailey hire a consultant to designate which portions of his property were wetlands.

Bailey did not take any action until late 1996 when he applied to Lake of the Woods County to have 13.2 acres of his property along the lakeshore platted as a subdivision. As a condition of approval from the county, Bailey had

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Court Dismisses Commercial Fishing License Claims

Palmyra Pac. Seafoods, L.L.C. v. United States, 80 Fed. Cl. 228 (2008).

Surya Gunasekara M.R.L.S., 1L, University of Mississippi School of Law

When the United States closed Palmyra Atoll to commercial fishing, several fishing licensees brought suit alleging a Fifth Amendment taking claim. The Unites States Court of Federal Claims held that there was a frustration of purpose but no taking of tangible property interests under the Fifth Amendment and subsequently granted the United States' Rule 12(b)(6) motion to dismiss for failure to state a claim.

Background

Palmyra Atoll (Palmyra) and Kingman Reef are United States territories located approximately 1,000 nautical miles south of Hawaii. They are "surrounded by a 200 nautical mile United States Exclusive Economic Zone (EEZ) that excludes foreign fishing vessels."[1] During World War II the United States Navy established a base on Palmyra, which consisted of an airstrip, dock, harbor, and base camp. The Navy held the Kingman Reef until August 25, 2000, when it was transferred to the Department of the Interior. However, after World War II, the Fullard-Leo family defeated the United States in the Supreme Court to establish quiet title of Palmyra.[2]

The Fullard-Leo family held title to the emergent land of Palmyra until late 2000, when the family sold the atoll to The Nature Conservancy. Prior to the sale, the Fullard-Leo family assigned rights to Palmyra Development Co., Inc. (PDC), which included the right to convey an exclusive license for a commercial fishing operation on Palmyra and use of the former base infrastructure. These license rights were then assigned by PDC to Palmyra Pacific Enterprises, L.L.C. (PPE). On November 17, 2000, PDC and the Fullard-Leo family gave written consent for PPE to assign their license rights to PPE Limited Partnership (PPELP) and granted PPELP permission to sublicense its rights to Palmyra Pacific Seafoods, L.L.C. (PPS). Following this agreement PPS made substantial investments on Palmyra in preparation for developing a commercial fishing operation.

On January 18, 2001 the tidal lands, submerged lands, and waters out to 12 nautical miles surrounding Palmyra and Kingman Reef were designated as a National Wildlife Refuge by order of the Secretary of the Interior. Six days later the Department of Interior (Interior) closed Palmyra and Kingman Reef to commercial fishing. In 2003 and 2006, The Nature Conservancy conveyed portions of its holdings on Palmyra to Interior to be included in the refuge.

See Commercial Fishing, page 4

Photograph of Palmyra Island courtesy of NOAA's National Climatic Data Center.

Commercial Fishing, from page 3

The plaintiffs PPS, PPE, and PPELP, alleged that the refuge designations prohibiting public access and commercial fishing on Palmyra and Kingman Reef left their various licenses, sublicenses, facility improvements, and fishing operations worthless. As a result, the plaintiffs argued that the government's action constituted a taking of valuable property interests for public use without just compensation in violation of the Fifth Amendment.

Motion to Dismiss Claim

The United States moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The United States argued that the plaintiffs' licenses were not cognizable property interests under the Fifth Amendment, but mere licenses, and thus not subject to the takings clause. The takings clause of the Fifth Amendment protects property interests by stating that private property shall not be taken for public use without just compensation.[3] In evaluating whether a takings claims has been stated the court applies a two part test. "First, the court must determine whether plaintiffs have established a property interest for the purposes of the Fifth Amendment."[4] Second, after the property interests in question have been identified, the court must determine if the government action constitutes a compensatory taking.

The plaintiffs contended that they had a property interest in the series of contractual licenses which granted the exclusive, transferable right to use Palmyra for commercial fishing operations and these interests were protected by the Fifth Amendment. The United States argued that the plaintiffs only held licenses, which are not cognizable Fifth Amendment property interests. The court determined that this case hinged on the issue of whether the plaintiff actually possessed a protected property interest.

In its analysis, the court relied on *Colvin Cattle Co. v. United States*, where the plaintiff alleged that the government had taken property interests in ranch and water rights after canceling on a long term grazing contract on an adjacent pasture.[5] In *Colvin Cattle*, the federal circuit court found that despite the possible loss in value of the ranch from losing the grazing lease, there had not been a taking because the loss did not occur from government restrictions on a protected property interest.

The court found the facts in *Colvin Cattle* to be analogous with the case at bar. Here, the plaintiffs had no property interest in the tidal lands, submerged lands, or surrounding waters. In fact, the Fullard-Leo family only had title to the emergent lands of Palmyra and thus lacked

See Commercial Fishing, page 20

Photograph of commerical fishing boat courtesy of Oceansart.us/Marine Photobank at http://www.OceansArt.us and photographer John T. Everett.

Rolling Beach Easement Not a Taking

Severance v. *Patterson*, 485 F. Supp. 2d 793 (S.D. Tex. 2007).

Joseph Rosenblum, J.D.

A federal district court in Texas recently rejected a takings challenge to a rolling public beach easement and related enforcement provisions under the Texas Open Beaches Act (TOBA). The court in *Severance v. Patterson* ruled on two significant claims; first, a takings claim based on the potential removal of three houses located within a "rolling" public beach easement, and, second, an alleged physical occupation claim based on public access to the dry beach. The court dismissed both claims.

Background

In early autumn of 2005, Carol Severance purchased three houses on Galveston Beach, Texas. Under the TOBA, and related underlying principles of Texas state law, the public has a "free and unrestricted right of ingress and egress"[1] to state-owned beaches on the Gulf of Mexico. In cases where the state retains an easement by virtue of continuous use by the public, the public has a right over the dry beach extending from the seaward boundary, marked by the mean high tide line, to the landward boundary delineated by the vegetation line. The Act further creates a presumption that the public has acquired such an easement over the dry beach area, placing the burden on landowners to present evidence to rebut this presumption. TOBA grants the Texas Attorney General the power to enforce the easement and specifically to remove obstructions to the public's right of access from the beach, including structures such as houses.

Severance's purchase contract for the three houses included a disclosure from the seller that the vegetation line customarily marks the landward boundary of the public beach easement. It further disclosed that structures seaward of the vegetation line may be subject to removal.

In the summer of 2006, the state surveyed the vegetation line in the area of Severance's houses and concluded that two of them were entirely seaward of the vegetation line and half of the third was seaward of the vegetation line. Consequently, according to the state, some of Severance's properties, including all or portions of the houses, were on the public beach because the vegetation line had moved. The state then contacted Severance and informed her that the Attorney General could seek removal of any portion of the homes that encroached on the public beach.

Severance subsequently filed a federal action to stop the state from enforcing the public easement against her. She alleged that at the time of purchase all three of the houses were landward of the vegetation line; only after her purchase did the landward boundary move causing the houses to be located on the dry beach. Her claim was predicated on two related claims both arising under the U.S. Constitution's Fifth Amendment takings clause. The first claim was based on possible removal of the houses while the second was based on the imposition of an easement allowing public access to the beach area.

The court first addressed the takings claim relating to the threat of home removal. Noting that no removal action had been initiated at the time of suit, the court held that the claim was not ripe because it was unclear as to when or if the state would actually remove any of the houses. Only if at some time in the future the state seeks to remove Severance's houses would she have a ripe constitutional claim.

The court then addressed the claim regarding public access to the beach easement which it concluded ultimately came down to whether the

See Rolling Beach Easement, page 6

Photograph of Texas beachfront property threatened by beach erosion provided courtesy of Ellis Pickett, Chairman of Texas Surfrider's Foundation.

state of Texas could constitutionally enforce a beach easement for public access that expands and contracts as the vegetation line moves through natural processes. In addressing the merits of this question, the court noted that the Texas judiciary has repeatedly recognized the validity of such beach easements and has consistently rejected similar constitutional claims to those raised by Severance. Further, TOBA does not provide an additional right, but merely identifies an enforcement mechanism for an easement that already existed at common law.

Accordingly, the court concluded that Severance could not show interference with a protected property interest. Rather, her "allegedly-invaded interests in her rental properties are (and always have been) subject to the public's superior interest in its pre-existing easement."[2] Moreover, while natural changes might shift the boundary of the easement, "this natural movement does not work a constitutional wrong."[3]

Background Principles of State Law

The court additionally made specific findings that its decision was consistent with the Supreme Court's landmark takings decision, *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). In *Lucas*, the Supreme Court held that an owner suffered a compensable taking when the Coastal Commission enacted a total ban on all beach construction preventing the owner from building on property that he purchased prior to passage of the legislation. The Court in *Lucas* also recognized, however, that no taking occurs where government action simply gives effect to "background principles of state law."[4]

The *Severance* court explicitly recognized Texas' rolling beach easements as a background principle of Texas state law. In *Severance*, unlike in *Lucas*, the relevant property law was established long before the purchase of the impacted properties. Further, a rolling beach "easement is one of the 'background principles' of Texas littoral property law."[5] Consequently, Severance could not have suffered a takings because "her right to exclude the public never extended seaward of the dynamic, natural boundary of the beach."[6]

Conclusion

The court ultimately dismissed the suit noting that nothing in the federal constitution prohibits applying the principles of accretion and erosion to establishing property boundaries and holding that Severance's property interests were subject to the pre-existing beach easement.

Endnotes

1. TEX. NAT. RES. CODE § 61.011(a).
2. *Severance v. Patterson*, 485 F. Supp. 2d 793, 803 (S.D. Tex 2007).
3. *Id*. at 804.
4. *Lucas*, 505 U.S. at 1029.
5. *Severance*, 485 F. Supp. 2d at 804.
6. *Id*.

Court Denies Regulatory Taking in Designated Port Area

United States Gypsum Company v. Executive Office of Environmental Affairs, 867 N.E.2d 764 (Mass. App. Ct. 2007).

Alicia Schaffner, 2L, Roger Williams University School of Law

A Massachusetts appellate court has concluded that there was no regulatory taking of property in a designated port area (DPA) when the Director of the Massachusetts Office of Coastal Zone Management placed requirements on a property owner as a condition of being excluded from the DPA.

Background

The Massachusetts Office of Coastal Zone Management (OCZM) has created designated port areas (DPA) in order to encourage proper use of coastal resources in a manner that is consistent with the federal Coastal Zone Management Act. These regulations are to promote "water dependent industrial uses" of the resources.[1] The theory behind these regulations is that non-industrial and non-marine uses have a "far greater range of locational options."[2]

In 2002, five property owners in the DPA asked for the OCZM to conduct a "boundary review" to decide if their lands should remain within the DPA. All of these property owners wanted to use their land for non-water dependent uses such as residential condominiums. The OCZM found that one property could be excluded from the DPA, two should stay in the DPA, and two could be excluded once the owners complied with certain conditions. These conditions included an easement for a roadway that was to be built on the properties. The Director of the OCZM accepted the conclusions from the boundary review.

Three property owners, United States Gypsum Company, LaFarge North America, Inc., and Charlestown Commerce Center (CCC), brought three separate suits, which were later consolidated. Two of the property owners requested the reversal of the conditional exclusions from the DPA on the following grounds: 1) the director exceeded his authority when making this decision and 2) he did not have substantial evidence when he made his decision. Additionally, the owner of CCC, Donato Pizzuti, requested "a boundary review leading

See Designated Port, page 8

Photograph of industrial port courtesy of NOAA.

Designated Port, from page 7

to exclusion of the CCC from the DPA[,]" and challenged "the denial of an exclusion for the CCC in the proceedings under review" as a denial of due process and stated that the CCC's "continued inclusion in the DPA constituted a regulatory taking."[3]

The lower court concluded that the director's decision was within his power to make and denied all of plaintiffs' claims. All appealed.

The Court's Decision

The Appeals Court of Massachusetts in Suffolk disagreed with the lower courts on all claims except those in regard to the CCC. The court first looked at the director's authority. The DPA designation regulations state that a property must be included in the DPA when it meets the designation standards. The OCZM can only make "minor adjustments" to a DPA boundary and these adjustments should not have the consequence of a "net reduction in the total area of the DPA."[4] The court found that these regulations clearly limit the director's discretion in designation. Furthermore, the purpose of the regulations is to preserve the coast for water-dependent industrial use to the greatest extent possible. The director admitted that the exclusion would cause a six percent reduction of the DPA's land area, but found this to be acceptable.

There are many regulations that limit directors' discretionary power when it comes to DPA designation; however, the director was able to find a provision in the regulation that he felt afforded him wide discretion in this matter. The court did not find that this grant of discretion could be so broadly read. The court said that it "would be an extraordinary distortion of ordinary meaning to transform the discretion to condition a decision designating a property that must be included or remain in the DPA because it meets the designation criteria … into discretion to do precisely the reverse."[5] To allow the discretion to be utilized this way would mean that his decisions would work contrary to the goals of the regulations.

The court also found that there was not substantial evidence to support the director's decision. The court is not required to affirm the agency's decision unless there is enough information from which an ordinary person could come to the same conclusion or if there is an overwhelming amount of evidence that cuts against the agency's decision. In this instance, there was no way for the director to show that even if he had an easement that the road would be built, because there was no evidence that the road was going to be funded by anyone in the near future. Therefore, there was nothing that warranted the director's decision to exclude otherwise suitable properties from being included in the DPA.

The court then addressed the rest of the CCC's claims. At this point the court agreed with the findings of the lower court. Regarding the inclusion of CCC in the DPA, the court found that the CCC met the regulatory criteria for classification as a DPA; therefore, the land must be included in the DPA.

The court also found that Pizzuti's due process claim was moot. He had claimed his due process right was violated because he was not allowed to negotiate for a conditioned exclusion from the DPA regulation, however, since the court already said that these exclusions were not valid, the claim was moot.

Finally, the court looked at CCC's regulatory taking claim. The court found no merit to Pizzuti's claim that he had been "deprived of all 'economically viable use' of his land by virtue of its inclusion," because he had failed to support this claim with the required facts.[6] It is also worth noting that Pizzuti was never looking for compensation for his taking, but was instead trying to circumvent the findings of the agency by having the court reexamine the evidence under the guise of a constitutional claim.

The court listed several other reasons why this is not a taking. The first is that DPA regulations allow twenty-five percent of the property to be used for non-water dependent and non-industrial purposes provided that these purposes are not incompatible with how the waterfront functions. Furthermore, the owner could not

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Landowners Prevail in Beach Access Case

Trepanier v. County of Volusia, 965 So. 2d 276 (Fla. 2007).

Lynda Lancaster, J.D.

The beachside communities of Volusia County, Florida, including Daytona Beach, are famous for sands hard enough to drive on. In fact, at one time, the beaches were used to set automobile land speed records. However, after several hurricanes shifted the public portion of the beach closer to private property, the landowners objected to the county allowing beach goers to drive and park on the beach.

Backgrounds

Endangered sea turtle and nesting shore birds share the beaches of Volusia County with all the other sun seekers. The county protects these species by setting aside a thirty-foot Habitat Conservation Zone (HCZ) in which vehicles are prohibited. Prior to Hurricanes Floyd and Irene in 1999, the HCZ area was outside of private property. The hurricanes caused substantial erosion, which resulted in the county moving the HCZ farther landward onto private lots. After the HCZ was moved, vehicles began driving up to and parking on the edge of the HCZ, which was on the private lots. Hurricanes in 2004 resulted in further erosion and encroachment onto the private property.

Several beachfront homeowners, Alfred Trepanier, Louis Celenza, and Zsuzsanna Celenza, filed suit against Volusia County. The homeowners alleged the county had appropriated their property for parking and driving lanes. The homeowners also alleged trespass based on the maintenance of the parking and driving lanes. Finally, the plaintiffs filed an inverse condemnation claim based on the county's installation of HCZ posts on their property.

In response, the county alleged that the public had a right to use the property based on the theories of dedication, prescription, and custom. The county sought an injunction to stop the plaintiffs' interference with the public's rights of access. The county also asked the court

See Volusia, page 10

Photograph of green sea turtle courtesy of Matt Wyatt/Marine Photobank.

Volusia, from page 9

to declare that the county held a strip of beach in front of the Celenzas' lot in trust for the public. The trial court denied the homeowners' request for summary judgment on those claims and granted summary judgment to the county.

On appeal to the Fifth District Court of Appeals, the plaintiffs claimed that the entry of summary judgment was in error because it was not clear whether the elements of dedication, prescription, and custom had been satisfied. Citing *City of Daytona Beach v. Tony-Rama*,[1] the county argued that the public has the right to access and use the beach, including the right to drive and park on the beach. The county also argued that the public use right moves with the changing coastline.

Prescription, Dedication, Custom

On appeal, the court looked at whether the elements of dedication, prescription, and custom had been satisfied. To gain a prescriptive easement in land, the access must be continuous for the statutory period of twenty years, actual, adverse under a claim of right, and either known to the owner or so open, notorious, and visible that knowledge may be imputed to the owner.[2] Additionally, the access must be inconsistent with the rights of the landowner, otherwise it would be presumed that the use was by the permission of the landowner. Finally, the occupation must be a defined area with a definite end. The court determined that it was not clear from the record whether the public was continuously driving on the area of the beach at issue or that the public's use was adverse; therefore, there were genuine issues that precluded the trial court's grant of summary judgment.

Dedication is another way that the public could obtain a right to use private property. To show that there has been a dedication, the landowner must have expressed a present intention to appropriate his lands to public use. In this case, the beachfront homeowners argued that there was no clear indication that that was ever done on their beachfront. While the trial court found that the developers had established roads, streets, and drives for public use, the appellate court determined that the developers' maps and descriptions did not indicate a dedication, and thus there was no right of access by dedication. If people were accessing the beach, it was without the homeowners' permission.

Custom is the third way to gain public beach access. Custom is a practice that has the force of law due to a common adoption of a long-unvarying habit.[3]

First, the court noted that the Florida Supreme Court's decision in *Tona-Rama* held that the public may acquire a right to use the sandy area adjacent to the mean high tide line by custom when the use of the sandy area has been ancient, reasonable, without interruption and free from dispute. The appellate court held that the intent of the court in *Tona-Rama* was to establish a public-use right only for the beach in question in that case.

Next, the court looked at how a customary right is established. The court agreed with the plaintiffs that the elements of whether the use was ancient, reasonable, without interruption and free from dispute required a fact specific examination, which the trial court did not perform before granting summary judgment. Furthermore, the court found that although driving and parking were a customary use of some of the beaches, this did not include all of Volusia

See Volusia, page 17

Photograph of of Ralph DePalma driving in the sand in his Packard '905' Special in 1919, courtesy of Florida Photographic Collection, State Archives of Florida.

Regulatory Taking, from page 2

to construct an access road as an extension of an existing road to the property. In June 1998, Bailey was orally advised to cease work on the access road until he obtained the necessary permit from the Corps.

Bailey applied for an after-the-fact permit for the access road. With his application to the county, Bailey submitted a Wetland Replacement Plan pursuant to the Minnesota Wetland Conservation Act. The county forwarded the application to the Corps and the Corps acknowledged that a wetlands permit was needed pursuant to the Clean Water Act. In September, the Corps sent Bailey a written order to stop operations until a permit was obtained; however, Bailey continued to work on the road to obtain county approval. In December, the county approved the fourteen lot subdivision and in August 1999 the county approved the access road.

In August 2000, the Corps conducted its own wetlands delineation of the property and determined that a majority of the land was wetlands. In October, the Minnesota Pollution Control Agency revoked its previously-issued water quality certification and in June 2001, the Corps denied the after-the-fact permit for the access road. The Corps gave Bailey three options: (1) completely remove the road; (2) partially remove the road; or (3) mitigate. In October 2001, the Corps ordered the road to be completely removed.

By this time, some of the lots had been sold. When the permit was denied, Bailey bought back four of the lots. In August 2002, Bailey sued the Corps alleging that the restrictions on the subdivision property deprived him of all economically beneficial and productive use of his land, or, in the alternative, substantially diminished the value of his property, resulting in a regulatory taking of his property requiring just compensation under the Fifth Amendment.

Regulatory Taking

In order to bring a claim, the claim must be based on a final agency decision. Initially, the Corps argued that the court should dismiss the taking claim for lack of ripeness or readiness, because there was no final decision. The court found that the taking claim based on the restoration order was ripe, agreeing with Bailey's argument that the order to remove the road was a final decision because it prohibited access to the property. Furthermore, the court held that Bailey's challenge of the restoration order did not bar him from proceeding with the taking claim.

The crux of the decision focused on what property was allegedly taken by the Corps' denial of the permit. The Corps argued that Bailey could only base his taking claim on the property interests he held on the date of the alleged taking, and not on the interests he acquired after that date, such as the lots he bought back. The court explained that government compensation for the physical displacement of a private property owner from the exercise of a property interest is permanent. For example, if the takings claim was based on a physical invasion of private property by the government, a subsequent owner could not seek government compensation.

However, the court found that no court had previously considered a *regulatory* taking claim raised by a subsequent owner. The court relied on the Supreme Court's decision in *First English*,[1] which emphasized that a government actor whose regulatory actions are found to have taken property cannot be required to obtain the full, permanent interests in the property; because, the government retains the option of converting the taking into a temporary one.

The court also relied upon the Supreme Court's decision in *Palazzolo*,[2] in which the court held that a property owner may base a takings claim on the application of a regulation to his property even if the regulation existed prior to his ownership. The Supreme Court stated that the "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[3] The court explained that when a government restriction on the use of the property is so severe as to

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Court Rejects Condemnation of Private Property under Salmon Recovery Act

Cowlitz County v. Martin, 2008 Wash. App. LEXIS 224 (Wash. Ct. App. Jan. 29, 2008).

Sara Wilkinson, 3L, University of Mississippi School of Law

The Washington Court of Appeals has held that the Salmon Recovery Act does not afford counties, cities, and tribal governments the authority to condemn private property. In its holding, the court contemplated three primary questions: 1) whether the Salmon Recovery Act authorizes the state or its entities to condemn private property; 2) whether rehabilitation of salmon streams constitutes a public use, a prerequisite for condemnation of private property under state law; and 3) whether a county's deputy prosecuting attorney has the authority to articulate an additional purpose for condemnation of private property not considered by the Board of Commissioners.

Background

In 2002, Cowlitz County, Washington, applied for and received a $447,000 grant from the Salmon Recovery Fund to replace a culvert that it claimed posed an impediment to fish passage. At the time the county received the grant, it held an easement on the property for the culvert in its current state. However, the proposed culvert, funded by the grant from the Salmon Recovery Fund, would require an expanded easement over the private property.

In April 2005, the county began negotiations with the property owners to enlarge the existing easement through voluntary purchase and sale. However, the parties never came to an agreement and in October 2005 the Cowlitz County Board of Commissioners passed a resolution authorizing the county prosecuting attorney to bring a condemnation action against the property owners to acquire the enlarged easement.

The Board of Commissioners' resolution, and subsequently the petition for condemnation filed on behalf of the county, stated that the project was necessary to remove and replace an existing culvert that posed a barrier to fish passage and was to be funded from the grant awarded to the county by the Salmon Recovery Funding Board. In addition, the resolution and petition stated that the additional property was required to complete the culvert replacement project, which constituted a public use as required for condemnation of private property under state law. However, upon filing the petition for condemnation, the county's chief civil deputy prosecuting attorney alleged an additional reason for condemnation that was not contemplated in the Board of Commissioners' resolution. The petition stated that the existing culvert, in addition to posing a barrier to fish passage, was not adequate to handle storm stream flows under a 100-year storm and the petition was necessary to prevent road damage. The Cowlitz County Superior Court ruled in favor of the county, and the property owner appealed.

Salmon Recovery Act

The Salmon Recovery Act was enacted by the Washington State Legislature in 1999 in an effort to improve salmonid fish runs throughout the state. The Act encourages the state to integrate local and regional recovery activities primarily by providing state funds to counties, cities, and tribal governments to repair and improve fish runs that are designated on a "habitat project list." While any project may be placed on the habitat project list, the Act specifically states, "no project included on a habitat project list shall be considered mandatory in nature and no private landowner may be forced or coerced into participation in any respect."[1]

Per the express language of the Salmon Recovery Act, the court found nothing in the act granting a county, city, or tribal government the authority to condemn private property. The court stated that the Legislature did not intend to grant any eminent domain authority through its passage of the Salmon Recovery Act and thus counties, cities, and tribal governments had no authority to condemn private property under the auspices of the Act.

Public Use Requirement

Washington state law confers the power of eminent domain to counties when the condemnation is necessary for a public use. Procedurally, a petition for condemnation must be filed with the county superior court followed by a trial court hearing after which the court must issue an order granting or denying the petition. In determining public use and necessity, the trial court must consider whether: 1) the use in question is really a public use; 2) the public interest requires the public use; and 3) the property to be acquired is necessary to facilitate the public use. In this case, the trial court granted the petition for condemnation of the private property finding that fish passage is a public use.

A review of the resolution passed by the Cowlitz County Board of Commissioners revealed that the board chose to proceed with the culvert replacement strictly under the Salmon Recovery Act and did not articulate any other specific public purpose. The Washington Court of Appeals pointed to the clear language in the Salmon Recovery Act specifically prohibiting counties from condemning private property for projects solely funded and regulated by the Act. In this case, the Cowlitz County Board of Commissioners authorized the condemnation of the private property solely for the purpose of improving fish passage by means of a project funded by and under the auspices of the Salmon Recovery Act.

The court reversed the trial court's grant for condemnation relying on the specific language of the Salmon Recovery Act. However, the court pointed out that condemnation could potentially be granted for the project if another public use was determined or even still using the fish passage as a public use so long as the Board of Commissioners did not authorize condemnation under the Salmon Recovery Act.

Prosecuting Attorney's Authority

According to Washington state law, a county must determine the necessity of condemnation through the authority of its Board of Commissioners. Here, the Cowlitz County Board of Commissioners, in their resolution, deemed the repair of a fish passage a necessity but did not speak to any other factors in their decision to condemn the property. The court found that because the culvert's current ability to handle storm stream flows was not contemplated or addressed by the Board of Commissioners, the county's deputy prosecuting attorney had no authority to determine the necessity for a condemnation and acted without authority by articulating an additional purpose for replacing the culvert.

Conclusion

The Washington Court of Appeals held that the Recovery Act contains express language removing a county's authority to exercise its powers of

See Salmon Recovery, page 22

Photograph of spawning salmon courtesy of Marine Photobank and photographer Reuven Walder.

Restriction on Water Use Not a *Per Se* Taking

Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (2007).

Terra Bowling, J.D.

The U.S. Court of Federal Claims ruled that a taking claim regarding a regulatory restriction on water use is subject to the *Penn Central* taking analysis, and not the *per se* physical occupation taking theory.

Background

The Casitas Municipal Water District operates a water project on behalf of the U.S. Bureau of Reclamation (BOR) that supplies water to Ventura County, California, for irrigation and other uses. The district's use of the water is subject to a license from the State Water Control Board.

In 1997, the National Marine Fisheries Service (NMFS) listed the West Coast steelhead trout as an endangered species. Because the trout are in the Ventura River, Casitas and the BOR worked with NMFS to determine how the habitat could be preserved and improved. NMFS eventually issued a Biological Opinion that included revised project operating criteria, which resulted in a decrease in the amount of water Casitas was allowed to divert. Although Casitas implemented the criteria, the district sued the United States. The district claimed contract damages, as well as a Fifth Amendment taking. The court rejected the contract damages claim, and the United States sought summary judgment on the taking claim.

Photograph of steelhead trout courtesy of U.S. Fish and Wildlife Service.

Tulare

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." The court noted that there is an unconditional right to compensation when the government 1) directly appropriates private property; 2) physically occupies private property; and 3) imposes a regulatory constraint on the use of property so severe as to deprive an owner of all economically beneficial use. Aside from these categories of *per se* takings, a court must use a multi-factor balancing test outlined in *Penn Central Transportation Co. v. New York City*.[1] The factors include: 1) the extent to which the regulation interferes with investment-backed expectations; 2) the economic impact of the regulation on the claimant; and 3) the character of the government's interest.

In a recent case, *Tulare Lake Basin Water Storage District v. United States*,[2] the court of federal claims ruled that a regulatory restriction on the use of water should be treated as a *per se* physical taking. In the *Casitas* case, the United States argued that *Tulare* was decided incorrectly,

because the court focused on the finality of the plaintiffs' loss, instead of the character of the government's action. The United States also argued that in a taking action that involves regulatory restrictions on the use of property, the court should use the *Penn Central* analysis. Relying on another Supreme Court case, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[3] the United States argued that a *per se* taking should be recognized only when the government has physically invaded property or appropriated property for its own or another's use. In *Tahoe-Sierra*, the court stated, "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."[4]

The court agreed that *Tahoe-Sierra* was instructive. The court recognized that the government's action in this case resulted in the diminishment of the district's right of use, which is "… the functional equivalent of a physical taking,"[5] However, the court found that *Tahoe-Sierra* "compels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property."[6] The court granted the United States' motion for partial summary judgment.

Endnotes

1. 438 U.S. 104 (U.S. 1978).
2. 49 Fed. Cl. 313 (2001).
3. 535 U.S. 302 (U.S. 2002).
4. *Id*. at 323-25.
5. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 105 (2007).
6. *Id*. at 106.

Designated Port, from page 8

establish a "categorical taking" based on the deprivation of all economically viable use. Even if there was a diminution in market value of the CCC, it was not serious enough to warrant compensation for a taking. The court did not agree with the plaintiff that there was a taking based on *Penn Central*, a case that outlines factors to determine if regulation has gone "too far" and become an unconstitutional taking. The CCC's claim does not satisfy any of the guiding factors used in *Penn Central*. These factors include: "the economic impact of the regulation; the extent to which it has interfered with the owner's 'distinct investment-backed expectations'; and the character of the government actions."[7] For example, the owner had no investment-backed expectation because the DPA regulation was in effect when he bought the property. Lastly, the court mentions that there was no "physical invasion" of the property; therefore, the government action involved here does not have the character which would seem to indicate a taking. With all of these considerations, the court found it proper to deny the petitioner's takings claim.

Conclusion

The court concluded that there was no taking in this case and that all of the areas that met the requirements for DPAs must be classified as such. This is a decision that is consistent with the regulation and promotes the goals which the OCZM was meant to promulgate.

Endnotes

1. *United States Gypsum Company v. Executive Office of Environmental Affairs*, 867 N.E.2d 764, 767 (Mass.App.Ct. June 4, 2007).
2. *Id*.
3. *Id.* at 768.
4. *Id.* at 771 *quoting* 301 MASS. CODE REGS. § 25.05(2) (1994).
5. *Id.* at 772.
6. *Id.* at 776-77.
7. *Id.* at 777-78.

Permit to Remove Sand Is an Imminent Injury to Beachgoers

Smiley v. South Carolina Dept. of Health and Environmental Control, 2007 S.C. LEXIS 292 (S.C. July 30, 2007).

Margaret Enfinger, 2L, University of Alabama School of Law

The Supreme Court of South Carolina unanimously found that a permit to remove sand from a public beach is an imminent injury, and held that a recreational user of a public beach had standing to contest the sand removal permit.

Background

James Smiley enjoys using a public beach in South Carolina for recreational purposes. He is partially disabled in both legs and uses the flat hard public beach for rehabilitation and jogging, as well as nature-watching. He contested a state agency decision that gave a private company, Wild Dunes, the right to remove sand from this beach. The "beach sand scraping" permit allows the company to take 25,000 cubic yards of sand each month from November through April for five years. Smiley alleged that the entrance of heavy equipment onto the public beach and the excavation would make it impossible to jog in the area and reduce his enjoyment of the beach. After Smiley contested the agency's decision, the administrative law judge, the appellate panel, and the circuit and appellate courts found that he did not have standing, which is the right to pursue a claim in court, to challenge the permit.

Standing

Citing *Lujan v. Defenders of Wildlife*,[2] South Carolina Supreme Court noted that standing requires three elements: 1) the plaintiff must have suffered an "injury in fact" which is concrete and particularized, meaning that the plaintiff is affected in a personal and individualized way, and actual or imminent, meaning that the injury cannot be conjectural or hypothetical 2) there must be a causal connection between the injury and the conduct complained of, and 3) it must be likely that the injury will be "redressed by a favorable decision."[2] In 2005, the South Carolina Court of Appeals found that Smiley did not have standing because he had not met the first requirement of the standing test in *Lujan*. The court focused on the fact that though the permit had been issued, no sand had been yet excavated, so there was no actual injury. Additionally, the appellate court found that Smiley would not suffer an "injury in fact" even if sand were to be excavated, due to the permit's temporary nature. Smiley's jogging route would simply have a temporary detour. The court found that sand excavation does not substantially impair the public interest, and it is within the state's policy of preserving and restoring its beaches.

The South Carolina Supreme Court disagreed, finding that Smiley met the first standing requirement. The court first noted that the injury may be actual or imminent.[3] There is no reason to wait until the injury is actually inflicted. Here, the gravity of a permit to excavate so much sand is an imminent injury. In fact, the court notes that up to ten acres of beach per month would be affected if the maximum amount of sand were extracted.

Next, the court examined the appellate court's determination that the temporary nature of the permit would not result in an "injury in fact" to Smiley. The court noted that there is no legal distinction for temporary and permanent injuries; temporary or minor ones are still allowed to be vindicated and allow someone a direct stake in the outcome. Furthermore, the agency had not submitted any evidence that the injury from the winter excavation will be only temporary. An interference with Smiley's enjoyment of the beach and his inability to use it for at least those six months gives Smiley a direct stake in the permitting decision.

Conclusion

Giving Smiley standing to appear in court, the South Carolina Supreme Court directed the administrative law judge to proceed with the case and allow Smiley a chance to contest the agency's permit.

Endnotes

1. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992).
2. *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329 (S.C. 2007).
3. *Lujan*, 560-561.

Photograph of public beach courtesy of ©Nova Development Corp.

Volusia, from page 10

County beaches and should be decided on a case by case basis.

Finally, the court had to decide whether the public's use shifted with the changing shoreline. Erosion is a fact of coastal living, which the Florida Constitution and common law rules acknowledge. The Florida courts have determined that the slow seaward shift of sand, causes the mean high tide line to shift, resulting in a loss of land to the landowner. The court agreed with the county's argument that if the change in the mean high water mark was the result of erosion, then the public's right of access would be preserved under the public trust doctrine. In this case, however, it appeared as if the change in the beach was the result of avulsion rather than erosion. Avulsion is the sudden removal of land through a storm or some other event. The court found that when the land is avulsed, or so changed that there is a difference in the landscape after one storm event, the boundaries are not subject to change, and private landowners would not lose their beach.[4] It was not certain whether the areas subject to the public right by custom would move as a result of avulsion. The court reversed the summary judgment in favor of the county and sent the question back to the trial court to determine if the public's right to access the beach migrates with avulsion as it does with erosion.

Conclusion

The court reversed the trial court's grant of summary judgment, finding that the general issues of material fact had not been resolved. The appellate court did agree with the trial court that if the public has a right to access the beach by custom, there is no taking and the land owners are not entitled to money for the public's access of the beach.

Endnotes

1. 294 So. 2d 79 (Fla. 1997).
2. *Trepanier v. County of Volusia*, 965 So. 2d 276, 284 (Fla. 2007).
3. *Black's Law Dictionary* 169 (2d Pocket ed. 2001)
4. *In re City of Buffalo,* 99 N.E. 850, 852 (NY 1912).

Corps Liable for Shoreline Erosion on Lake Michigan

Banks v. United States, 78 Fed. Cl. 603 (Ct. Cl. 2007).

Terra Bowling, J.D.

In a takings case arising from coastal erosion on Lake Michigan caused by an Army Corps of Engineers project, the U.S. Court of Federal Claims has ruled that the government is responsible for 30 percent of each plaintiff's property loss above the mean high water mark.

Background

Between 1950 and 1989, the Corps performed construction and maintenance on harbor jetties around the mouth of St. Joseph River to accommodate commercial shipping. After the lakeshore south of the jetties began to erode, the Corps began a beach renourishment program in the 1970s; however, the project proved ineffective.

In 1999, property owners affected by the erosion filed suit against the United States, alleging that the Corps' activities caused erosion of their shoreline property and resulted in a taking under the Fifth Amendment. After the trial on liability in June 2007, the U.S. Court of Federal Claims had to consider whether the government's renourishment efforts compensated for the effects of the jetties enough to show that the erosion was not attributable to the government.

Liability

The court first looked at whether the jetties affected plaintiffs' properties. The court found that the plaintiffs' properties were affected by the jetties, citing a 1958 study as well as Corps reports attributing 30 percent of the total erosion to the jetties.

To determine whether the renourishment project was effective, the court looked at the adequacy of nourishment material used by the Corps, the sediment transport rate, and the effective placement of nourishment material. The court first found that the plaintiffs failed to prove that their properties were located on a cohesive lake bottom, meaning that the property damage would not be analyzed as permanent and irreversible. Next, the court found that the sediment used by the Corps in the renourishment process was the inappropriate size and was ineffective. Therefore, that portion of the renourishment program was not credited as mitigation to the Corps. The court next looked at the sediment transport rate, including the net littoral drift and the various factors affecting the net southerly littoral drift, to determine how much sediment was affected by the jetties. Finally, in looking at the effective placement of the nourishment material, the court found "by a preponderance of credible evidence" most of the nourishment was placed in a way that would replenish the plaintiffs' property.

The court considered additional arguments regarding the Corps' liability. The plaintiffs argued that revetments constructed by the Michigan Department of Transportation and Chesapeake and Ohio Railway Company to stop erosion resulted in further erosion to their property and was attributable to the Corps' restoration project. The court found that the plaintiffs failed to prove that the Corps caused direct injury to the plaintiffs through the building of the revetments. Although the plaintiffs also argued that the impermeable nature of the jetties contributed to erosion, the court found that the property owners failed to prove that the jetties were impermeable. Finally, the plaintiffs argued that although Lake Michigan is lowering, the plaintiffs would still suffer erosion because the lakebed was lowering due to sand deprivation. The court noted that owners failed to prove that the lowering of the water level was due to human intervention.

Holdings

Through exhaustive testimony and reports, the court found that the Corps did not mitigate erosion that it caused by dumping dredged sand into deep water before 1970. The court concluded that the Corps was responsible for 30 percent of the unmitigated erosion above the high water mark occurring after each owner's acquisition of the property from 1950 to 1970. The court then turned to liability for erosion caused after 1970.

While the court found that the court had mitigated erosion since 1970, it also found that the coarse material it used was not effective for mitigation. Therefore, the court was liable for damages of for any portion of 30 percent of each plaintiff's total erosion above the high water mark since 1970 and after each owner's acquisition of the property. Additionally, the Corps is liable for 30 percent of all reasonably foreseeable future loss. Finally, the court held that the Corps was liable to plaintiffs with property at the northernmost end of the plaintiffs' zone. Because the property in this area was found to be permanent and irreversible, the Corps was liable for 30 percent of total erosion above the ordinary high water mark that occurred after plaintiff's acquisition of the property after 1950, as well as any reasonably foreseeable future loss.

Conclusion

The case will next move to the damages phase, in which the government will determine the appropriate payments for each plaintiff.

Regulatory Taking, from page 11

result in a taking, the owner is suing for *his* loss of use, not for the loss of subsequent owners.[4]

The court further explained that a regulatory taking can never be viewed as a permanent restriction on the land since the government may choose to stop regulating the use of the property at any time. As a result, the court held that whoever owns the property while the regulatory taking continues is entitled to compensation. The court reasoned that the right to use property runs with the land. If a current owner is compensated for the restricted use of his land, a subsequent owner of the restricted land would be similarly entitled to compensation. Consequently, the court held that Bailey could seek compensation for the alleged taking of his property interests in five lots, one which he continuously owned and four that he had repurchased after the permit denial.

Conclusion

A property owner who owned lakeshore property which he converted to subdivision lots brought this action to contest the denial of an after-the-fact permit and order of the Corps, pursuant to wetlands regulation, to remove an access road he had constructed for his property amidst Corps warnings to cease construction operations. The plaintiff argued that the regulation of his property, which left the property without a means of access, rendered it void of any economic value. The Corps argued that the plaintiff could not assert a taking claim based on his property interests in the reacquired lots because a taking claim should be based on property interests at the time of the alleged taking. However, the court held that rule was only applicable to physical permanent takings. The court held that current owners, as well as subsequent owners, may assert a regulatory taking claim and seek compensation. Therefore Bailey could assert a regulatory taking claim for four lots which he repurchased and one lot for which he continuously held title.

Endnotes

1. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).
2. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
3. *Id.* at 630.
4. *Bailey v. United States*, 2007 WL 2317493 (Ct. Fed. Cls. Aug. 10, 2007). (Emphasis in the opinion).

Commerical Fishing, from page 4

the ability to grant a license to the plaintiffs for any of tidal lands, submerged lands, or surrounding waters. Furthermore, the plaintiffs freely admitted that the government restrictions regarding the refuge only applied to the tidal lands, submerged lands, and surrounding waters to which the plaintiffs had no claim. Thus, the plaintiffs had not lost value in their licenses by virtue of the government restriction on commercial fishing surrounding their property interest. Since there had been no restrictions regarding the emergent land, the government had not imposed any restrictions on the plaintiffs protected property rights.

What had occurred was a frustration of purpose of the commercial fishing licenses, as opposed to a Fifth Amendment taking. The court examined the Supreme Court case *Omnia Commercial Co. v. United States*, which held that the plaintiffs had suffered a frustration of purpose, but not a taking.[6] In *Omnia*, the plaintiff had a large, long-term contract with a steel company at a low fixed price. The government requisitioned all the steel from that company throughout 1918 in order to supply the demands for World War I and ordered the company not to fulfill any of its contractual obligations.[7] The Supreme Court ruled that the loss of the contract was merely consequential and the Fifth Amendment takings clause did not provide a remedy. The Court subsequently denied the plaintiff's takings clause claim holding that frustration of purpose and appropriation for public use are completely different. Applying *Omnia*, the court found that the purpose of the plaintiffs' commercial fishing licenses had been frustrated by the closure of the surrounding waters to commercial fishing. However, the governmental action did not appropriate the rights which those licenses granted. Therefore, the court found that the government could not be liable under the plaintiffs takings claim.

The plaintiffs relied on *Cienega Gardens v. United States* in an attempt to refute the claim that the government's actions represented a frustration of purpose rather than a constitutional taking. In *Cienega Gardens* the Federal Circuit Court abandoned the principles set forth in *Omnia*, because the government action specifically targeted the plaintiff's contractual rights.[8] In the present case, the plaintiffs introduced several documents which they claimed demonstrated that the government action in creating the refuge was intended to nullify their licenses. The court rejected this argument stating that while in *Cienega Gardens* the governmental actions directly affected the contracts, in *Omnia* and this case the actions only regulated the subject matter of the contracts, steel, and commercial fishing operations respectively.

Conclusion

The United States Court of Federal Claims granted the United States' motion to dismiss for failure to state a claim holding that the designation and closure of the Palmyra refuge frustrated the purpose of the plaintiffs' licenses but did not violate the takings clause of the Fifth Amendment because the plaintiff was unable to assert a protected cognizable property interest. Furthermore, the court concluded that even if the plaintiffs' licenses constituted a protected property interest, the plaintiffs were unable to "allege that the government's designation of the Palmyra National Wildlife Refuge and closure of the refuge to commercial fishing directly regulated operations under those licenses."[9]

Endnotes

1. *Palmyra Pac. Seafoods, L.L.C. v. U.S.*, 80 Fed. Cl. 228 (2008).
2. *U.S. v. Fullard-Leo*, 331 U.S. 256 (1947).
3. U.S. Const amend. V.
4. *Palmyra*, 80 Fed. Cl. at 230 (citing *Colvin Cattle Co. v. U.S.*, 468 F.3d 803, 806 (Fed. Cir. 2006)).
5. *Colvin Cattle Co.*, 468 F.3d at 808.
6. *Omnia Commercial Co. v. U.S.*, 261 U.S. 502 (1923).
7. *Id*.
8. *Cienega Gardens v. U.S.*, 503 F.3d 1266 (Fed. Cir. 2007).
9. *Palmyra*, 80 Fed. Cl. at 236.

Protecting Your Copyrighted Works

By Will Wilkins

In prior articles in this series, we discussed copyrights in general as well as the more specific issue of when and how you can use someone else's copyrighted work. In this article, I will continue to look a bit more specifically at copyright protection and how you can protect your own creative works.

In other words, what do you need to do to protect a book, article, website, etc. you have created? As I discussed in the last article, there are certainly times when other folks can use your work without your permission but there are also times when use by another would constitute copyright infringement and we're going to discuss ways of protecting against the latter (infringing uses) in this article.

Let's take a brief step back here at the outset and review what exactly can be copyrighted. Copyright protection exits in this country for *original works of authorship which have been placed in tangible form for a limited period of time*. The first requirement, thus, is that the work must be original – that is, it must be the work of the creator (not your neighbor) and it must be, at least in a basic sense, creative. Second, the work must be one of the types of works decreed in the copyright statutes to fall under the protection of copyright which includes such things as: books, articles, plays, music, and artwork. Finally, the work must be in tangible form which means somewhere other than rattling around in the creator's head. As long as the work is on paper, computer, or any other type of recoding media it easily meets this requirement.

What else is required technically to create a copyrighted work? Nothing at all. Short article, right? Basic protection is, in fact, that simple. If a work is an original "work" and in tangible form, it is protected by federal copyright law. However, the story does not necessarily end there. There are several additional steps you as the creator can take to protect your works.

One method of enhancing copyright protection is by registering the work with the Library of Congress. Registration is relatively inexpensive and simple. It involves filing in a form and mailing the form, a check with the filing fee, and a sample of the work to the Library of Congress. Registration is required before copyright enforcement in federal court and, once a case is in court, provides several legal advantages including shifting the burden of proof and

See Copyright, page 22

Photograph of west front of the Library of Congress courtesy of The Library of Congress Historic American Engineering Record.

Copyright, from page 21

the availability of additional damages. So, registration can be a valuable step in protecting your copyright.

An even simpler method of protection is to use a copyright notice. The copyright notice was once required on works claiming protection but this is no longer the case. Use of the notice on works, however, has a tremendous deterrent effect. People see the notice and think "well, that work is protected, I'll look elsewhere for materials for my website." The form of the notice can be one of the following: [©your name, date] or [copyright, your name, date]. For example, on this article I could mark it "© Will Wilkins, 2008." Notice is a great and cheap way of protecting copyrighted works.

Another deterrent-type protection is simply being careful with what you do with your works and how you use them, especially works used on the internet. If you do not want your work copied from your website, protect the work as best you can. With photos, use a low-resolution image that looks good on the website but does not print well. Watermarks may also be helpful. For textual works, PDFs may provide protection over more easily editable formats.

Of course, there are times when nothing you can do will deter a determined copyright infringer. So, what should a copyright owner do when his work has been used without permission or legal justification (fair use, etc.)?

The answer, of course, is check with his attorney. Strategies often employed include demand letters and lawsuits. If the infringement is online, a simple approach is to notify the infringer's website hosting site asking them to shut down the infringing website. This procedure, created under the Digital Millennium Copyright Act, is outlined on the Library of Congress' copyright website.

The good news is that simple measures such as registration and the use of copyright notice generally deter most infringement. These steps are inexpensive and effective.

In the next issue, we will turn toward the seemingly simple question of: who owns that copyright? Stay tuned.

How to Protect Your Copyright

A checklist . . .

We learned that to receive copyright protection a work merely needs to be a protected type of work, original, and in tangible form. To provide additional protection, take these steps:

- Register your work with the Library of Congress.
- Use a copyright notice.
- Use care when publishing your works- don't make it easy on copyright infringers!

Salmon Recovery, from page 13

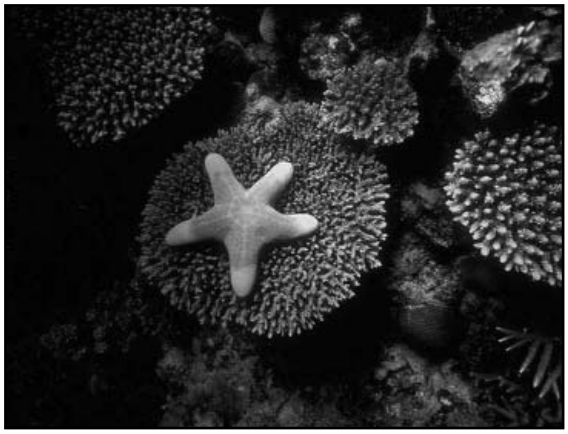
eminent domain under the auspices of the Act. The court also found that the restoration or improvement of salmonid fish runs did not constitute a public use as articulated by state law and prior jurisprudence. Finally, the court held that the county's deputy prosecuting attorney acted outside the scope of his authority by alleging an additional purpose for replacing the culvert in the petition for condemnation that was not contemplated by the Cowlitz County Board of Commissioners.

Endnotes

1. WASH. REV. CODE § 77.85.050(1)(a).

Coast to Coast
And Everything In-Between

The world's largest marine reserve has been established by the Pacific Island nation of Kiribati. The area covers 410,500 square kilometers and includes 120 species of coral reefs and over 500 species of fish, as well as sea bird nesting sites. The island nation, which is located halfway between Fiji and Hawaii, received a boat donated by Australia to patrol the area.



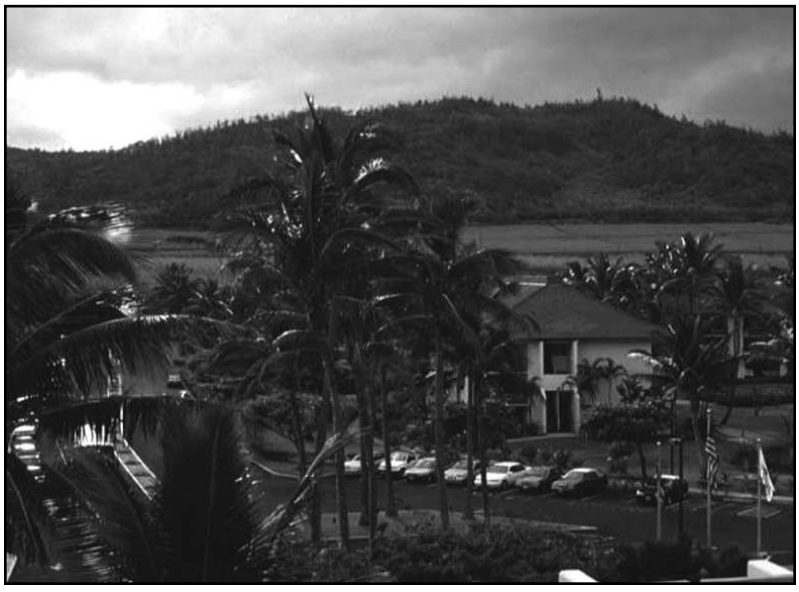
Photograph of starfish on coral formation courtesy of ©Nova Development Corps.

Citing an 1818 survey, the Georgia state legislature passed a resolution to restore the boundary line between Georgia and Tennessee to the 35th parallel. The current border runs below the Tennessee River and a shift would give Georgia a portion of the river. The resolution was passed in the wake of recent water rights issues in Georgia. If the Tennessee state government does not approve the change, Georgia could take its case to the United States Supreme Court.

An Australian fisherman swam nine miles from his capsized boat to shore. After the fisherman was discovered, authorities were dispatched to find two other crewmembers. A helicopter was able to rescue one crewmember, who had been clinging to an ice cooler to remain afloat. The third crewman had separated from the ice cooler in the middle of the night and there was no sign of him.

A Navy airlift saved the day for a 14-year old girl whose appendix ruptured while she was aboard a cruise with her family. When the cruise ship sent out a distress call, the *USS Ronald Reagan* sent a helicopter to airlift the teenager back to its ship, which had the nearest hospital facility.

Photograph of Hawaii residential area courtesy of ©Nova Development Corps.



In Hawaii, neighbors are feuding over whether short-term rentals should be allowed in residential areas. Some residents are fed up with the noise tourists bring to their neighborhoods and worry that the practice destroys the sense of community. Local lawmakers are considering proposals to eliminate permits that allow short-term vacation rentals in residential areas, the AP says.

THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR*, contact: the Sea Grant Law Center, Kinard Hall, Wing E, Room 262, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: sealaw@olemiss.edu . We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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