

No. 04-5031

In the United States Court of Appeals for the Federal Circuit

STEARNS CO., LTD.

Plaintiff-Appellee,

v.

THE UNITED STATES

Defendant-Appellant.

Appeal from the United States Court of Federal Claims
Senior Judge Loren Smith

**BRIEF OF THE NATIONAL LEAGUE OF CITIES AND
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
AS *AMICI CURIAE* URGING REVERSAL
IN SUPPORT OF DEFENDANT-APPELLANT**

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INTEREST OF THE *AMICI CURIAE*

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with state municipal leagues, NLC serves as a national resource and an advocate for the more than 18,000 cities, villages, and towns it represents.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1,400 municipalities across the country. IMLA serves as the legal voice for the nation's local governments.

Although municipalities do not typically litigate in this Court or the U.S. Court of Federal Claims, state courts that review local land use decisions look to this Circuit's takings precedent for guidance in developing their own takings

jurisprudence.¹ If adopted by other courts, the trial court's physical takings theory would severely threaten everyday municipal land use planning. Moreover, the trial court's ruling could undermine a host of federal protections of vital importance to municipalities.

ARGUMENT

Takings law can give rise to difficult cases, but this is not one of them. The trial court's error is not only plain and fundamental, but also deeply disturbing in its implications for municipal land use planning.

Senior Judge Loren Smith held that the Department of the Interior's assertion of jurisdiction under the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), and the concomitant imposition of a requirement on Stearns to obtain a compatibility determination prior to mining, worked a "*physical* taking by operation of law." *Stearns Co., Ltd. v. United States*, 53

¹ *E.g.*, *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 766-69 (Pa. 2002); *Keshbro, Inc. v. City of Miami*, 801 So.2d 864, 871 (Fla. 2001); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1024-25 (Md. 2000); *K & K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531, 536 (Mich. 1998); *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 1195 (Cal. 1998).

Fed. Cl. 446, 447 (2002) (emphasis added). In the court's view, SMCRA effected this physical taking because it fundamentally altered the parties' property rights by "revers[ing] the basic structure of rights between surface and subsurface owners." *Id.* The court concluded that "[a]fter SMCRA, plaintiff coal owner could only mine with the permission of the [defendant] surface owner," thereby making the coal owner's rights "subservient to the public's rights" and "effectively destroy[ing]" the claimant's coal estate. *Id.*

While recognizing that the federal government has never denied Stearns a compatibility determination,² the trial court concluded that this seemingly salient fact "misses the point" because Stearns's "ownership has been effectively made subservient to another owner's property, in this case that of the

² The trial court apparently accepted the government's representation that if lessee Ramex's "request for a compatibility determination [had] been allowed to proceed, a favorable determination would have been quickly made." *Id.* at 450. The trial court acknowledged government testimony that "a compatibility finding * * * is essentially a rubber stamp," and the federal government has granted an unbroken string of 18 straight compatibility requests within the Daniel Boone National Forest since 1982. *Id.* at 451.

United States.” *Id.* Articulating a breathtakingly broad standard of takings liability, the trial court concluded that “[w]hen the owners’ rights over the parcel change through government action, then a taking has occurred.” *Id.* at 450.

As explained in Section I below, the trial court’s ruling impermissibly blurs the clear line between physical takings and mere restrictions on the use of land. The precedent that applies to physical takings (as opposed to permitting schemes and other use restrictions) is rooted not only in the plain language of the Takings Clause, but also in the Supreme Court’s special solicitude for landowners who suffer an infringement of their right to exclude others from their land. Here, Stearns has suffered no such impairment and thus no physical taking of its property.

Section II below explains how loose applications of physical takings theories to mere land use restrictions like those at issue threaten to sweep within their ambit myriad land use controls and other community protections. Indeed, under the trial court’s theory, countless assertions of regulatory jurisdiction over property, as well as many common land use controls, could be

deemed a physical taking through the simple expedient of recharacterizing the use restriction as a “fundamental altering” of property rights.

By focusing on Stearns’s physical invasion claim, we do not mean to minimize the seriousness of the other issues raised by the United States. Due to the critical importance of the physical takings theory of liability to municipal interests, however, we give it our exclusive attention.

I. THE TRIAL COURT’S DECISION BLURS THE HISTORICAL DISTINCTION BETWEEN PHYSICAL INVASIONS AND LAND USE REGULATIONS.

Before turning to the merits of Stearns’s physical takings theory, it is illuminating to consider why Stearns might be advancing it. A physical taking theory affords Stearns two tactical advantages. First, Stearns evidently seeks to sidestep the ripeness requirements set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), by arguing that the requirement of obtaining a compatibility determination works a physical taking, even where the approval would be granted. Second, invocation of a physical takings theory

allows Stearns to circumvent the parcel-as-a-whole rule because a permanent physical occupation is a *per se* taking regardless of the size of the intrusion. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (“affirm[ing] the traditional rule that a permanent physical occupation of property is a taking,” regardless of size); *accord*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (under *Loretto*, a permanent physical occupation is a taking “no matter how minute the intrusion”). Thus, a physical invasion theory permits Stearns to ignore the extent to which it already has exploited its mining interests throughout the entire relevant parcel.

As shown below, however, Stearns has done little more than improperly slap a physical invasion label on a pure land use restriction that involves no physical encroachment. Stearns’s analytical sleight of hand should not be countenanced.

A. Binding Precedent Makes Clear That a Physical Invasion Taking Occurs Only Where the Government Requires a Landowner to Suffer an Actual *Physical* Invasion.

Stearns’s effort to impose a physical invasion theory on the land use restrictions at issue is rooted in a fundamental

misunderstanding of takings law. Indeed, no brighter line exists in takings jurisprudence than the demarcation between physical and regulatory takings. The U.S. Supreme Court could not have been clearer in its landmark ruling in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), when it condemned the application of physical takings precedent to cases involving restrictions on the use of land:

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.

Id. at 323.

Notwithstanding this unbreachable jurisprudential gulf between physical and regulatory takings, the trial court held that the federal government’s imposition of an approval requirement under SMCRA – *i.e.*, a mere use restriction – worked a physical taking. It so held even though there has been no physical invasion of property and no government authorization of physical invasion

by a third party. The ruling thus blurs the clearest distinction in takings law.

The text of the Fifth Amendment itself “provides a basis for drawing a distinction between physical takings and regulatory takings.” *Tahoe-Sierra*, 525 U.S. at 321. Its plain language requires the payment of compensation when the government takes property for a public purpose, but the Amendment is silent as to the limits of government regulation. *Id.* at 321-22.

Indeed, for the first 150 years of our nation’s history, the Takings Clause applied only to the direct condemnation or physical appropriation of property. *Lucas*, 505 U.S. at 1014 (“Prior to Justice Holmes’s exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’”) (citations omitted). Although *Mahon* extended the reach of the Takings Clause to regulatory restrictions, regulatory takings are found only in “extreme circumstances.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Land

use regulations that simply “adjust[] the benefits and burdens of economic life to promote the common good” are far less likely to work a taking than a physical invasion. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The trial court’s failure to understand the nature of a physical taking is reflected in its 1995 opinion in this case, where it incorrectly stated that “[t]he question of whether Stearns’ claim can be characterized as a physical or regulatory taking is, in many ways, *one of the most difficult issues* in this case.” *Stearns Co., Ltd. v. United States*, 34 Fed. Cl. 264, 272 (1995) (emphasis added). In fact, it is not difficult to identify a physical taking. The U.S. Supreme Court in *Tahoe-Sierra* described physical takings as “relatively rare,” “easily identified,” and “typically obvious.” 535 U.S. at 322 n.17, 324. Physical takings are so “easily identified” because they can be readily confirmed simply by looking at the subject land and determining whether the government has physically occupied it or authorized a third party to do so.

The seminal ruling in *Loretto* explains why a physical takings analysis is inappropriate here. There, the Supreme Court

ruled that a New York statute compelling landowners to permit cable companies to install on their properties boxes and cables, which would remain under the cable companies' ownership, worked a *per se* taking. 458 U.S. at 427. In other words, in contrast to a restriction on land use, which is analyzed under the multifactor *Penn Central* standard, a permanent physical occupation constitutes a taking without regard to the size of the intrusion, its economic impact, or the public purpose advanced by the government action. *Loretto*, 458 U.S. at 434-35. In requiring this *per se* treatment, the *Loretto* Court was careful to reaffirm “the distinction between a permanent physical occupation * * * and a regulation that merely restricts the use of property.” *Id.* at 430.

The *Loretto* Court repeatedly stressed that its “very narrow” holding (*id.* at 441) is rooted, not in some abstract reallocation of theoretical rights, but rather in “property rights in a physical thing.” *Id.* at 435. The government action in *Loretto* was a taking because it involved “a direct physical attachment of plates, boxes,

wires, bolts, and screws to the building.” *Id.* at 438. In the case at bar, there is no comparable physical invasion of a physical thing.

The *Loretto* Court also explained that the special treatment given to such physical invasions derives from the right to exclude, “traditionally * * * considered one of the most treasured strands in an owner’s bundle of property rights.” *Id.* at 435; accord *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing the right to exclude others from one’s land as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

Indeed, the Supreme Court repeatedly has reaffirmed that government denial of the right to exclude others from physical property is an essential predicate for any physical takings claim. For example, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court emphasized: “The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. This element of required acquiescence is at the heart of the concept of occupation.” *Id.* at 527; *B & G Enters., Ltd. v. United States*, 220 F.3d 1318, 1323 n.2 (Fed. Cir. 2000)

(same, quoting *Yee*); accord *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (“[a] physical taking of land occurs when the government itself occupies the property or ‘requires the landowner to submit to physical occupation of its land’”; internal citations omitted).

The distinction between invasions of physical property and regulation is so clear that the *Yee* Court unanimously held that a regulatory taking issue is not fairly included within a question presented concerning a physical taking. *Yee*, 503 U.S. at 537 (“Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well. * * * [The two issues] exist side by side, neither encompassing the other.”).

B. The Trial Court Disregarded this Binding Precedent.

The trial court’s conclusion that SMCRA’s compatibility determination requirement as applied to Stearns constitutes a physical taking is directly contrary to the precedent discussed above. The trial court held that a physical taking occurred because SMCRA “fundamentally altered” Stearns’s right to mine.

53 Fed. Cl. at 446. Although government action that reallocates property rights might present a claim for a regulatory taking, it cannot form the basis for a physical taking absent a government-compelled physical invasion. *E.g. Yee, supra; Loretto, supra.*

Warning against the expansion of physical takings theories, this Court endorsed these sage words of Judge Andewelt: “[T]he *Loretto per se* approach should not facilely be extended in cases where the historically rooted expectations that underlie the *Loretto* decision do not remotely apply.” *California Hous. Secs., Inc. v. United States*, 959 F.2d 955, 960 (Fed. Cir. 1992) (quoting *American Cont’l Corp. v. United States*, 22 Cl. Ct. 692, 701 (1991) (rejecting an argument that the government’s exercise of regulatory authority constituted a *Loretto* taking because the government action did not interfere with “historical notions of the rights of owners of physical things.”)). Judge Andewelt presciently concluded that claimants would try to “squeez[e] the government’s action into the language that the Supreme Court used in defining the *per se* rule in *Loretto*.” *Id.* at 700. But such efforts must be resisted: “In view of the very fundamental nature of the issues

involved, *Loretto* cannot, and should not, be extended by mere analogy without careful analysis.” *Id.* at 701. The lower court’s blurring of physical invasions and regulatory restrictions is inconsistent with the entire body of takings jurisprudence that preserves the critical distinction between them.

The ruling below is especially disturbing due to the unique posture of this case. As this Court well knows, landowners have not been shy about using the Takings Clause to challenge a wide range of restrictions on land use. Here, the challenge is not even to a final use restriction, but to an approval requirement that the Interior Department characterizes as a virtual rubber stamp. The trial court nevertheless found a taking, concluding that “[w]hen the owners’ rights over the parcel change through government action a taking has occurred.” 53 Fed. Cl. at 450.

This sweeping standard of liability flies in the face of *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which squarely holds that the “mere assertion of regulatory jurisdiction by a governmental body” does not constitute a taking. *Id.* at 126 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452

U.S. 264, 293-97 (1981) (rejecting a facial takings challenge under SMCRA)). “A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself ‘take’ the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.” *Riverside Bayview Homes*, 474 U.S. at 127.

The requirement to seek a compatibility determination does not physically take Stearns’s mining rights, any more than any other requirement to seek a land use permit physically takes an owner’s fee. To be sure, it imposes a condition, and to that extent restricts unfettered use. But approval requirements have never been deemed a physical taking, especially where the record shows that approval likely would be granted.

The trial court’s opinion is remarkably thin on legal precedent, citing none of the Supreme Court’s or this Court’s landmark rulings on physical takings. It does invoke *United States v. Winstar Corp.*, 518 U.S. 839 (1996), which is not a takings case but a contract case. While recognizing that the case

at bar “is not a *Winstar*-type [contract] case nor a regulatory taking case” (53 Fed. Cl. at 453), the trial court attempted to draw an analogy to *Winstar* by noting that the government entered a “deal” with Stearns through the 1939 deed, the terms of which (according to the trial court) the government now seeks to alter. 53 Fed. Cl. at 453-54. Whatever relevance this attempted analogy might have to a regulatory takings analysis under *Penn Central’s* multifactor test, it does not justify treating the government’s assertion of jurisdiction as a physical taking.

To be sure, the Supreme Court and this Court have found takings where government action entirely extinguishes a mortgage, a lien, or other basic property right. *See Armstrong v. United States*, 364 U.S. 40, 48 (1960) (although “not every destruction or injury to property by governmental action has been held to be a ‘taking,’” a taking occurred where government action resulted in the “total destruction * * * of all value” of materialmen’s liens); *Shelden v. United States*, 7 F.3d 1022, 1027 (Fed. Cir. 1993) (a taking occurred where government action “effectively transferred” title and full ownership in the subject

property to the United States and thus entirely extinguished the claimants' mortgage). But neither *Armstrong* nor *Shelden* is rooted in physical takings jurisprudence. Neither case stands for the proposition that an owner challenging a use restriction may sidestep applicable ripeness rules and ignore the claimant's ability to exploit other portions of the claimant's relevant parcel by invoking a physical invasion theory. Both *Armstrong* and *Shelden* involved the total destruction of the claimants' property rights, a situation worlds apart from imposition of a requirement to obtain a compatibility determination prior to mining.

II. A LOOSE APPLICATION OF PHYSICAL TAKINGS THEORIES TO MERE LAND USE RESTRICTIONS THREATENS MUNICIPAL PLANNING AND COMMUNITY PROTECTIONS.

As shown above, “physical invasion cases are special” and thus subject to special takings rules inapplicable to mere land use restrictions. *Loretto*, 458 U.S. at 432. If courts conflate the standards for physical invasion with those governing land use regulation, municipal governments might well face an onslaught of challenges to their traditional police power authority. As Justice Kennedy has explained, inappropriately broad theories of

takings liability unfairly subject “States and municipalities to the potential of new and unforeseen claims in vast amounts.” *Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

The trial court ruling seems to require compensation where “the owners’ rights over the parcel change through government action.” 53 Fed. Cl. at 450. But virtually *every* government permitting scheme could be characterized as changing landowners’ rights. Prior to a permitting requirement, use is unrestricted, subject only to otherwise applicable laws; afterward, the regulated use is conditioned on approval. Such a change in property rights by itself has never been thought to give rise to a taking, physical or otherwise.

An expansive view of physical takings could generate claims in courts across the country. Municipalities would then be forced to choose between paying untold amounts in compensation or abandoning legitimate planning efforts needed to protect neighboring landowners and the general public. Such a result is

wholly at odds with the standard of fairness that informs takings analysis.

Numerous studies demonstrate how municipal litigation costs have soared in recent years, due in no small part to the “explosion in the non-traditional use of civil rights statutes * * * to include cases involving such areas as zoning and land development.” Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 SYRACUSE L. REV. 833, 834 (1993) (citations omitted).³ Allowing takings claimants to challenge permitting requirements as physical takings will only add to the cost of defending against these lawsuits and could seriously hinder future municipal planning efforts. Municipalities might choose to settle otherwise winnable cases or allow development to proceed despite

³ The survey of the membership of the International Municipal Lawyers Association (formerly the National Institute of Municipal Law Officers) found that more than half the jurisdictions reported litigation cost increases of 10 percent or more during the study period; 19.3 percent reported cost increases of 30 percent; and 6.6 percent reported cost increases of more than 50 percent. Almost half of the respondents cited land use and zoning cases as “contributing most to their rising litigation costs over the past three years.” *Id.* at 839-40.

the public interest against it. *See id.* at 838, 842 (noting that 81.4 percent of survey respondents “acknowledge they settle at least some of their ‘winnable’ cases just to save money.”).

There is little doubt that affirmance of the lower court ruling, and adoption of that ruling by other courts, could wreak havoc on municipal budgets across the country and seriously chill efforts to regulate development. Municipalities simply cannot engage in necessary land use planning to protect public health, safety, and the environment if they are subject to *per se* liability whenever new regulations impose an approval requirement. It is vitally important that this Court continue to cabin application of *Loretto*’s very narrow holding to cases involving actual permanent *physical* occupations, and not extend it to mere theoretical adjustments of abstract property rights. The balance of equities that is the hallmark of regulatory takings jurisprudence must be preserved.

Conclusion

The judgment below should be reversed, and Stearns’s physical takings claim should be rejected. The Court also should

rule that Stearns's regulatory takings claim is unripe for the reasons advanced by the United States.

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