

September 2002

## *Takings Watch*

*CRC's Monthly Update on Regulatory Takings*

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### **FEATURE CASE:**

#### **Court Rules Salmonella Protections Are A Taking**

***Rose Acre Farms, Inc. v. United States*, No 92-710C (Cl. Ct., August 29, 2002)**

On August 29, Judge Bohdan Futey of the U.S. Court of Federal Claims dealt a shocking blow to the U.S. Department of Agriculture's efforts to protect the nation's food supply from salmonella poisoning. Ruling in favor of one of the largest egg producers in the nation, the Court held that the government's attempt to restrict the sale of contaminated eggs constituted a "taking" of private property and awarded more than \$6 million in compensation, plus interest from 1990 (the total award will greatly exceed \$10 million).

The Center for Disease Control receives reports of 40,000 cases of salmonellosis in the United States each year. It estimates that the bacteria afflicts 1.4 million people and is responsible for 1,000 deaths annually. Three salmonella outbreaks that sickened 450 people in 1990 were traced back to Rose Acre's egg farms. The USDA then designated hen houses on three of the plaintiff's farms as "test flocks." After tests came back positive, the agency forbade the company from selling those eggs from those houses in interstate commerce. Rose Acre was allowed, however, to sell its eggs in the pasteurization market (pasteurization kills bacteria), where eggs sold for 41 cents per dozen rather than 59 cents per dozen for table eggs. In addition, the USDA removed, killed, and tested 6,741 hens, of which about two percent tested positive for salmonellosis. The government relaxed its oversight on Rose Acre after 21 months of quarantine.

Rose Acre first challenged these protections in federal court in Indiana, claims that were forcefully rejected on appeal by the Seventh Circuit. In an opinion authored by Frank Easterbrook (a conservative appointed by President Reagan who is not noted for his sympathy for federal standards), the appeals court found that the USDA's efforts were well within the agency's authority and neither arbitrary nor capricious. See *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672-74 (7th Cir. 1992).

Despite this circuit court opinion upholding the USDA's conduct, Judge Futey based his taking finding in large part on his belief that the agency's actions were inefficient. Judge Futey also found a taking even though the company suffered at most only a 30 percent diminution in the value of the quarantined eggs. To our knowledge, no court has ever found a regulatory taking based on this level of economic impact.

Let's hope for a quick reversal on appeal, or else we might be forced to pass on the hollandaise sauce.

### **ON THE HORIZON:**

#### ***Dolan* in the Texas Supreme Court**

On August 23, the Texas Supreme Court requested full briefing in an appeal of a decision holding that (1) *Dolan's* rough proportionality test applies to an adjudicative, non-dedicatory permit condition, and (2) a road-improvement permit condition was not "roughly proportional" under *Dolan* even though the cost imposed upon the town by subdivision traffic far exceeded the cost of the condition upon the developer. See *Town of Flower Mound v. Stafford Estates Ltd. Ptnrshp.*, 71 S.W.3d 18 (Tex. Ct. App. 2002). The intermediate appeals court affirmed the trial court's judgment of more than \$425,000 for the developer due to a permit requirement that the developer construct and pay for offsite road improvements designed to promote traffic safety and road durability. Although the town imposed the requirement pursuant to a legislative mandate, the court concluded that the requirement was adjudicative because the town had exempted other developers from the requirement and initially approved the subdivision at issue without the condition. Even more remarkably, the court found a taking under *Dolan* even though the town proved at trial that the proposed subdivision would result in about 750 additional car trips per day and extra traffic costs on the town of nearly \$880,000. Rather than weighing these traffic costs against the far smaller costs imposed by the permit condition, the court improperly used the *Dolan* test as a vehicle for second-guessing the wisdom of the permit condition.

After a period of relative calm, the Texas Supreme Court has shown renewed interest in takings cases, requesting additional briefing where an appeals court found a taking based on a presumed 38 percent value loss (see Dec. 2001 *Takings Watch*), and reversing a \$2.95 million judgment against the City of Austin in an airport zoning case (see May 2002 *Takings Watch*). Given the steady stream of aberrant rulings from Texas appeals courts, high court intervention is coming none too soon.

## **OUTRAGE OF THE MONTH: Company's SLAM Suit Threat Riles Texas Community**

The aluminum manufacturing giant Alcoa reportedly has turned to threats to coerce local officials in Bastrop County, Texas to approve its mining plan, and local citizens and officials are feeling the heat.

Alcoa wants to mine lignite in an area transversed by county roads and two state highways. Alcoa wants the roads moved. It is willing to pay relocation costs, but that is not the point. Local officials want to go slow, if at all, because the proposed mine would dramatically impair 16,000 acres in Bastrop and adjacent counties, and could seriously impact groundwater in the region. Alcoa's aluminum smelting plant in Rockdale, Texas is the largest in the country and is thought to emit more air pollution than any other industrial facility in the state.

Alcoa wants a deal right away, and they're playing hardball to get one. Alcoa's lawyers are saying Bastrop County could be liable for up to \$120 million in takings compensation if the company is not allowed to mine lignite under the county's roads. The threat of such a huge judgment has county officials nervous since their total annual budget is roughly \$10 million.

This imbalance is nothing new for local governments. Most small cities and towns in America are like Bastrop County, generating less than \$10 million in annual revenue. Indeed, 90 percent of these communities maintain populations of less than 10,000 people and cannot afford even one full-time municipal lawyer to defend against the well-financed litigation efforts of the development industry and the so-called property rights movement. We call these frivolous legal actions SLAM (Strategic Litigation Against Municipalities) suits, and we are seeing more and more SLAM suits every day.

County officials are reportedly seeking the advice of outside counsel to help them assess Alcoa's takings threat. Let's hope they get some good advice. And shame on Alcoa for turning to threats and bluster to intimidate local officials seeking to protect the public interest.

### **QUOTE OF THE MONTH**

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.

The Federalist No 31, at 194  
(Clinton Rossiter ed. 1961)

## **EYE ON WASHINGTON:**

### **Claims Court Nominees Promote Court's Rightward Tilt**

The U.S. Court of Federal Claims (CFC) has been on an ideological tear of late, with decisions like *Rose Acre Farms*, *The Stearns Co.*, and *Tulare Lake Basin* pushing the boundaries of takings law and undermining important environmental protections. Such decisions have emboldened property rights advocates into filing a \$1 billion regulatory takings lawsuit against the United States in the CFC, challenging restrictions on irrigation water from Klamath Lake in Oregon needed to protect coho salmon and other endangered fish. The water withdrawal at issue marks the first time since the Klamath Project irrigation system opened in 1907 that the U.S. has acted in the interest of commercial fishers and Indian tribes, who have suffered for years due to declining salmon runs. The \$1 billion price tag illustrates the stakes at issue to taxpayers in CFC takings rulings.

That's why nominations to the CFC are so important. At a hearing on the nomination of Larry Block, Senate Judiciary Chairman Patrick Leahy (D-Vt.) criticized Block for spending "much of his legal career advancing a very specific and ideological political agenda" and the Administration for "proceed[ing] unilaterally" in nominations to the CFC "without consultation" with Committee Democrats. Noting Senator Orrin Hatch's (R-Utah) blockage of President Clinton's nominees to the CFC, Senator Leahy urged President Bush to "restore some sense of fairness to the process of nominations to the Court of Federal Claims."

Astonishingly, the Bush Administration's response this month was to nominate avowed libertarian Victor Wolski to the CFC. A 39-year old former lawyer for the Pacific Legal Foundation, one of the most extreme property rights groups in the country, Wolski stated in 1999 that "every single job I've taken since college has been ideologically orientated, trying to further my principles."

At a hearing Sept. 19, in which the Judiciary Committee approved Block's nomination, four Democratic senators spoke out against attempts to pack the CFC with property rights zealots who would undermine environmental, health, and safety regulations. Let's hope the Committee stands firm and confirms judges who will apply the law fairly, not those with ideological axes to grind.

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