Resource Development Council
121 W. Fireweed, Suite 250
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Resource Review

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Court ruling sends strong message to regulators

"From now on, if a federal or state agency wants to prevent private landowners from using their land under the guise of 'public interest,' the government must be willing to pay compensation for that decision."

- James Burling

Fight will be required to maintain property rights victory

The U.S. Supreme Court has drawn a tough line that will likely restrict government regulators who oversee activities on private lands.

In Lucas versus the South Carolina Coastal Council, the Court ruled that individuals have the right to be compensated when federal regulators deny the economic use of privately-owned property. The decision, handed down in June, is expected to have a significant positive affect on Alaska for miners and the owners of wetlands.

From now on, if a federal or state agency wants to prevent private landowners from using their land under the guise of "public interest," the government must be willing to pay compensation for that decision, said Jim Burling of the Pacific Legal Foundation. PLF filed a friend-of-the-court brief in the case, which pit a South Carolina developer against a state law banning any new home building along a stretch of coastline.

Cussy Reardon of Nome talks with congressional staffers regarding her permitting problems with the U.S. Army Corps of Engineers. The Lucas decision should help private property owners deal with government agencies which regulate development on wetlands. (See related story on page 2.) *(Photo by Debbie Reinwand)*

In 1986, David Lucas purchased two lots in coastal South Carolina. At the time, the lots were not subject to the state's coastal zone building permit requirements. However, in 1988 the state changed its laws and barred Lucas from erecting any structures on his property, which is located adjacent to existing homes with a home between the two lots. Lucas then filed suit against the state seeking compensation for the land under the Fifth Amendment's "takings" clause.

See analysis on page 4

In the 6-3 decision, the Court stated that regulations which leave the owner of private land without economically

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Alaska Wetlands Coalition statewide tour

Community leaders target "real-life" problems of wetlands policy

Message from the Acting Director

by
Debbie Reinwand

Kicking up their heels at the Iditarod finish arch in Nome were (front row, left to right) Vicki Hicks, PerryAnne Buchanan, Lyn Herdt and Lee Forsgren; (back row) Joey Finley, Ken Freeman, David Dye, Marge Carrico, Duane Gibson, Jim Mathews, Dave Whaley, Debbie Reinwand and Kim Duke. (John Handeland photo)

Cussy Reardon stood on the edge of a swampy stretch of land near Nome and shook her head in disgust. "What I wanted to do was fill about 10 feet by my house .... to shore up the pilings. My house has shifted four inches over time and it's causing major structural problems; I'm losing the investment I made in this home," she told a group of congressional staffers brought to Nome by the Alaska Wetlands Coalition.

When Reardon concluded by describing her stack of correspondence from the U.S. Army Corps of Engineers, which denied her request to place fill, the congressional staffers were appalled - and ready to take action themselves. Pointing to a small, idle bulldozer, one of them jokingly suggested the tour group take matters into their own hands and fill the small area for Reardon.

The frustration conveyed by Reardon over arbitrary and unreasonable enforcement of the "no net loss of wetlands" policy by federal officials was echoed by community leaders, private developers and citizens across Alaska, as they met with the group of 20 congressional staff members and others who participated in the fourth wetlands tour organized by the Alaska Wetlands Coalition.

The AWC was spearheaded by RDC in 1989, following the release of a Memorandum of Agreement mandating "no net loss of wetlands." Alaska, which has used less than .05% of its wetlands in the last century, is considered the best steward of wetlands among the 50 states. Other states, such as California, have used more than 50% of their wetlands and a no net loss policy makes more sense in places with high wetlands losses.

Since its inception, a major goal of the AWC has been to educate congressional and federal leaders on the vastness of Alaska's wetlands; the high amount that has been preserved in federally-designated wilderness, conservation system units, refuges and parks; and on the community needs in the 49th state for further expansion and economic development.

On July 14, 1992, AWC staff met a group of congressional staffers and squired them from Ketchikan to Thorne Bay to Juneau, Anchorage and Nome. The message that was emphasized - perhaps most effectively by individuals like Reardon - was the insanity of a national "no net loss" policy applied without flexibility. In the case of Reardon, a lifetime investment is slowly sinking away.

In Juneau, the infamous middle school was again a trip highlight. As many RDC members may recall, the school had permit problems last year because it sits upon a "forested wetland," even though there is approximately a 70 degree slope on the tree-lined hill selected by the City and Borough of Juneau for the new school site.

After more than a year of teeth-gnashing and arm-twisting, city officials were given the go-ahead to build the school. But, only after architect Cathy Fritz shifted the entire structure 15 feet to accommodate an anadromous fish stream deemed important by the Corps. Fritz reported, however, that

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Writer & Editor
Carl Portman

RDC supports Park Service proposal

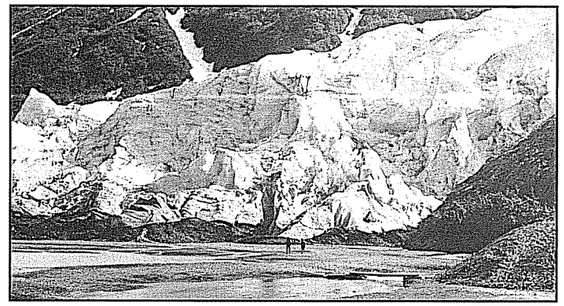
The Resource Development Council is supporting a $500,000 proposal by the National Park Service to build up to 16 public use cabins, cooking shelters and other improvements in four park units in Alaska.

In a letter to Ann Castellina, Superintendent to Kenai Fjords National Park, RDC President Paul Glavinovich said the proposal would improve facilities and access to Alaska park units and help stimulate tourism.

The proposal calls for the construction of a new public use cabin at Exit Glacier near Seward and three other cabins in outlying areas of Kenai Fjords National Park. The cabins are intended to provide new visitor opportunities while enhancing public safety in remote areas.

Exit Glacier, the Harding Ice Field and the Kenai Fjords coast are becoming more popular attractions for both first-time visitors and Alaska residents. Many visitors and residents prefer overnighting in cabins, opposed to tents, considering the unpredictable weather.

"Of course, some will oppose construction of public use cabins and other visitor facility improvements, but considering the fact that 33 million acres of national park lands in Alaska are already designated Wilderness, those remaining areas, such as Exit Glacier, should be managed to allow for operations catering to a wide variety of park users," Glavinovich said.



Exit Glacier near Seward is the only glacier in Kenai Fjords National Park that is accessible by road. (Photo by Carl Portman)

Oil companies looking abroad, investments up ...

(Continued from page 3)

C. Russell Luigs, Chairman of Global Marine Inc., said that his company had recently moved three drilling rigs and sold another into international markets because the U.S. market has been diminished by legislation and policies that have burdened the industry with high risks and costs.

"The U.S. is busy kicking the oil industry in the name of achieving environmental and economic objectives while the rest of the world is scrambling to lure oil investments to achieve precisely the same objectives," Luigs said. The Global Marine chairman noted that oil companies are now exposed to unlimited pollution liability while there executives are subject to criminal prosecution for accidents beyond their control.

"Major oil companies are not just scaling back operations in the U.S., they are abandoning domestic operations, laying off hundreds of thousands of workers and selling domestic properties to fund international operations," Luigs said. "It isn't any wonder that the oil industry is fleeing the U.S. with unceremonious haste. What is a wonder is that there are still a few decent rigs left in U.S. waters. But they too will go, and as they go, American jobs and American taxpayers will go with them."

As automobile manufacturers and the press complain about the inroads foreign companies have made into American markets, the United States has surrendered some 300,000 jobs to foreign shores to develop oil and gas deposits abroad, according to Linda Stuntz, Acting Deputy Secretary of the U.S. Department of Energy. This striking job loss has come at the expense of domestic development, Stuntz noted.

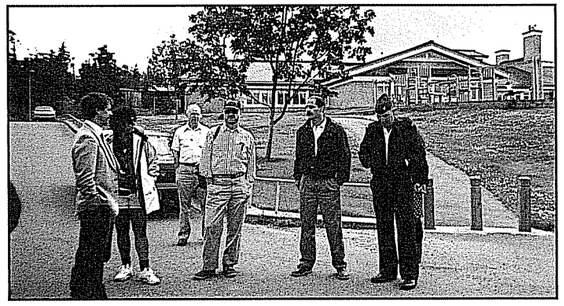
Since 1982, the domestic oil industry has seen a 45 percent reduction in jobs while the auto industry has had a net gain of 75,700 jobs, primarily because so many of the so-called "foreign" cars are actually being manufactured in the United States.

Failure to develop U.S. oil and gas resources on the Outer Continental Shelf (OCS) is largely responsible for the industry's employment reductions, Stuntz claims. She pointed out that OCS drilling bans have also cost the nation 3 billion barrels of oil and 10 trillion cubic feet of natural gas. In addition to the loss of the valuable resource, U.S. Treasury revenues have dropped from $10 billion in 1981 to $3.4 billion in 1990, a 68 percent reduction.

The Department of Energy estimates that the development of oil reserves beneath the Coastal Plain of the Arctic National Wildlife Refuge would not only supply the U.S. with both oil and gas for the next two decades, but would create 500,000 jobs. Though eliminated from both the Senate and House versions of the energy bill, the President has promised to continue to raise the issue of ANWR in future legislation.

Meanwhile, at least 60 western oil companies are negotiating directly with former Soviet republics to establish joint ventures in the development of oil and gas fields. Of the 3,000 oil and gas fields in the Commonwealth of Independent States, at least 100 are considered giant or super giant.

As western companies line up to do business with the Russians and other foreigners, drilling activity in the U.S. is at its lowest level, primarily due to restrictive legislation passed by Congress. Offshore drilling fell by 41.1 percent this year alone. International drilling activity increased by nearly 10 percent, taking up the U.S. slack.



Congressional wetlands tour...

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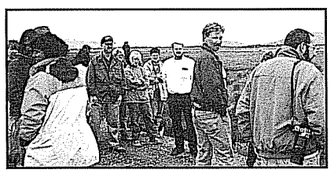
when all was said and done, the Corps felt the stream should be moved anyhow and when site preparation began, it was. "After all that fuss about the importance of this stream, they had us move it," said Fritz, shrugging her shoulders.

In Ketchikan, the issue of flexibility and community expansion was again reiterated by borough leaders. At Point Higgins School, our D.C. visitors viewed an area owned by the borough and selected for a ballpark. A seemingly uncontroversial proposal, the ballpark permitting process has taken most of the summer and no permit has yet been issued.

The common theme that Alaskans have presented on these tours is "Hey, we have needs like other communities in the Lower 48 - the need for new sewer systems, ball fields and schools - we also need economic development. But, one thing we don't have is a huge loss of wetlands like other states, so don't punish us for their sins." The Alaska community leaders like Juneau Mayor Jamie Parsons and the assembly, Nome Mayor John Handeland and Ketchikan Gateway Borough Mayor Ralph Bartholomew did a superb job in presenting "real-life" situations that point out the stupidity of a "no net loss" policy that is enforced without consideration of individual, community and private sector needs.

Participating in the 1992 tour were Joey Finley, legislative assistant to Congressman Jimmy Hayes; Jim Mathews, legislative assistant to Congresman Thomas Manton; Vicki Hicks, legislative assistant to Senator Quentin Burdick; David Dye, minority counsel, House Interior Committee; Dave Whaley, House Merchant Marine & Fisheries Committee; Lee Forsgren, Congressman Don Young's office; Rodney Moore, Congressman Don Young's office; Duane Gibson, Senator Ted Steven's office; Marge Carrico, director, National Wetlands Coalition; PerryAnne Buchanan, government relations director, National Water Resources Association; and other private sector representatives.

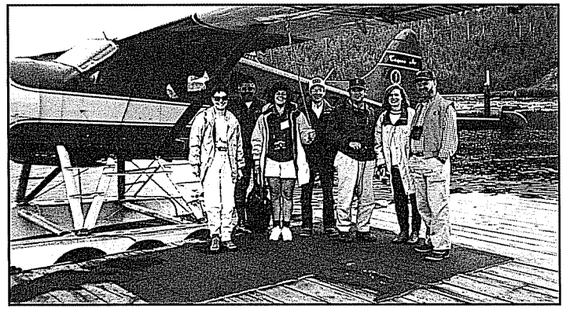
RDC and the Alaska Wetlands Coalition are proud to participate in coordinating these informative tours and appreciate the support of our members that make it possible for us to influence congressional leaders who will be working on this policy as it unfolds in the near future.



Mayor John Handeland (Center) and tour participants view a wetland near Nome.

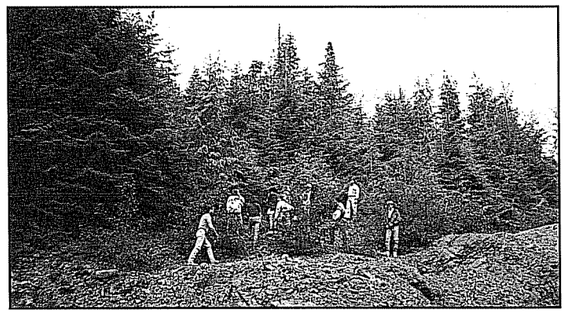
Photos by Debbie Reinwand

Ketchikan Gateway Borough officials speak with congressional staffers at Point Higgins School, site of a proposed ball park now in the permitting process.



Landing in Thorne Bay are (left to right) Marge Carrico, pilot, Lyn Herdt, Mike Joyce, Larry Kast, Joey Finley and David Dye.

Wetlands tour participants include (front row, left to right) Lyn Herdt, Rod Moore, (Middle row) Mike Joyce, Joey Finley, Vicki Hicks, Kim Duke, and Lee Forsgren, (back row) Ken Freeman, Dave Whaley.



Field work in Thorne Bay included this forested wetland near a new school site.

Larry Kast visits a clan house at Totem Bight Park in Ketchikan.

Thoughts from the President

by
Paul S. Glavinovich

Seizing an opportunity

Over the course of the next several weeks our fellow Alaskans in Juneau will be given the opportunity to demonstrate their willingness to accept mining as a responsible and appropriate use of the State's natural resources and a recognized means of diversifying Juneau's government-dependent economy.

Alaska, it appears, has not escaped the "not-in-my-backyard" malice which is strikingly common to resource projects in the Lower 48, be they a water reservoir, power plant, mine or oil field. In the case of in-place resources, if they are to be developed, then they must be developed where they are found. We cannot move a mineral deposit or an oil field to a more socially-acceptable location.

The City and Borough of Juneau planning commission is commencing final consideration of a permit to Echo Bay Mines to reactivate the historic A.J. Gold Mine. Fully operational, this mine would provide 450 new direct jobs and an estimated annual payroll of $22 million to the Juneau economy. For a community whose very roots are entwined in mining, and in fact the downtown sector of the community is constructed upon former A.J. tailings, the decision to proceed would seem obvious. Such is not the case.

A number of individuals and groups, some of national affiliation, are opposing the reactivation of this former mine. It is critical that those Juneau residents that support the mine, and there are many, make that support known to the CBJ planning commission. The CBJ decision of the reactivation of the A.J. mine will undoubtedly become a barometer for future resource development in the state.

Many Alaska communities have little in the way of a private sector economy and attendant tax base to support their growing demands for education, utilities and social welfare programs. Given the opportunity to support and participate in responsible resource development, too many of these very same communities, however, choose not to do so and instead turn to and fully expect the state to provide the requisite funds for these activities and facilities.

Declining State revenues are a fact and every Alaskan must accept that as responsible individuals. As a collective society, we must increasingly become contributors to, rather than recipients of, the many services that are now funded 100 percent by the State. A diversified resource base would be a big step in that direction.

Miners urged to oppose legislation repealing Mining Law

The Alaska Miners Association (AMA) is asking its members across Alaska to write Senator Bennett Johnston, Chairman of the U.S. Senate Energy and Natural Resources Committee, and urge him to oppose legislation that could lead to the repeal of the General Mining Law of 1872.

By itself, S. 433, sponsored by Senator Dale Bumpers, is a simple piece of legislation that could be made to work once certain problems are eliminated. However, Steve Borell, executive director of the Alaska Miners Association, warns that S.433 is a ploy by Bumpers to get a bill through the Senate.

The Senate bill would then be sent to a conference committee where it would be meshed with much tougher companion legislation from the House, H.R. 918. Miners fear that all of the bad points of H.R. 918 would then become law.

H.R. 918 repeals the General Mining Law, adds an eight percent gross royalty and eliminates patenting. It requires an annual holding fee that starts at $5 per acre and escalates over 25 years to $25 per acre. Miners warn that the bill would make it virtually impossible to undertake hardrock mineral exploration and development in Alaska.

S. 433 is not yet out of the Senate Energy and Natural Resources Committee. The AMA objective is to stop the bill in committee, preventing it from moving on to the conference committee.

Letters opposing S.433 and requesting hearings on the legislation can be sent to: Senator Bennett Johnston, Senate Energy and Natural Resources Committee, United States Senate, Washington, D.C. 20510.

American energy investments, jobs going overseas

The domestic energy industry invested approximately 70 percent of its exploration capital in the United States up through 1987, but today more than 50 percent of such investments are being made abroad, according to the U.S. Department of Energy.

With few incentives to drill and burdened by restrictive legislation, American oil companies are investing $33.6 billion in overseas energy markets, a 9.1 percent jump from a year ago.

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Supreme Court rules in favor of property rights

Landmark decision should help Alaska miners, Native corporations and owners of wetlands

(Continued from page 1)

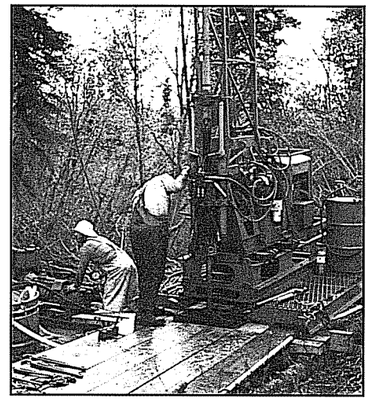
beneficial or productive options for its use, carry with them heightened risks that private property is being pressed into some form of public service under the guise of mitigating serious public harm. In truth, such requirements are merely the equivalent of appropriating land for public use, the Court said.

Justice Antonin Scalia wrote the decision for the Court, saying that the only time compensation need not be paid to a property owner is when use of the property would create a common law nuisance that would give a neighbor the right to stop the noxious use. Scalia was careful to point out that a real nuisance must be involved.

Burling said the ruling is a major victory for private property owners and it should help miners who are having their operating plans turned down on ecological grounds by the National Park Service. He said mining has been stopped in the parks primarily for aesthetic reasons and to a lesser extent habitat protection. Burling noted that the ruling should also help wetlands owners, including some Native corporations and the State of Alaska deal with the Army Corps of Engineers, which regulates development on wetlands.

"Most of the development on wetlands is not going to cause a significant nuisance," Burling said. "If the owner of a wetland is denied a permit, he now has a right to sue for compensation."

However, Burling predicted that a fight will be required to maintain the victory. He warned that regulators are already arguing that they can develop legal theories to get around the plain meaning of the Supreme Court's decision.



The Lucas decision should help Alaska miners deal with government agencies.

Burling said regulators will try to redefine the law of nuisance by expanding its definition. They will also claim that compensation need only be paid when 100 percent of a parcel's value is destroyed.

"Regulators will try to convince the state courts that nuisances now include everything that is mildly unpleasant or aesthetically displeasing," Burling said. "We expect them to argue that the definition of nuisance prevention should be the same as 'preserving the public interest' which would mean whatever a regulator says it is."

Burling predicted that the battle will now be taken first to the state courts and then again ultimately to the U.S. Supreme Court.

Bill Horn, Technical Advisor for the Alaska Wetlands Coalition in Washington, D.C., agreed with Burling that the ruling represents only one step in the right direction.

"The Lucas decision is a clear signal that the Court is moving in the right direction," Horn said. "It's a very important step which strips away the automatic nuisance defense the government has been hiding behind for 50 years," Horn added. "In that sense, it demonstrates the court is more than willing to rigorously examine claims of 'takings.'"

Prior to the Lucas decision, there was an extensive body of case law enabling regulatory entities to merely invoke the concept of public nuisance in locking up privately-owned lands, Horn explained. But the Lucas decision, which basically represents the judicial recognition of private property rights, finds that "simple invocation of the public nuisance doctrine is inadequate in insulating government from a takings claim," Horn said.

The Lucas ruling will not only make it easier to get a takings claim from the court, it will make it harder for a government entity to defend itself. Horn also noted that government regulatory actions do not have to represent a permanent taking to warrant compensation. Under the decision, the private property owner can claim compensation for the period that he was denied use of his property.

Lee Forsgren, Counsel for lands and forestry to the House Interior and Insular Affairs Committee, said "the EPA and the Corps will have to look at the impacts of their regulations on private property owners before taking certain actions in the future."

Although it's too early to gauge the effects of the decision on legislation, Forsgren said it does appear to ratify the private property rights provisions in H.R. 1330. Congressman Don Young is the co-author of H.R. 1330, the Comprehensive Wetlands Conservation and Management Act of 1991. The legislation is designed to save millions of acres of private and state lands from unnecessary wetland regulations and clear up numerous problems in the current wetland regulatory system. The bill currently has over 175 cosponsors from members of both parties.

Analysis

The post-Lucas challenge to private property rights

by James S. Burling

Alaska's property owners can thank the United States Supreme Court for making their lives a little bit more secure. Everyone, including private owners of wetlands or mining claims, Native corporations, and even the State of Alaska, can be assured that property rights are more secure following *Lucas versus South Carolina Coastal Council*. Once again, the Court turned back a challenge from advocates of more and more regulation who had argued that there is some sort of "public interest" exception to the United States Constitution.

In 1922, Justice Holmes wrote in the landmark case *Pennsylvania Coal Company versus Mahon* that a government regulation that goes "too far" will be considered a taking. In other words, when property is regulated too heavily, the owner might be entitled to compensation. For many years, however, regulators ignored this lesson, and the courts went along by refusing to grant money damages to owners whose property was regulated to near worthlessness. In 1987, the Supreme Court put the regulators on notice in *Nollan versus California Coastal Commission* and *First English Evangelical Lutheran Church of Glendale versus County of Los Angeles* that excessive regulation could "take" private property and that money damages must be paid.

In the wake of these decisions, the federal courts have awarded millions of dollars in damages to property owners who have been injured by excessive regulation. But some state courts have disregarded the 1987 decision. The most common excuse to ignore those opinions is that there is some sort of exception in the Constitution for a regulation that purports to prevent "public harm" or protect the "public interest."

David Lucas ran headlong into this so-called "public interest" exception to the Constitution after he bought two vacant lots on the Isle of Palms in South Carolina. After Mr. Lucas bought his property, later valued at $1.2 million, the state passed a law that prevented him from building *anything* of value on his property — even though large homes had already been built on the lots next to and between Mr. Lucas' lots. The devastation to the value of these lots was so great that a South Carolina trial court declared both of them to be totally worthless because of the new law.

And yet the South Carolina Supreme Court had no sympathy for Mr. Lucas. It ruled that he was entitled to no compensation because the South Carolina Legislature said the law was designed to prevent public harm. When Pacific Legal Foundation filed a friend of the court brief in support of Mr. Lucas in an appeal to the United States Supreme Court, we argued that there is no such thing as a "public interest" exception to the Constitution.

The Court agreed. As Justice Scalia put it, the rule that no law could create a taking if the law claimed to prevent a "public harm" would amount "to a test of whether the legislature has a stupid staff." The Court continued that the only time compensation need not be paid to a property owner is when use of the property would create the same sort of common law nuisance that would give a neighbor the right to stop the noxious use in court. Thus, just as a person could sue a neighbor to prevent the neighbor from filling in a lake which would flood the neighborhood, so too can government pass a regulation to prevent the same harm. But Scalia was careful to point out that a *real* nuisance must be involved. Just as a neighbor cannot claim that building a home that resembles every other home in a neighborhood is a nuisance, government cannot declare land to be "open space" and expect not to pay.

For many years, environmental advocates have been arguing that the government has no duty to compensate owners of wetlands, wildlife habitat, or mining claims when the government regulates that land into oblivion. The *Lucas* decision helps put a halt to these arguments. Property owners must still use their land in an environmentally-responsible manner, but government can no longer escape liability for excessive regulation that "takes" the value of property. Of course, we can expect that regulators will attempt to argue that everything not in the public interest is some sort of nuisance, and that when *any* value is left in a parcel there can be no taking. Thus, it is certain that new litigation will await property owners in the future, but at least one significant hurdle to fairness has been removed.