



Ridin' Shotgun

This property is condemned.

By Jeff Goodson

Last June, the U.S. Supreme Court said that cities could condemn people's homes in the name of economic development. The case, *Kelo v. New London*, dramatically increased the threat of condemnation and shocked Americans across the political spectrum.

Kelo involved nine individuals whose homes were condemned by the city of New London, Conn., to make way for a hotel, spa, convention center and condominiums. The homeowners argued that condemnation for economic development was unconstitutional, since it was not "public use" in the sense articulated in the Fifth Amendment of the Bill of Rights—"nor shall private property be taken for public use without just compensation."

Historically, condemnation of private property has been reserved for clearly public uses like the construction of roads, hospitals and courthouses. Definition of the term broadened somewhat in the 19th and 20th centuries, but aggressive attempts to redefine the term didn't occur until recently when cities like New London started using condemnation to expand their tax base. The Institute for Justice identified over 10,000

cases of actual or threatened condemnation for private development from 1998 to 2002 alone; of these, about 3,700 landowners were forced to sell.

Kelo tested this broader definition. It was decided by a 5-4 vote, with the liberal bloc of the Court—Stevens, Souter, Breyer and Ginsburg, along with Justice Kennedy—voting against the homeowners; and the conservatives—Rehnquist, Scalia and Thomas, along with Justice O'Connor—voting for them.

The majority opinion effectively redefined the term "public use" as "public purpose" and concluded that since creating tax revenue serves a public purpose, the condemnation was legal. In a blistering dissent, Justice O'Connor wrote: "Today the Court abandons a long-held, basic limitation on government power. Under the banner of economic development, all property is now vulnerable to being taken and transferred to another private owner..." Justice Thomas called the ruling "perverse," adding that, "Something has gone seriously awry with this Court's interpretation of the Constitution."

In the immediate aftermath of the decision, cities like Oakland, Santa Cruz and Washington, D.C., moved quickly to condemn land that was covered by the ruling. But in Congress, both parties moved just as quickly to condemn the decision. Legislation was introduced to deny federal funding for any state or local government that used the new authority, and the House denounced the ruling by a vote of 365-33.

In its decision, the Court emphasized that "nothing...precludes any State from placing further restrictions on" its use of condemnation. No sooner was the ink dry on that provision than the states started moving to do precisely that. Alabama was first, passing leg-

islation on Aug. 3rd prohibiting condemnation for economic development. By then, 24 other states and hundreds of local governments had also moved to implement similar restrictions.

Meanwhile, the public was galvanized. Polls found over 90 percent in favor of the homeowners, and even in Connecticut—where the case occurred—89 percent favored legislative limits on eminent domain. In July, a *Wall Street Journal*/NBC poll found that more Americans were concerned about private property rights than any other issue, and activists started proceedings to condemn Justice Souter's home and Justice Breyer's farm for conversion to greater tax-generating uses.

Suddenly, the private property rights movement was on fire with the grassroots rebellion it had tried for years to ignite. A Committee for Justice spokesman said that the ruling "is so bad, it's good," and the spokesman for Defenders of Property Rights said, "The timing of this has been just brilliant for us."

In the meantime, the situation was creating some pretty strange bedfellows. Jumping on the property rights bandwagon were city and suburban dwellers; liberals and libertarians; the rich and the poor; advocates for the elderly and minorities; and church groups of every denomination.

The impact of *Kelo* on ranchers and rural landowners is potentially huge. As Justice O'Connor said: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

Ranchers most at risk are those on the rural-urban frontier [see Goodson's story, *RANGE*, Winter 2004], and those in northeast and upper-Midwestern states with the worst history of condemnation for economic development. But any private property with scenic, historic or environmental resources coveted by tax-hungry local governments is now vulnerable.

There's no getting around that *Kelo* is bad news, big-time. The only silver lining is the broad-based grassroots support it has galvanized for private property rights, and the groundswell of state legislative initiatives designed to neuter the Supreme Court's decision. In that, at least, *Kelo* has awakened millions to the power of the Supreme Court over their lives. And to the importance of justices who haven't lost touch with the people. ■

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BITS & SPURS

Shovel Brigade Gets Satisfaction Apparently deciding the cure is worse than the cold, the U.S. Fish & Wildlife Service (FWS) in September withdrew its designation of 131 miles of the Jarbidge River as critical habitat for the threatened bull trout, thus ending the battle over Nevada's South Canyon Road [see *RANGE*, Winter '99, Winter '00, Fall '00 and Summer '01]. Citing a history of "anti-government demonstrations" and "substantial conflicts" triggered by FWS attempts to close a county camp road crossing the river, federal officials said further legal

action and local scuffles would only worsen cooperation in the area and discourage voluntary conservation.

Hundreds of people designating themselves the "Shovel Brigade" have kept the road open since 2000 despite federal efforts to block it with huge boulders and dirt fill. The former head of the Humboldt-Toiyabe National Forest in the region, Gloria Flora, tearfully resigned at the height of the dispute, saying, "Fed bashing has become a sport here."

While both current federal officials and Elko County authorities hailed the decision as a new era for cooperation, a spokesman for the Wilderness Society called it "abdication" and "appeasement."

Critical habitat designations to protect the bull trout remain in effect elsewhere on thousands of acres of waterways from the Pacific to the Northern Rockies. ■