Woodbury County Soil Conservation District V. Ortner: New Authority for Required Soil Conservation

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WOODBURY COUNTY SOIL CONSERVATION DISTRICT V. ORTNER: NEW AUTHORITY FOR REQUIRED SOIL CONSERVATION

Iowa's Soil Conservation Districts Law section 467A.44 provides that the Commissioners of a soil conservation district may enforce the district's soil loss regulations by requiring landowners to adopt specific soil conservation practices. In Woodbury County Soil Conservation District v. Ortner, the Iowa Supreme Court held that section 467A.44 was a valid exercise of the state's power.

INTRODUCTION

In *Woodbury County Soil Conservation District v. Ortner*,[1] the Iowa Supreme Court held that a compulsory soil conservation law constitutes a valid exercise of the police power.[2] The court also held that a landowner required to adopt soil conservation practices is not entitled to compensation unless he can prove economic damage great enough to outweigh the public's interest in preserving the soil resource. This note examines the facts and reasoning of *Ortner*; surveys *Penn Central Transportation Co. v. City of New York*,[3] the primary authority for the *Ortner* decision, and considers the effect of *Ortner* on agricultural nonpoint source water pollution abatement plans.[4]

FACTS OF WOODBURY COUNTY V. ORTNER

Iowa's Soil Conservation District's Law[5] (Conservation Law) provides a non-traditional approach to the problem of agricultural erosion.[6] Under the Conservation Law, soil conservation district commissioners[7] have the authority to: (1) promulgate soil loss limit regulations;[8] (2) investigate complaints of soil loss in excess of those regulations;[9] (3) require owners of land exceeding soil loss limits to adopt soil conservation practices;[10] and (4) de-

1. — Iowa —, 279 N.W.2d 276 (1979).
2. — Iowa at —, 279 N.W.2d at 279.
3. 438 U.S. 104 (1978).
4. For a definition of agricultural nonpoint source pollution *see* notes 53-55 *infra* and accompanying text.
5. IOWA CODE ANN. §§ 467A.1-467A.53 (West 1971).
6. The traditional approach toward agricultural erosion has been for the government to offer incentives for landowners to adopt voluntary soil conservation practices. *See generally* I.R.C. § 175 (current deduction for expenditures on new soil conservation practices).
7. Each soil conservation district is governed by five nonpartisan commissioners elected by the members of the district.
8. IOWA CODE ANN. § 467A.44 (West 1971).
9. IOWA CODE ANN. § 467A.47 (West Cum. Supp. 1979-80) provides in pertinent part that: [t]he commissioners of any soil conservation district shall inspect or cause to be inspected any land within the district, upon receipt of a written and signed complaint, from an owner or occupant of land being damaged by sediment, that soil erosion is occurring thereon in excess of the limits established by the district's soil control regulations.
10. IOWA CODE ANN. § 467A.44(3)(b) (West Cum. Supp. 1979-1980) provides in pertinent part that the Commissioners:
[m]ay specify two or more approved soil and water conservation practices or erosion con-

cide which soil conservation practices shall be adopted by that landowner.[11]

In 1975, Matt, a Woodbury County farmer, filed a complaint with the Woodbury County Soil Conservation District. The complaint alleged that soil loss from the neighboring farms of Ortner and Shrank was exceeding applicable soil loss limits. The complaint further alleged that the lost soil particles (sediment) were settling on Matt's land and causing crop damage. A subsequent investigation by the Commissioners revealed that soil loss on the Ortner farm was between 7.9 and 77.2 tons per acre per year. Soil loss on the Shrank farm was found to be between 0.3 and 30.8 tons per acre per year.[12] The applicable soil loss limit was five tons per acre per year.[13] The Commissioners ordered Ortner and Shrank to adopt one of two alternatives to bring the soil loss under control.[14] The first alternative was to seed portions of each farm to hay or permanent pasture. This alternative would have taken portions of each farm out of active production. The second alternative was terracing. Terracing would have cost Ortner and Shrank $12,253.50 and $1,471.00 respectively, inclusive of state cost sharing funds. Iowa law requires that state cost sharing funds equal to at least seventy-five percent of the cost required to establish a soil conservation practice be made available to any landowner required to adopt that specific practice.[15] Ortner and Shrank failed to adopt either alternative. The Commissioners then sought

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trol practices, one of which shall be employed by the landowner to bring erosion from land under his control within the applicable soil loss limit of the district when an administrative order is issued to the landowner.

South Dakota does not allow the soil conservation district to select the practices that must be employed to comply with soil loss regulations. Instead, the person in violation of soil loss regulations must submit an erosion and sediment control plan to the soil conservation district. The district, however, may reject any proposed plan. S.D.C.L. § 38-8A-18 (1977). Moreover, South Dakota makes no provision for cost sharing funds. The only state assistance provided to landowners is whatever state equipment, materials, and supplies as may be available. S.D.C.L. § 38-8-64 (1977).

11. IOWA CODE ANN. § 467A.44 (West Cum. Supp. 1979-80).

12. Soil loss was measured by use of the universal soil loss equation. This equation works as follows:

A = RKLSPC where A = average annual soil loss in tons per acre per year; R = rainfall factor; K = soil erodibility factor; L = length of slope; S = percent of slope; P = conservation practice factor and C = cropping and management factor. U.S. ENVIRONMENTAL PROTECTION AGENCY, METHODS AND PRACTICES FOR CONTROLLING WATER POLLUTION FROM AGRICULTURAL NONPOINT SOURCES 82 (1973) (hereinafter cited as METHODS AND PRACTICES).

13. The five ton limit was promulgated by the Commissioners and approved by the Iowa Soil Conservation Committee in 1972. Plaintiff's Exhibit no. 21, Woodbury County Soil Conservation District v. Ortner, — Iowa —, 279 N.W.2d 276 (1979).

14. The Commissioners can only require the adoption of approved soil conservation practices. Approved practices are defined by IOWA CODE ANN. §§ 467A.42(2)(a) and (b) (West 1971) that provides:

> a. "Permanent soil and water conservation practices" means the planting of perenial grasses, legumes, shrubs, or trees, the establishment of grassed waterways, and the construction of terraces, or other permanent soil and water practices approved by the state soil conservation committee.
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> b. "Temporary soil and water conservation practices" means the planting of annual or biennial crops, use of strip-cropping, contour planting, minimum or mulch tillage, or any other cultural practices approved by the state soil conservation committee.

15. IOWA CODE ANN. § 467A.48 (West Cum. Supp. 1979-80) provides in pertinent part that: [n]o owner or occupant of land in this state shall be required to establish any new permanent . . . soil and water conservation practice unless public or other cost-sharing funds have been specifically approved for such land and actually made available to the owner or occupant in an amount

judicial relief. The state trial court held that section 467A.44 deprived Ortner and Shrank of rights granted by the fifth and fourteenth amendments[16] and comparable provisions of the State of Iowa.[17] On appeal, the Iowa Supreme Court reversed and remanded. The main issue[18] on appeal was whether the application of section 467A.44 was a valid exercise of the police power[19] or a taking of private property without just compensation.

PENN CENTRAL: THE LATEST SUPREME COURT GUIDELINES

In determining whether the application of section 467A.44 was a valid exercise of the police power or a taking, the Iowa Supreme Court relied on the latest guidelines established by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*.[20] In *Penn Central*, the Grand Central Terminal (Terminal) owned by Penn Central Transportation Company (Penn Central) was designated a landmark under New York City's Landmarks Preservation Law (Landmarks Law).[21] The Landmarks Law was enacted to protect "the standing of [New York City] as a world-wide tourist center and world capital of business, culture, and government. . . ."[22] The dispute arose when Penn Central entered into a lease with UGP Properties (UGP) whereby UGP was to construct a multi-story office building above the Terminal.[23] Penn Central was to receive rent of approximately three million dollars per year upon completion of the project.[24] After the Landmarks Preservation Commission rejected Penn Central's plans to construct the office building,[25] Penn Central challenged the Landmarks Law as a taking. The United States Supreme Court upheld the Landmarks Law as a valid exercise of the police power.[26]

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equal to at least seventy-five percent of the cost of any permanent soil and water conservation practice . . . .

16. U.S. CONST. amend. V provides in pertinent part: "nor shall private property be taken for public use, without just compensation." This provision is made applicable to the states by U.S. CONST. amend. XIV.

17. IOWA CONST. art I, § 18.

18. The trial court also held section 467A.44 invalid as a violation of substantive due process. The supreme court summarily reversed using the same law as the lower court but interpreting the evidence differently.

The supreme court also rejected the theory that the soil conservation law was designed solely to protect the interests of private landowners and not the public as a whole. The court pointed out that the commissioners could also file complaints of violations of district soil loss regulations under certain circumstances. The court also relied on Miller v. Schoene, 276 U.S. 272 (1928), where a similar statute was upheld. Woodbury County Soil Conservation District v. Ortner, — Iowa at —, 279 N.W.2d at 279.

19. The term "police power is often used to define the panoply of governmental power . . . . *But in the area of eminent domain cases and analysis, 'police power' is used more narrowly, to designate only the power of government to regulate the use of land and property without the payment of compensation.*" (emphasis added). J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 437 (1978).

20. 438 U.S. 104 (1978).

21. *Id.* at 115-16.

22. *Id.* at 109.

23. *Id.* at 116.

24. *Id.*

25. *Id.* at 117-18.

26. *Id.* at 138.

In so holding the Supreme Court was again unable to "develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government. . . ."[27] The Court stated that "the economic impact of the regulation . . . and particulary the extent to which the regulation has interferred with distinct investment-backed expectation . . . are . . . relevant considerations."[28] Furthermore, the Court reiterated its prior holdings that where a state tribunal reasonably concludes that "the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land," regulations so prohibiting those uses can be upheld,[29] even where the regulations destroy recognized real property interests. Moreover, the Court flatly rejected the proposition that diminution of property value alone can establish a taking.[30] The Court also rejected the proposition that a taking can never occur unless the government has transferred physical control over a piece of land.[31] Finally, although the nature of the Landmarks Law was not at issue, the Court reaffirmed its prior holdings that land-use restrictions or controls may be enacted to "enhance the quality of life by preserving the character and desirable aesthetic features of a city."[32]

ORTNER: ATTEMPTING TO FOLLOW THE PENN CENTRAL GUIDELINES

The *Ortner* Court followed the Supreme Court practice of determining taking questions on a case by case basis.[33] The test to be applied is whether the "collective benefits [to the public] outweigh the specific restraints imposed [on the individual]."[34] The *Ortner* Court applied this balancing test pursuant to the *Penn Central* guidelines.

Collective Benefits of Soil Conservation

The *Ortner* Court determined the collective benefits of soil conservation by stressing the legislative intent of the Conservation Law[35] and by reaffirming its holdings in *Benschoter v. Hakes*[36] and *Iowa Natural Resources Council v. Van Zee*.[37] The Conservation Law was intended *inter alia* to prevent soil

27. *Id.* at 124; *see also* Armstrong v. United States, 364 U.S. 40 (1960) and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). Of the many mechanical tests used for defining a taking "none has received consistent judicial adherence." *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 222 (1978); *see generally* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

28. 438 U.S. at 124; *see also* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

29. 438 U.S. at 125 (citing examples from Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Gorieb v. Fox, 274 U.S. 603 (1927); and Welch v. Swasey, 214 U.S. 91 (1909)).

30. 438 U.S. at 131.

31. *Id.* at 123, n.25.

32. *Id.* at 129.

33. — Iowa at —, 279 N.W.2d at 278.

34. Iowa Natural Resources Council v. Van Zee, 261 Iowa 1287, 1294, 158 N.W.2d 111, 116 (1968).

35. IOWA CODE ANN. §§ 467A.2 & 467A.43 (West 1971).

36. 232 Iowa 1354, 8 N.W.2d 481 (1943).

37. 261 Iowa 1287, 158 N.W.2d 111 (1968).

erosion and sediment damage and to preserve natural resources.[38] *Benschoter* judicially recognized agriculture as the State's leading industry[39] and *Van Zee* held that the State had a vital interest in protecting the soil as its greatest natural resource.[40] Hence, the Court recognized that the public interest in soil conservation to be balanced against the specific restraints imposed on individuals by the Conservation Law consisted of a present interest in preventing current sediment damage and a present interest in preserving the soil resource for the future.

Specific Restraints Placed on Individuals by the Soil Conservation Law

The *Penn Central* guidelines[41] caused the *Ortner* Court to determine specific restraints by examining the Conservation Law in terms of economic impact and the extent to which the law interfered with investment backed expectations.[42] Factors important in the examination are the effects the Commissioner's proposed soil conservation practices[43] would have on farm income, land values, future farming operations, and the need for new equipment.[44] The possibility of other alternatives will also be considered.[45] In *Ortner*, the state was able to challenge all of the evidence presented by Ortner and Shrank regarding these factors.[46] Ortner and Shrank could prove only compliance costs.[47] The cost of compliance, however, standing alone, is usually not enough to invalidate a regulatory statute.[48] Hence, the court held that Ortner and Shrank failed to establish that the application of section 467A.44 constituted a taking of private property without just compensation.[49]

SOIL CONSERVATION TO CONTROL AGRICULTURAL EROSION AS A NONPOINT SOURCE WATER POLLUTANT

Water pollution control laws, like soil conservation laws, seek to control sediment caused by agricultural erosion. The Federal Water Pollution Control Act of 1972[50] (FWPCA), as amended by the Clean Water Act of 1977,[51]

38. IOWA CODE ANN. § 467A.2 (West 1971).
39. 232 Iowa at 1362-63, 8 N.W.2d at 486.
40. — Iowa at —, 279 N.W.2d at 278 (citing 261 Iowa at 1297, 158 N.W.2d at 118).
41. *See* notes 27-32 *supra* and accompanying text.
42. — Iowa at —, 279 N.W.2d at 278 (citing 438 U.S. at 124).
43. The Commissioners required seeding or terracing. — Iowa at —, 279 N.W.2d at 277.
44. *Id.* at 279.
45. *Id.*
46. *Id.* The district court record shows that the state challenged the argument that better alternatives than seeding or terracing existed by using expert testimony provided by a United States Soil Conservation service agronomist and a United States Soil Conservation technician.
47. — Iowa at —, 279 N.W.2d at 279.
48. Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 491-92 (1916).
49. — Iowa at —, 279 N.W.2d at 279.
50. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251-1376 (1976).
51. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. §§ 1251-1376 (Supp. 1977).

requires nation-wide water pollution control and abatement.[52] FWPCA recognizes two general types of water pollution: point sources[53] and nonpoint sources.[54] Sediment, caused by agricultural erosion, is the principal nonpoint source pollutant.[55]

FWPCA section 208[56] establishes a procedure under which states are required to establish nonpoint source abatement and control programs.[57] Under section 208, the governor of each state must identify the areas in his state that have "substantial water quality control problems."[58] "Substantial water quality control problems" are determined pursuant to Environmental Protection Agency (EPA) guidelines.[59] Once a problem area is identified, the governor is required to name an agency or organization to serve as the planning agency for that area.[60] The state is the planning agency for all areas not identified as problem areas.[61] Each planning agency is then required to develop a "continuing area-wide waste management planning process."[62] Each area-wide plan must provide for the control of nonpoint source pollution related to agriculture.[63]

The type of nonpoint source control to be implemented is left to the discretion of the EPA, the states, and the planning agencies.[64] The EPA has urged the use of "best management practices" which the agency defines as "a practice or combination of practices, that is determined by a State . . . to be the most effective practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals."[65] States wishing to develop "best management practices" regarding the control of sediment caused by agricultural erosion are assisted by two important guidelines. First, the EPA has recognized that soil conservation practices similar to those provided by the Conservation

52. *Id.*

53. 33 U.S.C. § 1362(14) (1976) defines point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." For an analysis of FWPCA point source control *see generally* Voytko, Hunciker, and Lazarus, *The Clean Water Act and Related Developments in the Federal Water Pollution Control Program During 1977*, 2 HARV. ENVT'L. L. REV. 103, 103-26 (1977); Note, *United States v. Homestake Mining Company: "That Ain't Gold in Gold Run Creek,"* 25 S.D.L. REV. 80 (1980).

54. FWPCA does not define nonpoint source. The term, however, can be defined as the converse of point source. Moreover, one type of nonpoint source, agricultural nonpoint source, can be defined as "organic and inorganic materials entering surface and ground water from nonspecific or unidentified sources in sufficient quantity to constitute a pollution problem. They include sediment, plant nutrients, pesticides, and animal wastes from cropland, rangeland, pastures, and farm woodlots." METHODS AND PRACTICES, *supra* note 12, at 1.

55. *Id.*

56. 33 U.S.C. § 1288 (1976).

57. Section 208 also provides for the control of point sources.

58. 33 U.S.C. § 1288(a)(2) (1976).

59. *Id.* § 1288(a)(1).

60. *Id.* § 1288(a)(2).

61. *Id.* § 1288(a)(6).

62. *Id.* § 1288(b)(1).

63. *Id.* § 1288(b)(2)(F).

64. Voytko, Hunciker, and Lazarus, *supra* note 52, at 183.

65. *Id.* (citing 40 C.F.R. §§ 1311.11(j), 130.2(q) (1976)).

Law in *Ortner*[66] are the best means of controlling water pollution from agricultural nonpoint sources.[67] Second, FWPCA specifically recognizes land use controls as a means of controlling nonpoint source pollution.[68]

FWPCA provides for the payment of agricultural cost sharing funds to rural landowners "for the purpose of installing . . . measures incorporating best management practices to control nonpoint source pollution . . . ."[69] Agricultural cost sharing funds are limited to fifty percent of the cost of installation unless: "(1) the main benefits to be derived from the measures are related to improving offsite water quality, and (2) the matching share requirement would place a burden on the landowner which would probably prevent him from participating in the program."[70] The agricultural cost sharing program has an authorized appropriation of $400,000,000 for fiscal year 1980.[71]

FWPCA, together with the EPA, provides states with federal congressional and administrative authority to utilize soil conservation and land use planning to achieve water quality. Hence, laws similar to or broader than the law in *Ortner* that required soil conservation practices to preserve soil resources, may be enacted to achieve and preserve water quality. Whether these new laws will constitute a violation of the fifth amendment injunction against takings of private property without just compensation will depend in part on the factors discussed in *Ortner* and *Penn Central*.[72]

CONCLUSION

Sediment caused by agricultural erosion is a threat to water quality and soil resource preservation. Soil conservation is the most effective means of controlling agricultural erosion. Accordingly, *Ortner* and FWPCA recognize that the public interest in water quality and soil resource preservation warrants the use of land use planning or required soil conservation to control and prevent agricultural erosion. Still, *Ortner* and *Penn Central* correctly recognize that laws enacted in the public interest can interfere with the interests of individuals to the extent that "fairness and justice" require the payment of just compensation. Moreover, the cost sharing fund provision of

66. *Cf.* METHODS AND PRACTICES, *supra* note 12, and IOWA CODE ANN. §§ 467A.42(a) and (b), *supra* note 14.

67. METHODS AND PRACTICES, *supra* note 12.

68. 33 U.S.C. § 1288(b)(2)(F) and (H) (1976).

69. 33 U.S.C. § 1288(j)(l) (Supp. I 1977).

70. *Id.* § 1288(j)(2) (Supp. I 1977).

71. *Id.* § 1288(j)(9) (Supp. I 1977).

72. Anyone wishing to challenge a required soil conservation law should pay particular attention to the proof problems encountered by Ortner and Shrank and plan their case accordingly. *See* notes 44-48 *supra* and accompanying text. Moreover, any assessment of the probable success of a taking challenge should include consideration of the willingness of government to assist landowners with the cost of establishing soil conservation practices. *See* notes 6, 10, and 70 *supra*. Finally, it should always be remembered that in some instances, the adoption of soil conservation practices can become cost beneficial in a short time, especially where public funds are available to offset the initial cost.

the Conservation Law in *Ortner*[73] impliedly recognizes that the public has a duty to provide assistance to individual landowners required to make expenditures to benefit future generations. Hence, the courts and legislatures should continue to promote the effort to preserve our soil and water resources for future generations while continuing to recognize that the public has a duty to assist individual landowners with the expenses required to achieve the goal.

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73. IOWA CODE ANN. § 467A.48 (West Cum. Supp. 1979-80).