'Takings' Snapshots Volume 45, September 27, 2001

1. Laguna Gatuna, Inc. v. United States, 2001 WL 1083518 (Ct.Fed.Cl., September 13, 2001) (in the first decision to address the "takings and errors" issue following the Supreme Court's decision in SWANCC (invalidating federal jurisdiction over isolated wetlands under the Clean Water Act), the court of claims held that an EPA order declaring a playa lake subject to the CWA, which the EPA withdrew post-SWANCC, resulted in a taking; the court rejected the government's defense that there was no taking because the agency lacked authority to regulate the property, stating that the government had conceded the validity of the order, EPA's acknowledgment of its lack of authority came "too late" for this plaintiff, and the EPA regulations were distinguishable from the Army Corps regulations at issue in SWANCC; finally the court concluded that the EPA order resulted in a temporary taking of a right of way over public lands the claimant had received from BLM).

3. Anderson v. Charter Township, 2001 WL 1104685 (6th Cir., September 21, 2001) (in a complicated procedural case, the Sixth Circuit Court of Appeals affirmed the district court's dismissal of a taking challenge to denial of a rezoning based on the Rooker-Feldman doctrine as well as the plaintiff's failure to make an England reservation or otherwise take action in the prior state court proceedings to protect his right return to federal court; the action was originally filed in state court, the municipal defendant removed the case to federal court, the district court abstained with respect to the state law taking claim and stayed the federal claim, and the plaintiff proceeded to litigate (and lose) in the state courts; the court of appeals reasoned that because the plaintiff had fully litigated the takings issue in state court, adjudication of the federal taking claim in federal court was barred by Rooker- Feldman; in addition, because the plaintiff had submitted both his federal and state takings claims in state court, the plaintiff waived any right to return to federal court).

4. Cienega Gardens v. United States, 2001 WL 1084987 (Fed.Cir., September 18, 2001) (the Federal Circuit reversed trial court's rejection, on ripeness grounds, of taking claim based on federal legislation prohibiting prepayment of loans on low-income housing and barring owners from raising rents on apartments; court ruled that claim was ripe because plaintiffs were not required to seek administrative approval from Department of Housing and Urban Development, given that HUD lacked discretion under the governing statute to grant approval to prepay the loans; on the merits of the takings issue, the court rejected the claim that the law effected a per se physical occupation taking, given that the law merely extended existing tenants' possessory interests, citing Yee v. Escondido).

5. Banks v. United States, 49 Fed.Cl. 806 (Ct.Fed.Cls., July 31, 2001) (the federal court of claims dismissed physical-occupation taking claims brought by Lake Michigan shorefront owners based on erosion caused by federal harbor project; court ruled that claims accrued in 1989 and that claimants who owned their property at the time failed to assert timely claims; court ruled that owners who acquired their property after that time are not "real parties in interest" entitled to pursue their claims; in footnote (#29), the

court, citing Palazzolo, identified a distinction between standing for regulatory takings purposes and standing for physical occupation claims)

6. United States v. Asarco, 1999 WL 33313132 (D. Idaho, September 30, 1999) (federal district rejected takings and due process challenges to the CERCLA liability scheme; court rejected takings claim on the grounds that the challenge to the act's retroactivity raised a due process issue not a taking issue, the act did not affect any specific property interest, and the 3-factor takings analysis precluded the claim; the court also rejected the facial due process challenge but left open the question whether, upon receipt of additional evidence, the court would find an as applied due process violation).

7. Braunagel v. City of Devil's Lake, 629 N.W.2d 567 (N.D., July 10, 2001) (North Dakota Supreme Court rejected taking claim based on city's refusal to annex and rezone land in agricultural use for multi-family residential development; court said that "[g]overnmental regulation constitutes a taking for public use only when it deprives the owner of all or substantially all reasonable uses of the property").

8. New Holland Village Condominium v. Destaso Enterprises Ltd., 139 F.Supp.2d 499 (S.D.N.Y., April 18, 2001) (federal district court rejected taking claim against various state and municipal officials whose alleged negligence led to bursting of dam and damage to plaintiffs' downstream properties; court ruled that the claim against the state was barred by the Eleventh Amendment; with respect to other defendants court ruled that allegations of negligence do not support a taking claim).

9. Department of Transportation v. Rowe, 549 S.E.2d 203 (N.C., July 20, 20010 (North Carolina Supreme upheld a jury verdict in an eminent domain proceeding that a land owner should receive nothing for a taking of 11 acres for a road, based on specific and general benefits accruing to the owner's remaining 7 acres; court ruled that the owner had waived any direct taking claim in the case, but nonetheless addressed the takings issue in considering the owners' claim that he was denied equal protection; the court ruled that U.S. and N.C. Supreme Court precedents clearly authorized consideration of benefits flowing to an owner as a result of a project in determining whether the owner is entitled to compensation).

10. Zealy v. City of Waukesha, 2001 WL 892797 (E.D. Wisc., August 6, 2001) (in a sequel to a long running takings case in the Wisconsin courts, federal district court rejected owner's substantive due process claim based on city's rezoning of property on the grounds that (1) the claim was barred under the Rooker-Feldman doctrine; and (2) the claim was barred by claim preclusion, given the prior state court takings case).

11. United States v. Davis, 2001 WL 915247 (1st Cir., August 17, 2001) (the First Circuit Court of Appeals rejected takings challenge to CERCLA insofar as it grants settling parties protection against contribution actions by non-settling parties; court said that the taking argument was only "perfunctorily developed" and that Supreme Court's decision in Eastern Enterprises did not support the taking argument").

12. United States v. Manzo, 2001 WL 980554 (D.N.J., August 15, 2001) (federal district court granted motion by United States for summary judgment as to defendants' constitutional defenses, joining "other courts in concluding that the Eastern Enterprises decision does not alter the longstanding view that CERCLA does not violate the takings clause").

13. Cowell v. Palmer Township, 2001 WL 968059 (3rd Cir., August 27, 2001) (Third Circuit Court of Appeals affirmed district court rejection of taking claim based on municipal officials' imposition of liens on plaintiffs' property; court said that taking claim was not ripe because (1) plaintiffs failed to pursue available inverse condemnation remedies in state court, and, in any event, (2) "a regulatory taking occurs only when the government's action deprives a landowner of all economically viable use of his or her property," and the imposition of the liens in this case did not rise to that level).

14. Daniels Cablevision, Inc. v. San Elijo Ranch, Inc., 2001 WL 920250 (S.D.Cal., July 12, 2001) (federal district court refused to grant a cable television company's request for a preliminary injunction barring the defendant developer from refusing to allow the plaintiff to install cable on defendant's property; court interpreted federal Cable Communications Policy Act as not authorizing the relief requested, because such an interpretation would lead to a physical occupation taking and the act included no provision for compensation; query whether this ruling is consistent with the Supreme Court's ruling in Riverside Bayview Homes that courts generally should not interpret statutory authority narrowly in order to avoid potential takings issues).