

## **Takings Snapshots, Volume 48, April 30, 2002**

1. Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 2002 WL 654431 (U.S. April 23, 2002) (the Supreme Court held, in a 6 to 3 decision, that a temporary moratorium on development to facilitate a comprehensive planning effort does not constitute a categorical taking under the Fifth Amendment Takings Clause.)
2. Verizon Communications, Inc. v. FCC, (U.S.) (with Tahoe decided, the Supreme Court has one remaining takings case pending, involving the constitutionality of FCC cost recovery formulas for communications equipment under the Takings Clause; oral argument was held October 10, 2001; there is widespread speculation that the decision is being written by Justice Souter).
3. Daniel v. County of Santa Barbara, 2002 WL 663806 (9<sup>th</sup> Cir., April 18, 2002) (the Court of Appeals for the Ninth Circuit (Fletcher, J.) affirmed a district court ruling rejecting a takings challenge to the county's decision to accept a nearly 25-year-old offer of a beach access easement; the court ruled that the alleged taking occurred when the offer of the easement was made, rather than it was accepted, and therefore the claim was time-barred; the court said that under Williamson County the claimants were required to seek compensation through state court procedures before resorting to state court, but they failed to do so and were now barred from pursuing such remedies by the applicable statute of limitations; as a second, independent ground for affirmance, the court ruled that the owners could not seek declaratory and injunctive relief because the remedy for a taking, in general and in this case in particular, is damages, not injunctive and declaratory relief).

NB: This decision is highly significant because the Ninth Circuit simultaneously withdrew a prior opinion in the case issued on March 12. The prior opinion also ruled in favor of the county, but erroneously stated that the Supreme Court's Palazzolo opinion had changed federal ripeness doctrine in takings case. The County, though victorious, filed an application for rehearing and

rehearing en banc. This bold move succeeded because the new opinion eliminates the suggestion that Palazzolo made new law on the ripeness issue.

4. *Chevron v. Cayetano*, 2002 WL 649402 (U.S.D.C. D. Hawaii, March 29, 2002) (in an extraordinary ruling, the federal district court in Hawaii, following a remand from the Ninth Circuit, see 224 F.3d 1030, ruled that a state law establishing a gas station dealer rent control law effected a facial taking on the theory that the statute failed to substantially advance a legitimate government interest; the court based its ruling on an evaluation of competing testimony from expert economists, using a preponderance of the evidence standard granting no deference whatsoever to the legislature's judgment).

5. *Asarco, Inc v. State of Washington*, 43 P.2d 471 (Wash. March 21, 2002) (the Washington Supreme Court vacated a trial court ruling that the retroactive application of the state's Model Toxics Control Act constituted a due process violation and an unlawful taking; the court ruled that the claims were not justiciable absent a final clean up order; in dissent, Justice Bridge concluded that the claims were ripe and that Asarco had established a due process violation (but not a taking, because the suit challenged a monetary assessment rather than regulation of a specific property interest, and because the suit challenged the legitimacy of the Act's application); also in dissent, Justice Sanders concluded that the claims were ripe and that Asarco has established both a due process violation and a taking).

6. *GBT Partnership v. City of Fargo*, 2001 WL 1820144 (U.S.D.C., November 27, 2001) (Federal District Court rejected takings challenge to moratorium on development in a floodway on the ground that the plaintiff was required to first pursue available state compensation remedies in state court; following the Fifth Circuit's decision in *John Corp.*, the court ruled that the Williamson County exhaustion requirement could not be avoided by asking the federal court to exercise supplemental jurisdiction over the state law claim; Williamson County does not merely require a litigant to pursue state law claims, the court said, it requires litigants to pursue state court procedures)

7. *Fax Christi Memorial Gardens, Inc. v. United States*, 2002 WL 562679 (Ct. Fed Cls., April 10, 2002) (in a wetlands takings case, the court ruled that the claim was not ripe because the Army Corps of Engineers had not acted on the permit application but instead had withdrawn the application for lack of information; the court concluded that the Army Corps had not effectively denied the application in a letter requesting additional information because the letter indicated the Army Corps' good faith willingness to consider at least a scaled back proposal; in accordance with longstanding Federal Circuit precedent, the court also dismissed the plaintiff's claim that the Army Corps' handling of their application violated their due process rights, on the ground that the Due Process Clause is not a money-mandating provision within the jurisdiction of the Court of Federal Claims).

8. *Hornback v. United States*, 2002 WL 602736 (Ct.Fed.Cls., April 18, 2002) (in a takings challenge involving an alleged taking of a patent as a result of the government's imposition of a national security classification on the patent classification, the court dismissed the claim as time-barred; the claimant argued that the taking claim did not accrue as of the issuance of the original 1987 secrecy order because the 1987 order was legally invalid, but the court rejected this argument on the ground that a legally invalid action (as opposed to an ultra vires action) can give rise to a valid taking claim; in addition the court granted summary judgment to the government on the ground that the claim was barred by res judicata and collateral estoppel).

9. *Turntable Fishery & Moorage Corp. v. United States*, 2002 WL 562677 (Ct. Fed. Cls., April 10, 2002) (court dismissed complaint alleging a taking of plaintiffs' boathouses and other facilities built on federal public land; plaintiffs alleged a taking on the theory that the government had compelled them to transfer ownership of the facilities to a third party and by causing the termination of certain private rights in the facilities; the court ruled that plaintiffs failed to state a viable taking claim because they had no property rights in the public lands and, while they possessed a property right to remove the facilities from the public lands, the

government never directly interfered with that right).

10. *Paalan v. United States*, 51 Fed.Cl. 738 (March 4, 2000) (ruling that plaintiff stated a taking claim on the theory that the government had seized an enlisted man's personal property following the filing of criminal proceedings and then held on to the property after the evidentiary need for the property expired; however, the court recognized that a taking claim could not be asserted based on the retention of property that was an instrumentality of criminal activity; the court also stated that a taking claim could not be asserted if the government seized property and then lost it, for then there would be no taking for public use within the meaning of the Takings Clause).

11. *Hair v. United States*, 2002 WL 562676 (Ct. Fed. Cls., April 15, 2002) (Court held that Tucker Act's six-year statute of limitations barred class action suit brought on behalf of 600,000 Americans injured by Japan's actions during World War II; the court reasoned that the Treaty of Paris, which allegedly effected a taking by extinguishing U.S. nationals' rights to sue Japan directly in connection with the war, was ratified in 1951, decades prior to the filing of the suit).

12. *Tuchman v. State of Connecticut*, 2002 WL 229697 (D.Conn., February 8, 2002) (federal district court dismissed takings compensation claim against State of Connecticut based on Eleventh Amendment).

13. *The Oneida Indian Nation v. The State of New York*, 2002 WL 485036 (N.D.N.Y. 2002) (in a long running Indian land dispute brought by the Oneida Indian Nation and the United States based on the State's alleged illegal purchase of ancestral Indian lands, a Federal District Court rejected a counterclaim by the State against the United States asserting that if the United States obtained possession of the disputed lands through the litigation the United States should be ordered to pay the State compensation under the Takings Clause; the court rejected the counterclaim essentially on the ground that any rights that the State possessed prior to ratification of the Constitution were ceded to the national government upon the founding of the Republic).