**Takings Snapshot, Volume 50, June 25, 2002**

1. Washington Legal Foundation v. Legal Foundation of Washington, 70 USLW 3580 (U.S. June 10, 2002) (U.S. Supreme Court issued a writ of certiorari agreeing to review the Ninth Circuit's decision, 271 F.3d 835, rejecting a takings challenge to the Washington IOLTA program; Court agreed to consider two questions, whether the use of interest earned on lawyers' trust accounts to fund legal services for the poor represents a taking and, if so, whether injunctive relief is available under the Takings Clause to block the IOLTA program).

2. Machipongo Land & Coal Co., Inc. v. Pennsylvania, 2002 WL 10701113 (Pa., May 30, 2002) (Pennsylvania Supreme Court issued an important decision unanimously reversing a finding of a taking by the Pennsylvania Commonwealth Court based on a state regulation designating 555 acres as unsuitable for surface coal mining in order to protect a trout fishery and drinking water supplies; the Commonwealth Court defined the denominator for the purpose of takings analysis as the plaintiffs' mineral interests, but the Pennsylvania Supreme Court ruled that this parcel definition was inconsistent with the parcel as a whole rule, as recently reaffirmed in the Tahoe decision; the Pennsylvania Supreme Court also reversed the Commonwealth Court's refusal to consider evidence about whether the pollution that would result from the mining would constitute a public nuisance; in one of the most comprehensive discussions of the nuisance exception by any court in the nation, the Pennsylvania Supreme Court concluded that "if the Commonwealth is able to show that the Property Owners' proposed use of the stream would unreasonably interfere with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation") (GELPI filed an amicus brief in the case on behalf of 10,000 Friends of Pennsylvania, Citizens for Pennsylvania's Future, and Pennsylvania Trout, which is available on the GELPI website).

3. Franconia Associates v. United States, 2002 WL 1270248 (U.S. June 10, 2002) (U.S. Supreme Court held that Federal Circuit erred in holding that contract claim

accrued, for statute of limitations purposes, when Congress enacted legislation repudiating commitment to allow developer of low-income housing to prepay mortgage and escape limitations on maximum rent it could charge tenants; Court ruled that claim accrued when borrower tendered actual prepayment and the government refused to accept prepayment; Court also reversed the dismissal of a parallel taking claim which the Federal Circuit had dismissed based on the same reasoning it had used to dismiss the contract claim).

4. Washington Legal Foundation v. Texas Equal Access to Justice Foundation, 2002 WL 1160069 (5th Cir., May 31,2002) (as a result of a 7-to-7 split vote on an application for rehearing, the Fifth Circuit denied the application to rehear a 2-to-1 panel decision issued on October 15, 2001, 270 F. 3d 180, enjoining as an invalid taking the Texas IOLTA program; Chief Judge King wrote a dissent joined by the other 6 dissenting judges: Judge Weiner, the dissenter from the original panel decision, wrote a more extensive dissent arguing that the panel had improperly applied a per se analysis and that, in any event, the taking claim should have been rejected because plaintiffs failed to show any economic injury).

5. Vogt v. Board of Commissioners of the Orleans Levee District, 2002 WL 1306163 (5th Cir., June 14, 2002) (in another adventurous takings decision authored by Judge Edith H. Jones, cf. United States Fidelity & Guaranty Corp. v. McKeithen, 226 F.3d 412 (striking down Louisiana workers compensation legislation under the Takings Clause), the Fifth Circuit ruled that plaintiffs who had reduced claim for past mineral royalties to a judgment in Louisiana Courts, but who were barred from recovering on the judgment by governmental immunity doctrines, were entitled to pursue a suit in federal court to enforce the state court judgment under the Takings Clause, reasoning that the levee district was not an instrumentality of the state of Louisiana entitled to immunity under the 11th Amendment and state immunity doctrines cannot bar an otherwise legitimate takings claim).

6. Conti v. United States, 2002 WL 1068300 (Fed.

Cir., May 29, 2002) (Federal Circuit affirmed Court of Federal Claims' grant of motion to dismiss taking claim based on 1999 ban on use of drift gillnet gear in the Atlantic swordfish fishery; court ruled the plaintiff lacked a compensable property interest in its federal fishing permit because, like grazing permits on public lands, a federal fishing permit is by its terms a revocable license; court also rejected taking claim based on alleged destruction of plaintiff's ability to use boat and gear, on the ground that the boat and gear could be used or sold for use in another fishery and because, in any event, the plaintiff's ability to use his boat and gear to exploit a particular fishery was entirely defined by and dependent upon federal regulation).

7. Casa de Cambio Comdiv S.A. v. United States, 2002 WL 1068297 (Fed. Cir., May 29, 2002) (Federal Circuit affirmed claims court's dismissal of taking claim based on U.S. Department of Treasury's refusal to make payment on a stolen treasury check; court rejected claim by firm engaged in international currency exchange, whose account had been debited by an intermediary U.S. bank following the Treasury Department's refusal to pay, on the ground that the intermediary bank did not act as the agent or alter ego of the U.S. government).

8. Preseault v. United States, 2002 WL 1023108 (Ct. Fed. Cl., May 22, 2002) (in the aftermath of the final judgment in this long-running rails-to-trails case, the Court of Federal Claims issued a detailed order awarding the plaintiffs $895,000 in fees and expenses; the court ruled, among other things, that plaintiffs were not entitled to recovery of fees for the initial round of litigation culminating in the Supreme Court Preseault decision in which they sought invalidation of the rails-to-trails program, and that plaintiffs were entitled to fees even if they only agreed to pay their attorneys fees from monies awarded by the court).

9. Barefoot v. City of Wilmington, 2002 WL 1274011 (4th Cir., June 10, 2002) (unpublished) (Fourth Circuit affirmed rejection of takings [and other] claims based on City of Wilmington's annexation of additional territory; court ruled that claims brought by plaintiffs who

previously challenged annexation in state court proceedings were barred by Rooker-Feldman doctrine and, in any event, mere fact of annexation clearly did not amount to a taking under per se or Penn Central analysis).

10. Powell v. City of Snellville, 2002 WL 1048974 (Ga., May 28, 2002) (Georgia Supreme Court rejected a taking claim based on city's zoning regulation which, for a limited period, barred plaintiff's intended use of property as a parking lot; court reasoned that restriction "did not amount to a refusal to permit any development on the land, and the property owner still had possession and use of the land where she could have built in accordance with the existing zoning or applied for a different type of zoning").

11. Legg v. County Commissioners, 2002 WL 1008444 (D.Md., May 15, 2002) (in a takings suit against county based on alleged contamination of property owner's land from adjacent county landfill, federal district court held that claim was barred by applicable 3-year statute of limitations).

12. Fala Corp. v. United States, No, 98-337L (Ct.Fed. Cls., May 29, 2002) (unpublished opinion) (in a taking case based on government's alleged construction of a seawall and other structures on plaintiffs' property, the Court of Federal Claims rejected the claim because a Virginia court had previously declared the plaintiffs' deed to the property invalid and that ruling was binding on the Court of Federal Claims under the Full Faith and Credit statute and based on collateral estoppel).

13. Currier Builders Inc. v. Town of York, 2002 WL 1146773, (D.Me., May 30, 2002) (magistrate's recommended decision) (in a takings challenge to a Residential Growth Ordinance adopted by York, Maine, to be in effect for three years unless extended, limiting the number of residential building permits which the town could issue each month to seven, federal magistrate recommended grant of summary judgment to the town on most of the claims [as to the Home Builders, based on standing because it presented no evidence that any of its members had sought to build in York or that any of its members had suffered any economic injury;

plaintiff Woods' facial taking claim, based on Tahoe, given that the ordinance will expire in three years, regardless of whether the ordinance would render this particular investment unprofitable; plaintiff Currier, who did not apply for a permit but claimed the destruction of its "entire business" in the town, on the ground that "[p]otential business in a particular municipality, when for all that appears similar business can be maintained elsewhere without significant hardship, simply does not constitute a property interest protected by the federal or Maine constitutions"; plaintiff Nedick under both Lucas and Penn Central because he had already sold one lot in his 8-unit subdivision, received permits to develop one or two additional lots, and presented no evidence that he had lost any sales], but denied summary judgment to the town on plaintiff Wood's claim under Penn Central based on the ordinance's alleged interference with his plans to build a multi-unit development for the elderly).