Takings Snapshots, Volume 51, July 24, 2002

1. Boise Cascade Corp. v. United States, 2002 WL 1586329 (Fed. Cir., July 19, 2002) (in an important decision, the Federal Circuit affirmed a Court of Federal Claims order dismissing as a matter of law a complaint alleging that the U.S. Fish and Wildlife Service effected a taking of Boise Cascade's property by (1) obtaining a court injunction barring the company from logging its property until it obtained an incidental take permit under the ESA and (2) by conducting surveys for spotted owls on the property; this case is a companion to the similarly unsuccessful state court takings action involving the same property, *see Boise Cascade v. Oregon State Board of Forestry,* 991 P. 2d 563 (Or. App. 1999), *review denied*,18 P.3d 1099 (Or. 2000), *cert. denied,* 532 U.S. 923 (2001); the court ruled, based on *Riverside Bayview Homes* and *Tabb Lakes,* that a requirement that the company apply for a permit cannot provide the basis for a regulatory taking claim; the court also ruled, following the state court *Boise Cascade* decision, that a restriction on logging to avoid injury to spotted owls does not constitute a per se physical-occupation taking under *Loretto*; finally, the court rejected, based on a narrow reading of the Federal Circuit's *Hendler* decision, the argument that Fish and Wildlife Service employees effected a physical taking by conducting surveys on the property for spotted owls over a five-month period).

2. K & K Construction, Inc. v. Michigan Department of Environmental Quality, Opinion and Order (Mich. Ct. Cls., May 24, 2002) (on March 24, 1998, the Michigan Supreme Court reversed a ruling by the Michigan Court of Claims that Michigan wetlands regulations had effected a taking of one portion of a larger investment property, *see* 575 N.W.2d 531 (Mich, 1998); the Supreme Court ruled that the Claims Court had ignored the parcel as a whole rule, that at least parcels 1, 2 and 4 of the contiguous property had to be considered part of the relevant parcel for the purpose of takings analysis, and that the Court of Claims should evaluate whether parcel 3 should be included in the relevant parcel; the Michigan Court of Claims has now issued its remand decision concluding that parcel 3 should be included in the relevant parcel but that parcel 4 should be excluded (because the plaintiffs acquired parcel 4 after the date of the alleged taking); the court also found a taking, despite the fact that plaintiffs were permitted to develop parcels 2 and 3 for apartment buildings, on the ground that the impact of the restriction on parcel 1 was so severe that it "overshadowed" the value of parcels 2 and 3).

3. Brubaker Amusement Co., Inc, v. United States, 2002 WL 1495485 (Fed Cir July 15, 2002) (Federal Circuit affirmed several Court of Federal Claims decisions rejecting takings challenges to FDA regulations concerning cigarette sales through vending machines; the U.S. Supreme Court in *FDA v. Brown & Williamson Tobacco Corp*., had struck down these rules as being in excess of the agency's statutory authority; the Federal Circuit rejected the taking claim on the ground that the regulation had never actually been applied to the plaintiffs and could not therefore be deemed a taking; the court did not reach the issue of whether the taking claim was also barred by the fact that the rules had been declared illegal) (GELPI filed an amicus brief in the case on behalf of the American Lung Association and other groups).

4. Isla Verde International Holdings, Inc., v. City of Camas, 2002 WL 1486446 (Wash., July 11, 2002) (Washington Supreme Court affirmed court of appeals decision (1) striking down city's requirement that developer, as a condition of subdivision approval, set aside 30% of the property

as open space and (2) upholding a requirement that the developer secure secondary access to the property for emergency vehicles; while the court of appeals ruled that the open space requirement was a taking, the Supreme Court did not reach the issue, ruling instead that the condition was invalid under a state statute providing that a "tax, fee or charge" can be imposed only upon a particularized showing that it is justified by the impact of the proposed development; the Court also ruled that the requirement of the emergency access road did not violate state regulations, the Due Process Clause or the Takings Clause, at least absent a showing that it was impossible for the owner to obtain access across the land of one or more neighboring owners; Justice Sanders dissented in part on the ground that any land use requirement that vests neighboring property owners with an effective veto power over development violates the Due Process Clause).

5. Benchmark Land Co., v. City of Battle Ground, 2002 WL 1486435, (Wash., July 11, 2002) (Washington Supreme Court affirmed court of appeals ruling that city illegally required developer, as a condition of subdivision approval, to improve roadway adjacent to subdivision; while the court of appeals struck down the condition based on *Nollan/Dolan*, the Supreme Court declined to reach the constitutional issue and instead struck down the condition based on a state statute requiring that land use decisions be supported by substantial evidence; the Court concluded that there was no evidence that the proposed road improvement would address any traffic problems generated by the development; Justice Sanders concurred on the ground that the condition also failed to comply with a state law concerning imposition of "taxes, fees or charges," which he interpreted as imposing requirements essentially identical to the *Nollan/Dolan* standards).

6. Morrison, v. O'Hair, 2002 WL 1354712, (S. D. Ind., April 17, 2002) (on a motion to dismiss property owners' complicated conspiracy claims, the Federal District Court ruled that, to the extent plaintiffs were asserting a taking claim, the claim had to be dismissed because plaintiffs failed to allege that they had availed themselves of state compensation procedures and had been denied relief under such procedures).