Takings Snapshots, Volume 52, September 4, 2002

1. Stearns Co., Ltd., v. United States, 2002 WL 2001280 (Fed.Ct.Cls., August 5, 2002) (in another extraordinary ruling by Judge Loren Smith of the Court of Federal Claims, the court found a taking and awarded compensation of $5 million (plus interest from 1980) based on the Department of Interior's ruling that the claimant lacked "valid existing rights" under the Surface Mining and Control Act; the court determined that the coal mining company's claim was ripe even though the company never completed the process for obtaining a government decision on whether it could proceed with mining; the court also determined that the claim was not barred by the applicable statute of limitations even though the claim was filed nine years after the date of the taking as determined by the court; on the merits of the taking issue, the court relied on a per se physical-occupation takings theory even though the case clearly involves a restriction on the use of private property, not a physical occupation).

2. People v. Murrison, 2002 WL 1902660 (Cal.Ct.App., August 20, 2002) (California Court of Appeals affirmed trial court order imposing an injunction and penalties on a land owner for placing a rock and gravel dam across a stream without complying with Section 1603 of the Fish and Game Code, which prohibits altering the flow or bed of any stream without first notifying the Fish and Game Department; the court rejected the argument that the notice requirement violated a state constitutional provision protecting appropriated water rights, relying partly on the fact that the State owns the fisheries in California streams in trust for the public and therefore has inherent sovereign power to protect wildlife; because the plaintiff had not raised the issue in the trial court, because the issue was not ripe, and because the plaintiff never showed that it had established water rights in the stream, the Court of Appeals also rejected the plaintiff's regulatory takings claims).

3. Pascoag Reservoir & Dam, LLC v. State of Rhode Island, 2002 WL 1905220 (D.R.I. August 20, 2002) (in a fascinating case, apparently raising an issue of first impression in the federal courts, the Federal District

Court of Rhode Island ruled that the State's acquisition of a portion of a reservoir by adverse possession and the acquisition of a right to use the reservoir by prescription constituted a per se taking under the federal Takings Clause; as the court acknowledged, this decision conflicts with numerous state court decisions that the application of state rules of adverse possession do not support takings claims; ultimately, the court dismissed the suit on the ground that it was barred by the applicable statute of limitations).

4. United States v. American Electric Power Service Corp, 2002 WL 1900067 (S. D. Ohio, July 16, 2002) (in a Clean Air Act enforcement suit brought by the United States, the State of New York and others against a Midwest utility, the federal district court granted the plaintiffs' motion to strike a defense based on the Takings Clause, the court rejected the argument that the defendants should be permitted to block this suit, which involved claims for civil penalties, based on the Supreme Court plurality decision in Eastern Enterprises indicating that injunctive relief may be available under the Takings Clause to bar monetary assessments under some circumstances; the court concluded that the utility was required to pursue any taking claim it might have in the Court of Federal Claims).

5. DeMendoza v. Huffman, 51 P.3d 1232 (Or., August 8, 2002) (on certification from the US District Court for the District of Oregon, the Oregon Supreme Court concluded, among other things, that a state law allocating 60% of punitive damages awards to the State's Criminal Injuries Compensation Account did not result in a taking under Article 1 Section 18 of the Oregon Constitution; focusing on the threshold question of whether the plaintiffs could claim a cognizable property interest to begin with, the court reasoned that tort plaintiffs have at most an expectancy, not a property right, to receive an award of punitive damages in a successful tort suit).

6. Leider v. United States, 2002 WL 1870281 (Fed. Cir. August 15, 2002) (in a suit by creditor in a Chapter 11 bankruptcy proceeding, the Federal Circuit affirmed a Federal District Court ruling that the creditor did not suffer a taking when he did not receive interest on his

distributive share from the proceeds of the bankruptcy estate; the creditor (largely through his own negligence) failed to obtain his distributive share at the close of the Chapter 11 case and his share was deposited in a federal government account from which the creditor obtained the money several years later (but without any interest); the Federal Circuit reasoned that the creditor could not recover under the Supreme Court decision in Phillips and the interest-follows-principle rule because under the statutory scheme in this case no interest was earned on the deposited funds and therefore nothing was taken from the creditor by the government's failure to pay interest).

7. United States Shoe Corp. v United States, 2002 WL 1610548 (Fed Cir., July 23, 2002) (on appeal from the Court of International Trade, the Federal Circuit ruled that the plaintiff was not entitled to interest on a refund of a tax imposed in violated of the Export Clause of the US Constitution; the court recognized that interest is generally an inherent part of an award of "just compensation" under the Takings Clause; however, the court ruled that there was no taking in this case because, in general, taxation is neither a per se taking nor a regulatory taking; in addition, viewing the tax as a user fee, the court said that the fee was not unconstitutional because it was not unreasonable).

8. Insurance Company of the West v. County of McHenry, 2002 WL 1803743 (N.D.Ill., August 6, 2002) (in an interesting case brought by an insurance company seeking a declaratory judgment on whether it had a duty to indemnify a county under a public liability insurance policy, the court concluded that it could not decide whether a claim was within the exclusion for inverse condemnation claims, because it was ambiguous whether the plaintiff was actually asserting a takings claim given that "the claim appears to be that the County acted arbitrarily and capriciously in enforcing zoning ordinances, not that it effectively 'took' the property" – alluding to, but obviously not definitively addressing, the question of whether wrongful government actions can support takings claims)

9. Myers v. Philip Morris Cos., 123 Cal.Rptr.2d 40 (Cal., August 5, 2002) (on certification from the U.S. Court of

Appeals for the Ninth Circuit, the California Supreme Court (Kennard, J.) ruled that a statute repealing tobacco companies' statutory immunity from products liability lawsuits was retroactive, relying in part on the maxim that courts should interpret statutes to avoid constitutional difficulties and the concern that a retroactive interpretation would raise questions about the repeal statute's constitutionality under Eastern Enterprises; Justice Moreno dissented, arguing that the legislature clearly intended the repeal statute to have retroactive effect and that retroactive application of the statute did not raise any serious constitutional problems).

10. Arreola v. Monterey County, 2002 WL 1614110 (Cal. Ct. Apps., June 25, 2002) (the California Court of Appeals affirmed a trial court judgment finding county, water districts and the State liable in inverse condemnation (and tort) for flooding damage caused by poor maintenance of a flood channel and the failure of a state highway culvert to accommodate flood waters; the court ruled that the counties and the water districts were properly held liable for a taking based on the unreasonableness of their policies regarding maintenance of the channel; the court ruled that the State was liable for a taking on a strict liability basis).

11. Toews v. United States, 53 Fed. Cl. 58 (July 31, 2002) (in a California rails-to-trails takings case the Court of Federal Claims ruled, under California law, that the claimants possessed fee simple title because the former railroad had only acquired an easement over the property and the easement did not continue to exist after the conversion to trail use because the trail use was not consistent with the purposes of the original easement; in making the latter determination, the court relied in large part on its belief that the change from railroad use to trail use was technologically "retrograde").

12. Bailey v. United States, 2002 WL 1964019 (Ct. Fed. Cls., August 14, 2002) (in an exceedingly complicated Winstar-type case, the Court of Federal Claims ruled that shareholders in a failed savings and loan could not recover for a taking either on the theory that they held a property interest in the failed corporation (as a matter of Mississippi law they did not) or that they were entitled to

part of the surplus of the receivership assets (of which there were none).

13. Castle v. United States, 2002 WL 1894262 (Fed. Cir. August 19, 2002) (in another Winstar-type case, arising rom the 1989 Financial Institutions Reform, Recovery and Enforcement Act the Federal Circuit affirmed the Court of Federal Claims's rejection of a taking claim, based on the government's alleged breach of its promise to allow a savings and loan operator to count corporate goodwill toward minimum capital requirements under federal banking laws; the Federal Circuit ruled that there was no taking because the 1989 law did not alter any of the contract rights which the plaintiffs allegedly possessed and the alleged contract did not confer a blanket immunity from future regulation; without deciding whether the trial court properly found a breach of contract, the Federal Circuit ruled that the plaintiffs were not entitled to any recovery on a restitution theory because the plaintiffs themselves had never made any contractual commitments to meet the savings & loan association's minimum capital requirements)

14. Warren v. City of Athens, 2002 WL 1584292 (S.D. Ohio, June 26, 2002) (federal district court issued an injunction in favor of the owner of a Dairy Queen barring municipal officials from erecting barriers which prevented the public from using the Dairy Queen's drive through; the court ruled the plaintiff demonstrated a likelihood of success on the grounds that the plaintiff possessed a protected right of access to public roads under Ohio law and the city had failed to justify its intrusion on the owner's property rights based on the standard in Dolan v. City of Tigard).

15. George v. City of Morro Bay, 2002 WL 1869612 (9th Cir., August 15, 2002) (in a strange little case, the US Court of Appeals for the Ninth Circuit, on an appeal from a ruling by the bankruptcy appellate panel, ruled that notwithstanding Williamson County, the Federal Bankruptcy Court had jurisdiction over a taking claim based on alleged interference with lease rights, even though the plaintiff had not pursued available state court remedies, on the ground that the bankruptcy court had comprehensive jurisdiction over "all core proceedings

arising under Title 11, or rising in a case under Title 11, 28 USC 157(b)").

16. Rylander v. Palais Royal, Inc., 2002 WL 1727313 (Tex. Ct. App., July 26, 2002) (Texas Court of Appeals, reversing the trial court, rejected various constitutional challenges to legislatively adopted amendments retroactively increasing the state corporate franchise tax; the court rejected the claim that the amendments effected a taking under either the Texas or federal constitutions distinguishing the US Supreme Court ruling in Eastern Enterprises based on the facts of this case).

17. Public Utility District No. 1 v. State of Washington, 2002 WL 1584569 (Wash. July 18, 2002) (in an important environmental case upholding the authority of the Washington Department of Ecology to condition a permit for a hydroelectric project on the applicant providing adequate flows for fisheries, Washington Supreme Court Justice Richard Sanders, in a dissenting opinion, argued that the court should have ruled that the agency lacked the authority to condition the permit in order to avoid a likely taking of the applicant's water right as a result of the Department's permitting decision, citing the Court of Federal Claims Tulare decision; the majority said it was premature and unnecessary to address any potential taking issue).

18. Henry v. Jefferson County Planning Commission, 2002 WL 864267 (4th Cir. May 7, 2002) (in an unpublished decision, the Fourth Circuit vacated a federal district court ruling rejecting a taking claim on the merits, on the ground that the plaintiff had no ripe claim because he had not exhausted the available West Virginia compensation procedures; the court of appeals determined that the claim was not ripe despite the fact that the plaintiff had previously sought judicial review of the county zoning decision in the state courts (but had not specifically asserted a claim for compensation); in addition, the court expressed the view that it was misleading to call the Williamson County state exhaustion requirement a ripeness rule because that terminology creates the erroneous impression that litigants will be able to ripen their federal claims in state court; in fact, the court said once, a taking claim in

litigated in state court, issue or claim preclusion generally bars relitigation of the claim in federal court).