Takings Snapshots, Volume 55, January 7, 2003

1. State ex rel. R.T.G., Inc. v. State of Ohio, 2002 WL 31770199 (Ohio, December 18, 2002) (the Ohio Supreme Court, in a controversial 4-3 decision, ruled that the state effected a taking by designating several hundred acres of land as "unsuitable" for surface mining in accord with the requirements of the Surface Mining Control and Reclamation Act; the state designated the area in response to a petition the village of Pleasant City filed in order protect the aquifer providing the village's sole source of drinking water; the court rejected the parcel as a whole rule as recently reaffirmed by the U.S. Supreme Court in Tahoe-Sierra, and, relying on the Ohio Constitution, ruled that the relevant parcel should be defined as the designated area alone and exclude adjacent lands which the company owns outside the designated area; the court also summarily affirmed rejection of the state's nuisance defense to the taking claim; the State of Ohio has petitioned for rehearing, with support from its amici, including the Ohio Environmental Council, represented by GELPI).

2. Appolo Fuels, Inc. v. United States, 2002 WL 31889325 (Ct. Fed. Cls., December 18, 2002) (in a comprehensive and thoughtful opinion – decided on the same day as the RTG case discussed above, and reaching the opposite conclusion – the court of federal claims (Miller, J.) granted summary judgment to the United States on a taking claim based on the Department of the Interior's designation of several hundred acres of land in Tennessee as unsuitable for surface mining under the Surface Mining Control and Reclamation Act; applying the traditional parcel as a whole rule, the court concluded that the relevant parcel included not only the designated area but also the plaintiff's underground mining rights and its mining rights on adjacent lands outside the designated area; using this parcel definition, the court ruled that the plaintiff could not establish a Lucas taking, which the court said requires a showing that the property has been rendered valueless; the court also rejected a Penn Central claim, ruling that the plaintiff lacked "reasonable investment-backed expectations" given that it acquired the property following the enactment of SMCRA, that the "character" of the regulation did not

support the claim because the department was seeking to prevent pollution, which is a nuisance under Tennessee law, and that the plaintiff failed to show that it could not profitably mine for coal; in a ruling on a motion in limine, the court, relying on the Federal Circuit decision in Rith Energy, ruled that a claimant is barred from challenging the legal validity of an agency decision in a taking case and, therefore, the claimant in this case was precluded from challenging the factual basis for the department's decision to designate the area as unsuitable for mining).

3. Madison v. Graham, 2002 WL 31856686 (9th Cir., December 23, 2002) (the Ninth Circuit affirmed the district court's dismissal of property owners' substantive due process challenge to the Montana Stream Access Law, ruling that (1) the plaintiffs were required to pursue this challenge to the law's restriction on their ability to exclude the public from streams on their property under the Takings Clause, rather than the Due Process Clause, (2) the conclusion that the plaintiffs should have brought their claim under the Takings Clause was not affected by the fact that the plaintiffs were seeking only declaratory and injunctive relief, which the court said are permissible remedies under the Takings Clause; and (3) the U.S. Supreme Court decision in Eastern Enterprises did not effectively overrule the Ninth Circuit en banc decision in Armendariz that a plaintiff may not pursue a due process claim where the alleged constitutional violation is addressed by the explicit text of the Takings Clause.)

4. First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. October 9, 2002) (in this highly publicized First Amendment challenge to the City of Salt Lake's transfer of land (subject to a reserved public easement) to the Mormon church, the Ninth Circuit held that prohibitions on expressive activity on the property violated the First Amendment; the court, in a footnote, rejected the argument that permitting public speech on the easement would constitute a taking of the church's property because it would exceed the scope of the city's easement; the court said that the scope of rights retained under the easement were irrelevant to the question of whether the property transfer and the limits on expressive activity violated the First Amendment; the

court indicated that any claim that revision of the terms of the easement would violate other provisions of the Constitution, such as the Takings Clause, presented an issue that was "speculative and not before us").

5. Reeves v. United States, 2002 WL 31778681 (Ct. Fed. Cls., December 11, 2002) (in an interesting case, the court of federal claims granted the United States summary judgment on a taking claim based on the Bureau of Land Management's denial of permission to exploit unpatented mining claims within the Grand Staircase-Escalante National Monument in Utah; the court ruled that because the plaintiffs acquired their mining claims after the area had been designated as a wilderness study area, and the claims were therefore acquired subject to the strict "non-impairment" standard of the Federal Land Policy and Management Act, the plaintiffs suffered no taking when their permits were denied; following the suggestion in Palazzolo that statutes can represent "background principles" barring a taking claim, the court ruled that FLPMA represented a background principle of federal law which limited the nature of the property interests the plaintiffs acquired to begin with).

6. Lost Tree Village, Corp. v. City of Vero Beach, 2002 WL 31507219 (Fl. App. Ct., November 13, 2002) (in a complicated case involving efforts by the City of Vero Beach and the Town of Indian River Shores to control, if not completely block, development of several islands in the Indian River lagoon, the Florida Court of Appeals ruled: (1) that the defendants could not avoid liability by relying on the fact that neither of their actions, considered individually, would rise to the level of a compensable taking, citing Ciampitti, (2) that the plaintiffs stated a ripe as applied claim based on the denial of development approval for one set of islands and the demonstrated futility of seeking further approvals, citing Palazzolo, and (3) the plaintiffs stated a taking claim on the theory that the city ordinance prohibiting construction of a bridge to the islands "substantially diminished" the plaintiff's right of access to their property; the court alluded to but did not discuss various other defenses which the court indicated had to be considered on remand).

7. Emerald International Corp. v. United States, 2002

WL 31817701 (Ct. Fed. Cls., December 13, 2002) (the court of federal claims rejected a coal broker's taking claim based on the allegation that the price the broker paid for coal included a federal excise tax which allegedly violated the Export Clause of the U.S. Constitution; relying on the Federal Circuit's en banc decision in Commonwealth v. Edison (which in turn relied on the 5-justice majority in Eastern Enterprises), the court ruled that the claim failed as a matter of law on the ground that "there can be no taking of money under the Fifth Amendment;" in addition the court rejected the claim on the ground that the tax was imposed on the plaintiff's seller, not the plaintiff itself, and therefore the plaintiff had no basis for asserting a taking claim against the government).

8. City of Keizer v. Lake Labish Water Control District, 2002 WL 31873575 (Or.App.Ct., December 26, 2002) (reversing a trial court decision, the Oregon Court of Appeals ruled that a city could bring an inverse condemnation action against a water district (another government entity) based on the flooding of one of the city's parks caused by the district's refusal to release water behind a dam; the court ruled that the plaintiff could not rely on the standard Oregon Takings Clause (the language of which basically tracks the federal Takings Clause), but could proceed based on a second takings clause in the Oregon Constitution, which provides that "no person's property shall be taken by any corporation under authority of law, without compensation being first made or secured in such a manner as may be prescribed by law").

9. Coastal Petroleum Co. v. State of Florida, Case. No. 01-101 (Fl.Cir.Ct., November 15, 2002) (in this long-running takings battle, the Florida Circuit Court rejected the company's claim that the Florida Department of Environmental Protection effected a taking by denying the company permission to drill for oil and gas on state-owned submerged lands; first, the court ruled that under the terms of the company's lease from the state, as amended, the company only had the right to drill if it applied for and received the necessary permits, and since the company's permit applications had been rejected the

company had no basis for a taking claim; second, the court ruled that in any event the taking claim failed because the permit denial involved only a portion of the 400,000-acre lease area and there was no showing the denial resulted in any diminution in the value of the property, especially given the uncertainty of the size of the oil and gas resources).

10. W.R. Grace & Co. v. Cambridge City Council, 779 N.E. 2d 141 (Mass.App.Ct., November 25, 2002) (the Massachusetts Appeals Court affirmed the judgment of the Land Court that a city did not effect a taking by imposing a 23-month moratorium on development of a specific property in order to facilitate a comprehensive rezoning process; following Tahoe-Sierra, the court ruled that Lucas did not apply and that Penn Central governed the case, applying Penn Central, which the court recognized "invit[es] idiosyncratic decision making," the court ruled that the economic impact factor did not support a taking because the plaintiff was allowed to continue to make remunerative use of a portion of the property during the moratorium, and that the reasonable investment-backed expectations factor did not support a taking because a landowner has no reason to assume that zoning will remain unchanged forever; "Simply stated," the court concluded, "a developer with designs on improving its property consistent with an existing zoning framework had best get its shovel into the ground").

11. Greater Boston Real Estate Board v. Department of Telecommunications & Energy, 779 N.E.2d 127 (Mass.App.Ct., November 27, 2002) (the Massachusetts Appeals Court vacated and remanded a Superior Court finding of a taking based on state agency regulations requiring building owners to grant telecommunication companies access in order to attached wires or cables to their properties; the court ruled that the agency regulations were not authorized by state law and since the regulations were ultra vires it was not appropriate to address the plaintiff's taking claim).

12. Hatfield v. Scott, 306 F.3d 223 (5th Cir., September 11, 2002) (in another in the series of post-Phillips cases dealing with the proper allocation of interest earned on criminal inmates' trust accounts, the

Fifth Circuit ruled that the decision by Texas prison officials not to pay interest was not a taking because (1) the prison system's administrative costs for managing the accounts exceeded the amount of interest earned, and (2) in any event, the plaintiff prisoners waived their right to raise any constitutional objection because their decisions to deposit funds in inmate trust accounts were voluntary).

13. Haberman v. City of Long Beach, 748 N.Y.S.2d 397 (NY Sp. Ct. App. Div., October 21, 2002) (The New York Supreme Court Appellate Division affirmed the trial court's denial of plaintiff's motion for summary judgment on a claim that the city effected a taking by imposing a development moratorium for three and one third years and by subsequently failing to act on the plaintiff's application for a building permit for more than one year; the court concluded that "issues of fact, such as the defendants' good faith, the reasonableness of the delay, the reasonableness of the plaintiff's development expectations, and whether there had been a taking, remained to be resolved at trial," citing the Supreme Court decision in Tahoe-Sierra).

14. Berst v. Snohomish County, 57 P.3d 273 (Wash. App. Div., November 4, 2002) (in a moratorium case with a twist, the Washington Court of Appeals, reversing the Superior Court, held that it was error to dismiss as a matter of law a claim that the county, after discovering that the plaintiff had engaged in illegal logging on his property, effected a taking by enforcing a state law requiring denial of any and all permits for the property for a period of six years following the violation).

15. Dakota, Minnesota & Eastern Railroad Corp. v. State of South Dakota, 2002 WL 31841866 (D.S.D., December 6, 2002) (in an apparently novel case, the federal district court ruled that a South Dakota statute which required a railroad, as a condition of the exercise of the eminent domain power, to make the right of way available to utilities and communications companies, effected an unconstitutional taking; the court held that Nollan/Dolan provided the proper framework for analysis, that the statute met the "essential nexus" test, but that the

statute did not meet the "rough proportionality" test; in the alternative the court ruled that the statute effected a per se physical-occupation taking under Loretto).

16. McNabb v. United States, No. 00-143C (Ct. Fed. Cls., December 10, 2002) (in a complicated case involving farmers operating on Indian reservation lands, the court of federal claims rejected a taking claim based on the Bureau of Indian Affairs' alleged taking of contract rights on the ground, among others, that such a claim must be pursued as a breach of contract claim rather than as a takings claim).

17. Daddario v. Cape Cod Commission, 780 N.E.2d 124 (Mass.App.Ct., December 18, 2002) (in this second round of appeals, the Massachusetts Appeals Court affirmed the trial court's refusal to further consider a plaintiff's taking claim based on the Cape Cod Commission's denial of a permit to mine sand and gravel on 32 acres out of a 70 acre parcel; the Appeals Court affirmed the Land Court's dismissal of the case on ripeness grounds because the plaintiff had failed to pursue any further interactions with the Commission to determine what the Commission would and would not permit; the Appeals Court rejected the plaintiff's theory that the Supreme Judicial Court's 1999 decision in this case simply required the Land Court to conduct a more detailed analysis of the ripeness question, without the need for the claimant to go back to the Commission itself).

18. Bailey v. U.S. Army Corps of Engineers, 2002 WL 31728947 (D. Minn., November 21, 2002) (a federal district court, in a case involving the filling of wetlands adjacent to Lake of the Woods in Minnesota, ruled that (1) the Reagan Executive Order on takings (No. 12,630) does not provide a private right of action against the United States, and (2) the plaintiff's takings claims against the state and the county were not ripe under Williamson County because the plaintiff had not pursued available state remedies).

19. Trio Algarivo Inc. v. Department of Environmental Protection, 778 N.E.2d 529 (Mass.App. Ct., November 12, 2002) (reversing the trial court, the Massachusetts Appeals Court ruled that the Department

of Environmental Protection lacked the power to impose a "tidewater displacement" fee in connection with a license for the use of a previously filled tidewater area, on the ground that the pre-1866 statute under which the plaintiff's predecessor acquired its interest in the property divested the state of any interest in the property).

20. Banks v. United States, No. 01-5150 (Fed. Cir., January 2, 2003) (reversing the claims court's dismissal of a takings suit based on the 6-year statute of limitations, the Federal Circuit ruled that the plaintiffs' takings claims based on erosion of their coastal properties caused by a U.S. Army Corps of Engineers navigational project did not "stabilize," and thus accrue for statute of limitation purposes, so long as the Army Corps' ongoing and repeated mitigation efforts caused "justifiable uncertainty" about the permanence of the alleged taking).

21. North Pacifica LLC v. City of Pacifica, 2002 WL 31778696 (N.D.Cal., November 26, 2002) (federal magistrate judge dismissed substantive due process claim based on city's allegedly illegitimate delay in processing a development application on the ground that (1) under Armendariz and its progeny, plaintiff's claim had to be brought under the Takings Clause rather than the Due Process clause and (2) the plaintiff was required to exhaust available state remedies under Williamson County, which it had so far failed to do).