Takings Snapshots, Volume 64, October 28, 2003

1. Ridge Line Inc. v. United States, 2003 WL 22319481 (Fed. Cir., October 10, 2003) (in an important ruling, the Federal Circuit vacated a trial court decision rejecting a takings claim based on the U.S. Postal Service's construction of a facility which caused increased storm water flows across the claimant's property; first, the appeals court rejected the trial court's position that the claimant had to show permanent and exclusive occupation of its property to establish a taking; the court ruled that a showing of intermittent flooding is sufficient to support a finding of a taking of a "flowage easement," citing e.g., Nollan; second, the court ruled that on remand the trial court should evaluate whether the claim properly lay under the Takings Clause or in tort, by analyzing (a) whether the flooding was the "direct, natural, or probable" result of constructing the facility, and (b) the nature and magnitude of the effects of the government action; third, the court ruled that the trial court had to evaluate whether, under background principles of West Virginia law, a taking might be barred because the Postal Service was simply exercising its rights of "reasonable use" in dealing with surface water on its property; fourth, the court ruled that, assuming a taking could be established, the expenses the claimant incurred to build dams and otherwise deal with the flood waters would provide an adequate measure of "just compensation" under the circumstances of this case).

2. First Healthcare Corp. v. National Labor Relations Board, 344 F.3d 523 (6th Cir., September 19, 2003) (in a significant decision, decided by a 2 to 1 panel, and illustrating the potential relationship between takings issues and labor relations law, the Sixth Circuit upheld a National Labor Relations Board order concluding that off-duty, off-site employees have a right under the National Labor Relations Act to access the outside non-working areas of their employer's property that outweighs the employer's property rights, except where restrictions on access are justified by business reasons; the dissenting judge (Gibbons, J), giving greater weight to a property owner's constitutional right to exclude, would have rejected the board's interpretation of the NLRA).

3. Vance v. Barrett, 2003 WL 22251353 (9th Cir., September 30, 2003) (in a fascinating, if complicated, case, the Ninth Circuit (O'Scannlain, J.) rejected state prison inmates' unconstitutional conditions claims, but accepted their unconstitutional retaliation claims, based on state prison officials' termination of plaintiffs' prison employment based on their refusal to waive their right to receive interest earned by their prison trust accounts; the court ruled that the plaintiffs could not support their unconstitutional conditions claims by alleging a taking, because the gravamen of the claim was that the officials had acted in violation of state law and that type of claim was more appropriately addressed under the Due Process Clause rather than the Takings Clause; the court ruled that the plaintiffs did establish an unconstitutional impingement on their Due Process rights, but that the state officials were immune from liability on this claim because they had not violated "clearly established" constitutional rights; on the other hand, the court ruled that the plaintiffs established that they were subjected to unconstitutional retaliation based on their attempts to protect their Due Process rights, and that this violation did violate clearly established rights).

4. Morris v. United States, 2003 WL 22416833 (Ct. Fed. Cls., September 26, 2003) (in an ESA-takings case, the Court of Federal Claims rejected on ripeness grounds the claim that the National Marine Fisheries Service effected a taking by informing the claimants that their proposal to log a one-half acre property along the Eel River in California would violate the Endangered Species Act because of the logging's likely adverse effects on fish behavior; following the Federal Circuit's decision in Boise Cascade, the court ruled that the claim was not ripe, because plaintiffs had failed to apply for an incidental take permit; the court rejected the argument that the claimants should be excused from having to file for an incidental take permit on the theory that the cost of applying for a permit would make the property valueless; the court reasoned that the government's good faith offer to assist the claimants in developing an application rendered "speculative" claimants' objections to the cost of obtaining a permit).

5. Moore v. United States, 2002 WL 22423162

(Ct.Fed.Cls., October 3, 2003) (in this long-running Rails to Trails takings case, the Court of Claims rejected several claims on the ground that the claimant either held no interests in the trail right-of-way, or held such limited interests, that they could not show that the Rails to Trails Act effected a taking of any property interest belonging to them; more interestingly, the court observed that in August 2003, the parties submitted stipulations on the amount of compensation and interest due in 280 of the 298 claims filed by other plaintiffs in this class-action litigation, illustrating the efficiency with which the claims court is resolving takings claims based on rail-trail conversions).

6. Tanners Creek Properties, LLC v. Tremain, 2003 WL 22284569 (S.D.Ind., September 30, 2003) (federal district court rejected regulatory takings claim based on city's alleged breach of real estate purchase and development contracts with plaintiff, on the grounds that (1) plaintiff's claim lay under state contract (or possibly tort) law, but not the U.S. Constitution, (2) in any event, plaintiff failed to establish that it was denied all or substantially all economically viable use of the property, as required to establish a taking under Seventh Circuit precedent; (3) further, plaintiff had not exhausted available state compensation remedies as required by Williamson County).

7. Bush v. United States, 2003 WL 22416830 (Ct. Fed. Cls., September 30, 2003) (court of federal claims rejected a taking claim based on a government order terminating plaintiff's mining activity on federal lands; the court ruled that the claim failed because the plaintiff did not demonstrate that he possessed a predicate property interest, given that (1) that the plaintiff had not made the various filings necessary to maintain a valid claim under the Mining Act of 1872, and (2) the Department of Interior previously determined that the mining claim was invalid because plaintiff failed to demonstrate the presence of valuable mineral deposits).

8. John R. Sand & Gravel Co. v. United States, 57 Fed. Cl. 182 (Ct. Fed. Cls., June 27, 2003) (in a Hendler-type case, the court of federal claims dismissed a taking claim based on EPA Superfund remediation efforts involving

installation of monitoring wells, because the wells had been installed outside the six-year limitations period and therefore the claim was time-barred; however, the court ruled that a claim based on the erection of fences on plaintiff's property, which the government had not used to permanently block access to the site until a point in time within the six-year limitations, was not time-barred).

9. First Federal Savings & Loan Association v. United States, 2003 WL 22415747 (Ct. Fed. Cls., October 14, 2003) (in this Winstar-type case, the court of federal claims granted summary judgment to the plaintiff on its contract claim, but indicated that the plaintiff's taking claim should probably fail based on the Federal Circuit decision in Castle v. United States, holding that a claimant cannot pursue a taking claim based on an alleged breach of contract by the government where the plaintiff retains the full range of remedies associated with the alleged contract right).

10. Paalan v, United States, 2003 WL 22415880 (Ct.Fed.Cls., September 30, 2003) (court of federal claims rejected taking claims by military prisoner, ruling that (1) claimant could not maintain claim based on seizure of property for evidentiary purposes in a criminal proceeding, and (2) claimant could not claim a taking based on military's seizure of other personal property being held pursuant to military regulation prohibiting prisoners from maintaining certain personal property while incarcerated).

11. Gisslen v. City of Crystal, 345 F.3d 624 (8th Cir., September 26, 2003) (Eighth Circuit, affirming the judgment of the district court, ruled that the Rooker-Feldman doctrine barred defendant in city-initiated condemnation proceeding from subsequently bringing takings and other claims in federal court for alleged constitutional violations arising from the condemnation).

12. Patel v. City of Anaheim, 2003 WL 22383480 (9th Cir., October 17, 2003) (unpublished) (in a brief, unpublished decision, the Ninth Circuit affirmed a district court judgment rejecting a takings claim based on a city's denial of applications for special use permits to operate a motel; applying the substantially-advance

takings test, the court ruled that "the record clearly reveals that the city's challenged decision was necessary to promote the public welfare and to control public nuisance").

13. Seay Outdoor Advertising Inc. v. City of Mary Esther, Case No. 3:02-CV-00012 (N.D. Fl., September 29, 2003) (federal district court dismissed taking claim based on city's sign ordinance on ripeness grounds, observing that the plaintiff did "not contend or even address" the city's argument that the taking claim was not ripe in federal court under Williamson County).