

Takings Snapshots, Volume 72, September 1, 2004

1. *American Pelagic Fishing Co. v. United States*, 2004 WL 1812709 (Fed. Cir., August 16, 2004) (in a major decision, the U.S. Court of Appeals for the Federal Circuit reversed a finding of a taking based on a congressional measure barring a factory fishing vessel from the Exclusive Economic Zone in the Gulf of Maine and vacated an award of compensation of \$37,275,952.67; without reaching the question of whether there was a taking, the court ruled that plaintiff lacked a "cognizable property interest" under the Takings Clause in either its federal fishery permit or its ability to use the vessel to fish in the EEZ; as to the permit, the court pointed to the fact that the permit was not transferrable, did not grant an exclusive privilege to fish, and the government retained the right to revoke or suspend it; as to the vessel, the court relied on Congress's assertion of sovereign authority over the EEZ in the Magnuson Act as well as the traditional common law doctrine of public property ownership of fisheries) (GELPI filed an amicus brief on behalf of Oceana and Ocean Conservancy, and the Maine Attorney General's office filed a brief on behalf of over a dozen coastal states; both briefs are available on the GELPI website).

2. *Bass Enterprises Production Co. v. United States*, www.fedcir.gov (Fed Cir. August 31, 2004) (in an important decision explicating Penn Central analysis, the Federal Circuit affirmed a Court of Federal Claims decision rejecting a temporary regulatory taking claim based on BLM's 45-month delay in issuing permits for oil and gas wells pending a determination about whether the wells would interfere with a planned nuclear waste storage facility; the appeals court rejected the argument that the delay was "extraordinary," as required to establish a temporary taking under Federal Circuit precedent, considering the length of the delay, the lack of bad faith on the part of the government, the complex nature of the permitting process, and the significant public health protection purposes served by the delay; with respect to the Penn Central analysis, the appeals court rejected the argument that the "character" factor is limited to a consideration of whether the property use amounts to a nuisance (as suggested by the court's 1994 *Loveladies Harbor* and its 2000 *Palm Beach Isles* decisions); instead,

the court said, relying on Palazzolo and Tahoe-Sierra, the character factor requires consideration of "the purpose and importance of the public interest underlying" the regulation, including an examination of "the relative benefits and burdens associated with the regulatory action").

3. Appollo Fuels, Inc. v. United States, 2004 WL 1921231 (Fed. Cir., August 30, 2004) (in another important case involving Penn Central analysis, the Federal Circuit affirmed rejection of a taking claim based on designation of nearly 4,000 acres of land in Tennessee as unsuitable for mining under the federal Surface Mining Control & Reclamation Act; to define the relevant parcel, the court included claimant's leases that were part of a "discrete mining unit;" using this parcel definition, the court ruled that the Lucas claim failed because claimant had not shown a "complete loss of value;" under Penn Central, the court ruled that a 78% reduction in value of one lease and a 92% reduction in the value of another lease was insufficient to establish a taking in light of claimant's lack of reasonable investment-backed expectations and the "character" of the regulation, that is, that it was designed "to protect public health and safety;" the court said three factors were relevant to the expectations analysis, all of which weighed against the claim: "(1) whether the plaintiff operated in a 'highly regulated industry,' (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have 'reasonably anticipated' the possibility of such regulation in light of the 'regulatory environment' at the time of purchase;" the court also rejected a temporary taking claim based on regulatory delay, indicating that it would be "strange" to uphold a temporary taking claim if the permanent taking claim has been rejected).

4. El-Shifa Pharmaceutical Industries Co. v. United States, 2004 WL 1780921 (Fed.Cir., Aug 11, 2004) (in a decision torn from today's headlines, the Federal Circuit affirmed the court of claims' dismissal of a taking claim brought by the owners of the El-Shifa pharmaceutical plant in Sudan destroyed by the U.S. military following the 1998 al-Qaeda attack on U.S. embassies in East Africa; the court ruled that the case presented a non-justiciable

political question because the courts have no authority to review the Executive Branch's designation of the plant as enemy property, and destruction of enemy property cannot provide the basis for a taking claim; however, the court rejected the government's three other defenses by, (1) declining to rule on the government's argument that the Takings Clause does not protect the interests of non-resident aliens whose property is located in a foreign country unless they can demonstrate substantial voluntary connections to the United States; (2) rejecting the argument that plaintiffs' claim that the U.S. military negligently targeted the plant for destruction states a claim in tort rather than under the Takings Clause, stating that an allegation that the government acted in a "legally improper" fashion does not preclude recovery under the Takings Clause; (3) rejecting the argument that plaintiffs failed to show that they satisfied the Reciprocity Act, because plaintiffs successfully demonstrated that Sudan courts treat natives and American citizens equally when they adjudicate claims brought against the government).

5. *Cashman v. City of Cotati*, 2004 WL 1575238 (9th Cir., July 15, 2004) (in yet another in the series of Ninth Circuit rent control cases, the appeals court overruled a district court order vacating its grant of summary judgment to mobile home park owners challenging a rent control law on the theory that the law failed to substantially advance a legitimate government interest; the trial court originally granted summary judgment to plaintiffs on the ground that the ability of incumbent tenants to capture the "premium" created by rent control meant that the law failed to accomplish its purpose; on reconsideration, the trial court concluded that plaintiffs had failed to carry their burden, at least at the summary judgment stage, of demonstrating that the presence of a premium made the law ineffectual; on appeal, the Ninth Circuit reversed the district court's change in position, ruling that a rent control ordinance is unconstitutional as a matter of law if it does not include a mechanism to prevent capture of a premium (absent extenuating circumstances making a premium unavailable), and that plaintiffs established a taking under this rule; ironically, the effect of the appeals court's ruling was to wipe out the district court's trial on the merits, conducted after it vacated its initial grant of summary judgment, in which the court concluded that plaintiffs failed to carry their burden of

showing that the law would not be effective in accomplishing its purpose; in dissent, Judge William Fletcher commented "We learned in the 1930's that economic regulation is generally done better by politically accountable legislators than by life-tenured judges. I regret to say that the Ninth Circuit is unlearning that painful lesson.").

6. *Tuthill Ranch, Inc. v. United States*, 2004 WL 1872725 (Fed.Cir., Aug 23, 2004) (in an interesting case involving application of physical-occupation theory, the U.S. Court of Appeals for the Federal Circuit, in a 2-1 decision, ruled that the Bonneville Power Administration did not effect a taking by building excess fiber optic signal capacity within its pre-existing right-of-way to meet projected future demand and then leasing the unused excess capacity to a telecommunications company; the majority ruled that since the lease of the excess capacity effected only the "use of the property," and did not expand the physical area subject to occupation, the BPA's actions did not amount to a per se taking under a physical occupation theory; Chief Judge Mayer, in dissent, argued that since the creation of the excess capacity was outside the literal terms of the easement, which only allowed the government to create signal lines "necessary in connection with" maintaining electrical power transmission lines, the government had effected a per se taking under a physical occupation theory).

7. *Moon v. North Idaho Farmers Association*, 2004 WL 1717533 (Idaho, August 2, 2004) (in a high-profile case, the Idaho Supreme Court, reversing a trial court decision, ruled that a recently enacted Idaho statute immunizing farmers from nuisance and trespass claims brought by neighbors affected by smoke from burning fields failed to state a taking claim under either the Idaho or U.S. Constitutions; first, the court ruled that plaintiffs failed to allege a permanent deprivation of all economically beneficial use of the property, as required to establish a regulatory taking; second, the court rejected the argument that the statute created an easement over the plaintiffs' property by authorizing the farmers to maintain a nuisance affecting their property; on this last point, the Idaho court rejected the contrary analysis of the Iowa Supreme Court in *Bormann v. Board of Supervisors*, 584 NW 2d 309 Iowa (1998)).

8. *Tulare Lake Basin Water Storage District v. United States*, 2004 WL 1870073 (Fed.Cl., Aug 18, 2004) (the Court of Federal Claims, in this long-running water rights takings case, in response to a motion for reconsideration, retreated from its earlier holding that pre-judgment interests should be calculated based on the 52-week treasury bill rate pursuant to the Declaration of Taking Act, and instead applied the rate of return earned by the plaintiffs in their state-sanctioned, diversified investment funds; the court justified its ruling on the ground that the yield on the investment funds represented the level of earnings that a "prudent investor" would have achieved and would place the claimants in as good a position as they would have occupied if they had received payment on the date of the taking; the court also ruled that this standard for interest was more consistent, relative to the available alternatives, with a policy favoring the use of a uniform rate of interest in takings cases).

9. *Sacramento Municipal Utility District v. United States*, 2004 WL 1708969 (in one of the several cases dealing with the United States' liability for failing to deal with the problem of utilities' spent nuclear fuel, the Federal Court of Claims declined to dismiss (1) the plaintiff utility's claim of a taking of its contract right with the United States that the United States would deal with the problem of spent nuclear fuel; (2) plaintiff's claim of a taking of its land at which nuclear waste was stored under a physical-occupation theory).

10. *Nolen v. Newtown Township*, 2004 WL 1698625, (Pa. Cmwlth, July 30, 2004) (the Pennsylvania Commonwealth Court, affirming a trial court dismissal of a taking claim, and relying on the U.S. Supreme Court decision in *Tahoe-Sierra* and the Pennsylvania Supreme Court decision in *Machipongo*, ruled that an approximately 2-year moratorium on residential and commercial subdivision and development did not constitute a compensable taking).

11. *Riviera Drilling and Exploration Co. v. United States*, 61 Fed.Cl. 395 (July 28, 2004) (the Court of Federal Claims rejected a takings challenge based on a Forest Service requirement that the owner and operator of natural gas wells on national forest lands post a large surety bond to cover repair costs in order to obtain a new

road-use permit; the court ruled that the claim was fatally defective because plaintiff alleged the challenged governmental actions were substantively invalid, contradicting the requirement that a taking claim be based on a valid governmental action; the court also ruled that the taking claim was not ripe because plaintiff had not actually applied for a new road-use permit; finally, the court ruled that the claimant's temporary taking claim had to be dismissed on the merits because claimant failed to allege any extraordinary delay, as required to establish a temporary regulatory taking under Federal Circuit precedent).

12. *Central Pines Land Co. v. United States*, 2004 WL 1870065 (Fed.Cl., Aug 12, 2004) (Court of Federal Claims dismissed a taking claim based on plaintiff's alleged loss of subsurface mineral interests under federal lands in Louisiana; first, the court ruled that the taking claim failed with respect to several parcels because the mineral interests had reverted to the United States pursuant to Louisiana law as a result of 10 years of non-use and, in any event, the claim was barred by the six-year statute of limitations; second, the court ruled that the record was not sufficiently clear, on cross-motions for summary judgment, to determine whether a claim with respect to another portion of the property based on an alleged moratorium on development was barred by the statute of limitations).

13. *West Linn Corporate Park v. City of West Linn*, 2004 WL 1774543, (D. Or., August 6, 2004) (in a rather confused and confusing case, the federal district court rejected cross-motions for summary judgment on whether various conditions on development imposed by the city constituted compensable takings; the court allowed takings claims under the Oregon Constitution to proceed without explaining the basis for the court's jurisdiction over the state law claims; the court also allowed the federal takings claims to proceed, without explaining how under Williamson County these claims could proceed without the claimants first exhausting available state compensation procedures).