Takings Snapshots, Volume 75, February 7, 2005

1. Stearns v. United States, 2005 WL 181712 (Fed. Cir., January 28, 2005) (in a significant decision on when a government action can be challenged as a "regulatory" taking or a "physical" taking, the U.S. Court of Appeals for the Federal Circuit, reversing the Court of Federal Claims (Smith, J.), ruled that a mining company could not assert a physical taking claim based on a determination by the Office of Surface Mining that the company lacked "valid existing rights" under the Surface Mining Control and Reclamation Act (SMCRA) and, therefore, had to seek a determination about whether its proposed operation was "compatible" with the protection of significant public resources prior to commencing to mine; the Court said the physical occupation theory is limited to the situation where the government itself occupies the property or requires the landowner to submit to the physical occupation of its land; viewing the claim as a regulatory taking claim, the Court ruled that the case was not ripe because the company had never sought a compatibility determination under SMCRA) (GELPI filed an amicus brief in the case on behalf of the Kentucky Resources Council urging reversal of the court of claims decision; the brief is available on the GELPI website).

2. Smith v. Town of Mendon, 2004 WL 2941271 (N.Y., December 21, 2004) (in an interesting and important case, the N.Y. Court of Appeals, by a 4 to 3 margin, ruled that the standards of Nollan and Dolan do not apply to a permit condition requiring permittees to place a portion of their property under a permanent conservation easement, reasoning that Nollan and Dolan are limited to the context of conditions that take away the "right to exclude;" one dissenting opinion argued that Nollan and Dolan apply to all types of permit exactions, not simply those impinging on the right to exclude, and that the condition at issue in this case did not satisfy the Nollan "essential nexus" test because there was no logical relationship between the proposed single-family development, which was not expected to have any significant adverse environmental effects, and protection of the area covered by the easement; another dissenting opinion argued that the condition failed to substantially advance a legitimate state interest because the easement was essentially redundant of already existing regulatory restrictions in the area covered by the easement).

3. Illinois Clean Energy Community Foundation v. Filan, 392 F.3d 934 (7th Cir., December 22, 2004) (in a fascinating, oddball case, arising from electric utility deregulation, the U.S. Court of Appeals for the Seventh Circuit (Posner., J.) affirmed a district court ruling that the Illinois legislature effected a taking by demanding a portion of the assets of a private foundation established to promote energy conservation and environmental improvement; the foundation had been established by the state legislature using part of the "huge profits" Commonwealth Edison earned from selling off its fossil fuel plants; the Court ruled that even though the State might have required the money to be paid to ratepayers in the first instance, once the funds were placed in the foundation the State could not "recapture" the funds without violating the Takings Clause; the Court also rejected the argument that since several of the foundation trustees were appointed by the State, the foundation was actually an arm of the State).

4. Morris v. United States, 392 F.3d 1372 (Fed.Cir., December 16, 2004) (in a novel and important ruling, affirming rejection of a taking claim based on application of the Endangered Species Act, the U.S. Court of Appeals for the Federal Circuit rejected as not ripe a claim that a requirement that the landowners undergo regulatory review under the ESA before logging trees on their property effected a taking because the cost of compiling the application would have exceeded the value of the small parcel of property at issue; the Court ruled that since the National Marine Fisheries Service had indicated it would assist the landowners in preparing the application, and the plaintiffs had not pursued this offer of assistance, it was impossible to know whether the cost of the regulatory review process would actually exceed the value of the property).

5. Norman v. United States, 63 Fed.Cl. 231 (December 10, 2004) (in an exhaustive opinion, touching on virtually every aspect of Federal Circuit and Court of Federal Claims takings jurisprudence, the Court of Federal Claims (Bush, J.) rejected a regulatory taking claim based on the Army Corps of Engineer's requirement under the Clean Water Act that a developer restore and preserve 221 acres of wetlands as mitigation for wetland destruction on a 2425-acre development site in Reno, Nevada; the Court rejected a per se physical occupation claim, including an argument based on Nollan, observing that the mitigation "related directly" to the plaintiff's wetland destruction; the Court also rejected a Lucas claim, observing that the plaintiff was not denied all economic use of the property in view of the parcel as a whole rule; and finally, the Court rejected a Penn Central claim based on a comprehensive application of the three Penn Central factors; one particularly interesting part of the Court's Penn Central analysis is that even if the parcel were defined as the 221-acre mitigation area, the developer was not denied all economic use because the area served important flood control functions and represented an economically valuable amenity for the entire development project; another interesting aspect of the decision is the conclusion that the "after" value of the property was actually greater than the "before" value because the mitigation process gave the developer the opportunity to develop certain commercially valuable wetland acres in exchange for giving up the opportunity to develop less valuable acres).

6. Huntleigh USA Corp. v. United States, 2005 WL 44439 (Ct.Fed.Cls., January 14, 2005) (in a case drawn from yesterday's headlines, the Court of Federal Claims rejected the government's motion to dismiss a taking claim by the former operator of airport security check points based on the government's decision to federalize airport security post 9/11; the Court ruled that the plaintiff could claim a protected property interest based on its preexisting contracts with air carriers, its business good will and going-concern value, and that the heavily regulated nature of the business did not bar plaintiff from claiming a protecting property interest; applying the three-factor Penn Central analysis, the Court ruled that the plaintiff had sufficiently alleged a taking to survive a motion to dismiss).

7. Goodrich v. United States, 2005 WL 78895 (Ct.Fed.Cls., January 15, 2005) (in the latest takings case by a public lands cattle rancher, the Court of Federal Claims ruled that a claim of a taking of water rights based on restrictions on access to federal public lands was barred by the statute of limitations; treating plaintiff's claim as a regulatory taking

claim rather than a physical occupation claim, the Court ruled that the claim accrued when the Forest Service made its formal decision to reallocate a portion of the public range from plaintiff to another rancher, not as of the date the second rancher started grazing his cattle).

8. Cane Tennessee v. United States, 62 Fed.Cl. 703 (October 29, 2004) (in an interlocutory decision in this long-running takings suit based on regulation under the Surface Mining Control & Reclamation Act, the Court of Federal Claims ruled that (1) even though oil/gas interests and coal interests were physically contiguous, they should not be considered part of a single unit of property for the purpose of takings analysis, and (2) the reasonableness of the claimant's expectations is not a relevant factor in a Lucas categorical case; on the latter issue, the Court provides a comprehensive survey and analysis of the Federal Circuit's shifting pronouncements on the question).

9. Dickgeiser v. State of Washington, 2005 WL 171346 (Wash., January 27, 2005) (in a somewhat novel twist on the usual takings case, the Washington Supreme Court, reversing the Washington Court of Appeals, ruled that State was not entitled to summary judgment on a claim by landowners that the State effected a taking of their property by conducting logging on adjacent state-owned timberlands that had the inevitable effect of causing severe, chronic flooding of downslope properties).

10. Paradise. Inc. v. Pierce County, 102 P.3d 173 (Wash.Ct.Apps., December 6, 2004) (reversing a $1.5 million takings award, the Washington Court of Appeals ruled that the trial court should have rejected as a matter of law a claim that a county ordinance barring "social card games" in bars and restaurants effected a taking; applying the peculiar Washington state takings standards, the Court ruled that there was no taking because plaintiffs were not denied all economic use of their property and the regulation was designed to protect the public from harm).

11. Caldwell v. United States, 391 F.3d 1226 (Fed.Cir., December 14, 2004) (the U.S. Court of Appeals for the Federal Circuit, in a 2 to 1 decision, affirmed a court of claims ruling that a taking claim based on establishment of a recreational trail on a former railroad right of way was barred by the applicable six-year statute of limitations; the majority ruled that the claim for a taking of a state reversionary interest in the right of way accrued when the railroad and the trail operator expressed their intent to negotiate an interim trail agreement and the Surface Transportation Board issued a Notice of Interim Trail Use forestalling the reversion of the right of way to the original owners of the underlying fee; the dissenting Judge (Newman, J.) would have ruled that the claim accrued only when the easement was transferred to the City of Columbus, Georgia, the trail sponsor).

12. Johnecheck v. Bay Township, 2004 WL 2921962 (6th Cir., December 17, 2004) (unpublished) (affirming the district court, the U.S. Court of Appeals for the Sixth Circuit ruled that a zoning ordinance barring wind turbines more than 300-hundred feet tall in a designated agricultural district "easily" survived a taking challenge on the ground that the ordinance failed to substantially advance legitimate state interests).

13. Paalan v. United States, 2005 WL 78697 (Fed.Cir., January 12, 2005) (unpublished) (the Federal Circuit, in a per curiam decision, affirmed a decision of the Court of Federal Claims rejecting the taking claim of an incarcerated prisoner, ruling that (1) the government is entitled to retain property seized for evidentiary purposes in a criminal proceeding without paying compensation, at least while plaintiff's legal challenges to his incarceration were still pending; and (2) the Takings Clause provides no protection against seizure of personal property pursuant to prison regulations prohibiting a prisoner from possessing certain types of property while in jail).

14. Thousand Trails, Inc. v. California Reclamation District No. 17, 124 Cal.App.4th 450, (Cal. Ct. Apps., October 20, 2004) (the California Court of Appeals, affirming a trial court grant of summary judgment to an irrigation district, ruled that the so-called "emergency exception" barred a taking claim against the district based on flooding of private property resulting from the district's breach of levees to avoid serious flooding of other areas).

15. WJF Realty Corp. v. Town of Southampton, 2004 WL 3037717 (EDNY, August 2, 2004) (in this long-running takings case arising from a series of moratoria on development is Southampton, Long Island, the Federal District Court rejected the town's summary judgment motion based on ripeness doctrine and the applicable statute of limitations; with respect to the merits of the case, the Court ruled that the plaintiffs have asserted potentially viable claims based on a "bad faith" takings theory as well as on a "failure to substantially advance" theory).

16. Baehler v. Department of Environmental Protection, 863 A.2d 57 (Pa.Cmwlth., December 6, 2004) (in the context of a judicial challenge to an administrative compliance proceeding based on a landowner's illegal filling of wetlands, the Pennsylvania Commonwealth Court ruled that the claim of a taking was premature because the owner never applied for a permit; the Court specifically rejected the argument that the State's requirement that the owner seek an after-the-fact permit would effect a taking because it would compel the owner to expend a significant sum of money without any guarantee the State would ultimately issue a permit).