Takings Snapshot, Volume 81, August 31, 2006

1. Mansoldo v. State of New Jersey, 187 N.J. 50, 898 A.2d 1018 (N.J., June 5, 2006) (in a significant ruling, the New Jersey Supreme Court vacated a trial court decision that a prohibition on development in the floodway of the Hackensack River effected a taking; the court ruled that the trial court improperly relied on the doctrine of collateral estoppel to conclude that a prior administrative proceeding had resolved that the regulation denied the owner all economically viable use of the property, and that the trial court erred in failing to consider whether the claim was barred based on background principles of New Jersey nuisance law; the court remanded the case and instructed the trial court to determine whether the regulation had rendered the property valueless, whether background principles applied, and/or whether the plaintiff could establish a taking under Penn Central. (GELPI filed an amicus brief in the case on behalf of the Association of State Floodplain Managers, which is available on the GELPI website).

2. Manning v. Mining & Minerals Division of the Energy, Minerals, & Natural Resources Department, 2006 WL 1787124 (N.M. June 1, 2006) (in a 3 to 2 decision, the New Mexico Supreme Court, reversing the Court of Appeals, ruled that state sovereign immunity did not bar a suit for just compensation under the Fifth Amendment in state court; the court distinguished the U.S. Supreme Court's Alden decision (holding that state sovereign immunity can bar federal-law claims in state court) by concluding that congressional rights of action founded on the Commerce Clause may be barred in state court by state sovereign immunity, but that the same principle does not apply to the Takings Clause of the Fifth Amendment, which is "self-executing;" two justices dissented on the ground that the suit should have been dismissed as unripe).

3. Allegretti & Co. v. County of Imperial, 138 Cal App.4th (Cal.Ct.App., March 28, 2006) (in an important takings ruling involving regulation of water use, the California Court of Appeals affirmed a trial court judgment rejecting a landowner's claim that the county effected a taking by imposing a condition on plaintiff's permit to pump underground water requiring plaintiff to extract no more than 12,000 acre-feet/year, the court rejected the plaintiff's per se physical-occupation takings theory, declining to accept the physical occupation analysis used by the claims court in the Tulare Lake case; the court also ruled that there was no total taking under Lucas, because the restriction did not eliminate all economically viable use of the property; in addition, the court rejected the Penn Central claim because plaintiff failed to demonstrate anything more than a modest impact on the value of the property, plaintiff failed to demonstrate any interference with investment-backed expectations since his investment was essentially speculative and water use in California is subject to a reasonable use restriction, and the character of the regulation did not involve a physical invasion of private property; finally, the court rejected plaintiff's reliance on the California Supreme Court Landgate decision because the county's action did not amount to "unreasonable delay").

4. Regency Outdoor Advertising Inc. v. City of Los Angeles, 139 P.3d 119, 46 Cal.Rptr.3d 742 (Cal., Aug. 7, 2006) (in a unanimous ruling, the California Supreme Court affirmed a trial court decision rejecting a billboard company's claim that the City of Los Angeles effected a taking by planting trees along Century Boulevard and reducing the visibility of the billboard for passing motorists; the court affirmed California's adherence to the majority view that property owners can claim no protected right to have their property seen from adjacent public streets; the court also said "in passing" that the plaintiffs failed to demonstrate that the city's landscaping adversely affected the value of plaintiff's leaseholds; in a highly significant passage, the court emphasized that the holder of a narrow property interest in real property should not enjoy any special advantage in a takings suit; in the court's words "we do not believe that a property owner, confronted with an imminent property regulation, can nullify…a legitimate exercise of police power by leasing narrow parcels or interests in his property so that the regulation could be characterized as a taking only because of its disproportionate effect on the narrow parcel or interest leased," quoting the Michigan Supreme Court's 2000 decision in Adam's Outdoor Advertising).

5. McCarran International Airport v. Sisolak, 137 P.3d 1110 (Nev., July 13, 2006) (the Nevada Supreme Court, affirming the trial court, ruled that land use regulations limiting the height of buildings adjacent to the county airport effected a taking under the Nevada Constitution; taking the view that the claimants owned all the airspace above the property up to a height of 500 feet, the court ruled that the height restrictions and the passage of planes through the airspace constituted a per se physical taking).

6. Small Property Owners of San Francisco v. City & County of San Francisco, 2006 WL 2277956 (Cal.App. Aug. 9, 2006) (affirming the trial court, the California Court of Appeals rejected the claim that a city ordinance requiring landlords to pay tenants 5% on their security deposits effected a taking because, for at least a limited period, this rate of interest exceeded the rate of interest paid on typical money market accounts; the court addressed, but did not definitely resolve, whether this type of monetary burden was covered by the Takings Clause; assuming that it was, and applying the Penn Central framework, the court found no taking, "[g]iven the small or nonexistent economic loss occasioned by the Ordinance, appellants' failure to prove that this loss was inconsistent with reasonable investment-backed expectations of San Francisco landlords, and the nature of the Ordinance as part of a broader scheme of allocating economic benefits and burdens between landlords and tenants for the public good").

7. Foggy Bottom Association v. District of Columbia Office of Planning, 2006 WL 2126332 (D.D.C., July 28, 2006) (in an unusual takings case, the federal district court for the District of Columbia rejected a regulatory takings claim by residential property owners in the vicinity of George Washington University who claimed the District's failure to enforce zoning orders governing the University's expansion of its campus drastically reduced plaintiffs' ability to use their property; the court reasoned that plaintiffs lacked predicate property interests sufficient to support the claims, given the government's broad discretion about whether or not to enforce zoning regulations).

8. Lingan v. Town of Cave Creek, 2006 WL 1722316 (D.Ariz., June 22, 2006) (in useful decision examining the relationship between just compensation claims under the takings clause and claims seeking declaratory judgment that a taking occurred, the federal district court dismissed, based on Williamson County's state judicial exhaustion requirement, a just compensation claim based on the town's denial of a permit to operate a bed and breakfast; the court also rejected the plaintiff's alternative request for declaratory relief, observing that "federal declaratory relief concerning takings claims should not become a regular procedural mechanism for the federal courts to intervene prematurely before state procedures have run their course").

9. Rabum County v. Mountain Creek Estates, LLC., 632 S.E.2d 140 (Ga., July 6, 2006) (in an interesting case, the Georgia Supreme Court, by a vote of 4 to 3, reversed the trial court, and ruled that a county's improper failure to accept public dedication of roads within a residential subdivision did not support a viable takings claim and therefore the plaintiff's claim for damages was barred by state sovereign immunity; the court ruled that while the plaintiff was entitled to mandamus ordering the county to accept the roads, the plaintiff could not assert a taking claim based on an alleged government "act of omission" which had no effect on the "functionality" of the property).

10. National Mining Association v. Scarlett, 2006 WL 1194224 (D.D.C. May 4, 2006) (the federal district court upheld the validity of a 1999 rule (issued after endless back and forth) interpreting the "valid existing rights" language in the Surface Mining Control and Reclamation Act; the district court also rejected the mining association's takings argument, ruling that the rule on its face did not effect a taking and, if valid existing rights were taken under the rule, compensation would be available in the Court of Federal Claims under the Tucker Act).

11. Brace v. United States, 2006 WL 2261332 (Ct.Fed.Cls., Aug. 4, 2006) (the claims court ruled that a consent decree requiring a land owner to restore an illegally filled wetlands did not effect a regulatory taking, given that the government action caused only a 19% reduction in value, the owners lacked investment-backed expectations, and the consent decree generated substantial public benefits; the court also rejected the claim that the consent decree effected a per se taking of the property).

12. Wensmann Realty, Inc. v. City of Eagan, 2006 WL 1390278 (Minn.Ct.App., May 23, 2006) (in an unpublished decision, the Minnesota Court of Appeals, reversing the trial court, ruled that a city's denial of an application to permit development of a golf course for residential purposes did not effect a taking under Penn Central; the city's action did not have "a substantial negative economic impact to the property;" the plaintiffs lacked reasonable investment-backed expectations because they purchased the property knowing of the existing zoning restrictions, and therefore presumably paid a discounted price that reflected the effect of the restrictions; and the character factor supported the city's action because denial of the application was consistent with the city's existing comprehensive plan).

13. Viacom Outdoor Inc. v. City of Arcata, 44 Cal. Rptr. 3d 300 (Cal.Ct.App., June 8, 2006) (reversing a trial court ruling, the California Court of Appeals ruled that a city ordinance requiring a billboard owner to apply for permits before rebuilding billboards destroyed in a windstorm was not preempted by state law; the court also reversed the trial court's award of damages for violation of the company's "property rights," on the ground that the taking claim was premature given that plaintiff had not sought a permit under the city ordinance).

14. Advertising Display Systems 1, LLC, v. City & County of San Francisco, 2006 WL 1646138 (N.D.Cal., June 14, 2006) (in an illustration that the lessons of the Supreme Court's Lingle decision have only begun to penetrate Ninth Circuit case law, a federal district court in California dismissed substantive due process and takings claims based on the city's refusal to issue permits for outdoor advertising signs; the court ruled, probably incorrectly in light of Lingle, that the substantive due process claim was barred under the Ninth Circuit Armendariz decision; the court also ruled that plaintiff's takings claim was not ripe under Williamson County because the plaintiff had not pursued available state compensation procedures).

15. Northwest Louisiana Fish & Game Preserve Commission v. United States, 446 F.3d 1285 (Fed.Cir., May 2, 2006) (the U.S. Court of Appeals for the Federal Circuit, in a two to one decision, reversed the trial court and ruled that a taking claim by a Louisiana fish and wildlife commission against the United States was not barred by the applicable six-year statute of limitations; the taking claim arose from the Army Corp of Engineers' operation of a navigation project, which had the effect of limiting the commission's ability to lower the water level in one of its lakes, thereby preventing the commission from controlling weed infestation; the majority ruled that the claim did not accrue until the extent of the weed infestation became apparent; Judge Lourie argued in dissent that the trial court was correct in ruling that the claim accrued as soon as the government completed the navigation project).

16. Firebaugh Canal Water District v. United States, 70 Fed.Cl. 593 (Ct.Fed.Cls., March 29, 2006) (in a takings suit alleging that the Bureau of Reclamation failed to provide "drainage services", the claims court dismissed the case under 28 U.S.C. 1500, which prohibits the filing of a taking claim in the claims court when another suit arising from the same facts and seeking the same relief is pending in another court; the court ruled that the plaintiff's tort claim against the United States filed in federal district court was pending for the purpose of section 1500 because, although the district court had entered an order dismissing the claim, it had not yet entered a final judgment in the case).

17. John R. Sand & Gravel Co. v. United States, 2006 WL 2267100 (Fed Cir., Aug. 9, 2006) (in what is apparently the last step in a complicated case, the Court of Appeals for the Federal Circuit vacated and remanded a trial court ruling rejecting a takings claim based on the government's physical occupation of plaintiff's leasehold as the result of a superfund cleanup effort; the trial court had accepted the government's nuisance defense and also ruled that the claim was barred because the plaintiff acquired the lease with knowledge of and subject to the superfund problems at the site; however, the Federal

Circuit still came down on the side of the government, ruling, sua sponte, that the claim fell outside the applicable six-year statute of limitations; Judge Newman dissented based on the view that the statue of limitations was not jurisdictional, and that the majority therefore erred in addressing the issue after the United States abandoned its statue of limitations defense on appeal).

18. Barclay v. United States, 443 U.S. 1368 (Fed. Cir. April 11, 2006) (in a 2 to 1 decision, the U.S. Court of Appeals for the Federal Circuit, reaffirming its decision in Caldwell, ruled that a taking claim based on the rails to trails act accrues upon the issuance of a Notice of Interim Trail Use or Abandonment; Judge Newman, dissenting, urging the court to reexamine its decision in Caldwell en banc).

19. Reagan v. County of St. Louis, 2006 WL 1867195 (Mo.App., June 30, 2006) (reversing the trial court, the Missouri Court of Appeals ruled that the county's rezoning of plaintiff's property did not effect a taking under Penn Central; the economic impact factor favored the county because an owner is not entitled to the most profitable zoning, and in any event the plaintiff sold the property for a price that was higher than the price plaintiff paid for the property prior to the rezoning; the expectations factor supported the county because the surrounding land area was devoted to residential uses; and the character factor favored the county because the regulation did not involve a physical occupation).

20. City of Coeur d'Alene v. Simpson, 136 P.3d 310 (Id. April 27, 2006) (reversing the trial court, the Idaho Supreme Court ruled that plaintiffs might be able to establish a taking based on a regulation prohibiting any structures, including fences, along the shorefront of Lake Coeur d'Alene; the court ruled that the trial court had erred in ruling that the waterfront lot, which plaintiffs had apparently transferred to their sons for tax avoidance purposes, should be considered as part of the same parcel as the plaintiffs' upland lot; the court remanded the case for reconsideration of the parcel issue, focusing on (1) whether the transfer was made for the purpose of manufacturing a taking claim, and (2) if so, based on such factors as whether the lakefront and upland lots were subject to different regulations, the fact that the lots were separated by a road, and the fact that the lots were separately taxed).

21. Board of County Commissioners of Muskogee County v. Lowery, 2006 WL 1233934 (Okla., May 9, 2006) (the Oklahoma Supreme Court, by a divided vote, joined a small minority of states that hold that the use of eminent domain for economic development purposes is not a legitimate "public use" under their state constitutions; in this case, the Oklahoma court, reversing a trial court ruling, barred a county from exercising eminent domain to construct two water pipelines necessary for the construction and operation of an 800 megawatt electric generating plant).

22. Banks v. United States, 71 Fed.Cl. 501 (Ct.Fed.Cls., May 26, 2006) (in a long-running takings suit involving a claim for compensation for "a physical taking by erosion" caused by an Army Corps of Engineers coastal construction project, the court declined to certify the issue of the boundary of the federal navigational servitude to the

Michigan Supreme court; the court reasoned that the boundary of private shoreline property under Michigan law is irrelevant to the federal-law question of the location of the limit of the federal navigational servitude).

23. Quicken Loans Inc. v. Wood, 449 F.3d 944 (9th Cir., May 22, 2006) (the Ninth Circuit affirmed the trial court's dismissal of a taking claim based on a state law regarding mortgage lending on the ground the plaintiff failed to satisfy either the finality or judicial-exhaustion prongs of Williamson County; the court suggested (apparently ignoring the U.S. Supreme Court's decision in Lingle) that the plaintiff could prosecute a "failure to substantially advance" claim in federal court without regard to Williamson County's requirements, but ruled that the plaintiff had waived this potential claim in the district court).

24. Jacob's Ranch LLC v. Smith, 2006 WL 1391543 (Okla., May 23, 2006) (the Oklahoma Supreme Court, affirming the trial court, rejected a takings challenge to an amendment to the state Groundwater Law which imposed a moratorium, pending completion of a hydrologic study, on municipal or other public permits to withdraw water from a "sensitive sole source groundwater basin" for use outside the basin, and that required the State, before issuing a permit to withdraw water from a sensitive groundwater basin, to determine if the proposed use is likely to degrade or interfere with springs or streams; the court ruled that the amendment only imposed a temporary restriction and that it represented "a proper regulation of a state's water resources in the exercise of the Legislature's policy power").

25. Youngman v. Department of Transportation, 2006 WL 1312480 (Cal.App., May 12, 2006) (in an unpublished decision, the California Court of Appeals, affirming the trial court, ruled that the state Department of Transportation was liable in inverse condemnation for constructing an erosion control project that diverted water onto plaintiff's property and caused plaintiff's property to flood).

26. Overview Books, LLC v. United States, 2006 WL 2052317 (Ct.Fed.Cls., July 24, 2006) (the Court of Federal Claims dismissed a takings claim based on the Library of Congress's refusal to include the plaintiff's self-published book in the library's national cataloging system; the court declined to dismiss the case under Rule 12(b)(1) on the theory that the court lacked subject matter jurisdiction because the claim was patently frivolous; however, the court granted a motion to dismiss under Rule 12(b)(6) for failure to state a claim, on the ground that denial of access to the cataloguing system did not effect a taking of the book, given the other options available to the claimant for marketing the book; the court also dismissed the claim that the library took the plaintiff's right to be included in the catalogue, ruling that the claimant had no protected entitlement to be included in the catalogue).

27. Anaheim Gardens v. United States 444 F.3d 1309 (Fed.Cir., March 24, 2006) (in another in the series of cases arising from Congress's alleged abrogation of low-income housing developers' right to prepay HUD mortgages and escape rent regulation, the Federal Circuit reversed the trial court's dismissal of the plaintiffs' takings claims based

on ripeness doctrine and remanded for consideration of whether plaintiffs' claims were ripe under the theory of "administrative futility").

28. Pacific Gas & Electric Company v. United States, 70 Fed.Cl. 766 (Ct.Fed.Cls., April 25, 2006) (in yet another in the series of cases arising from the Nuclear Waste Policy Act, the claims court dismissed the takings claim on the ground that when an alleged right is based on a contract, plaintiff's remedy is to file suit for a breach of contract, not for a taking).