Georgetown Environmental Law & Policy Institute's
Takings-Net

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To provide timely information about regulatory takings litigation, the Georgetown Environmental Law & Policy Institute provides brief summaries of very recently issued decisions and other important case developments. Past "snapshots" are collected on the GELPI website. As in the past, the cases are organized in rough order of their importance and interest value.

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Takings Snapshots, Volume 84, April 9, 2007

1. Casitas Municipal Water District v. United States, 2007 WL 968154 (Ct. Fed. Cls. Mar. 29, 2007) (in a dramatic development, the U.S. Court of Federal Claims (Wiese, J.) issued an opinion repudiating the controversial ruling in the 2001 *Tulare Lake* case that a regulatory restriction on the use of water should be treated as a *per se* physical taking; the *Casitas* case arose from restrictions on water diversions from the Ventura River mandated by the ESA in order to protect endangered steelhead trout; in response to the government's motion for partial summary judgment on the applicable takings standard, the Court rejected the *per se* physical occupation taking theory and ruled that the claim should be governed by the traditional multi-factor *Penn Central* analysis; to support this conclusion the Court invoked the Supreme Court's 2002 *Tahoe-Sierra* decision, which, according the claims court, "compels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property;" in a prior order issued in 2006, the Court rejected the plaintiff's the contract claim) (GELPI filed an amicus brief in the *Casitas* case on behalf of the Natural Resources Defense Council, which is available on the GELPI website).

2. Klamath Irrigation District v. United States, 2007 WL 853018 (Ct. Fed. Cls. Mar. 16, 2007) (in another important decision, the U.S. Court of Federal Claims rejected the breach of contract claims in this controversial case brought by Klamath River irrigators based on 2001 reductions in water deliveries mandated by the ESA in order to protect several species of endangered fish; in evaluating the contract claims, the Court suggested that the "shortage clauses" in the contracts might bar most or all of the claims, but the Court did not dispose of the contract claims on that basis; instead, the Court ruled that, under the sovereign acts doctrine, the government could not be held liable for breach of contract based on its actions implementing a "general and public" measure such as the ESA; the Court rejected plaintiffs' argument that the sovereign acts defense required the Court to reexamine the full range of water management options available to the Bureau of Reclamation and the wisdom of the Bureau's management decisions; so long as the agency action was not arbitrary and capricious, the court said, the only relevant question

in applying the sovereign acts defense is whether there is a "causal connection between the sovereign act and the interference that brought about the nonperformance of the contract;" in addition, the Court ruled, for the purpose of applying the sovereign acts defense, that the focus is on the mandate created by the ESA rather then the details of each project-specific application of the Act; finally, disagreeing with the plurality opinion in Winstar, the Court ruled that the sovereign acts defense is not merely a prelude to application of the common law defense of impossibility, meaning that the government need not establish the traditional elements of the impossibility defense in order to rely on the sovereign acts defense; in a prior 2005 ruling in this case the Court dismissed the plaintiffs' takings claim on the ground that the water at issue is owned by the United States, the operator of the Klamath project, rather than the water users, meaning that the entire case has now been resolved in favor of the United States) (GELPI filed several amicus brief in the *Klamath* case on behalf of the Natural Resources Defense Council, which is available on the GELPI website).

3. Asociacion de Subscripcion Conjunta Del Seguro de Responsabilidad Obligatorio v. Flores Galartza, 479 F.3d 63 (1st Cir. Mar. 1, 2007) (in a *revolutionary* decision, a panel of the U.S. Court of Appeals for the First Circuit has adopted two novel ideas: (1) that the *Williamson County* state-litigation requirement only applies if a state has adopted a process "particularly aimed at providing compensation when government action effects a taking," and not simply when the claimant can pursue a state takings claim or invoke some other general remedy; and (2) that a taking suit seeking financial compensation can be brought against a state official in his *personal* capacity; a well-reasoned concurrence by Circuit Judge Jeffrey Howard disputes both of these conclusions; this takings suit was brought by an insurance underwriter created by the Commonwealth of Puerto Rico against the state Treasurer seeking injunctive, declaratory, and compensatory relief based on the Treasurer's retention of tens of millions in insurance premiums allegedly owed to plaintiff; the First Circuit ruled that the claims for injunctive and declaratory relief could proceed against the Treasurer in his official capacity; the Court also concluded that the claims for damages were not barred by ripeness doctrine, and could be brought against the Treasurer in his personal capacity, at the same time, the Court ruled that the claims for damages were barred under qualified immunity doctrine and, therefore, reversed the trial court order allowing the lawsuit to proceed).

4. Rose Acre Farms, Inc. v. United States, 2007 WL 594915 (Feb. 22, 2007) (in a highly problematic ruling, the U.S. Court of Federal Claims awarded $5.4 million in compensation to the plaintiff, one of the largest egg producers in the United States, based on regulatory restrictions limiting the plaintiff's egg business to address an outbreak of salmonella poisoning traced to the plaintiff's egg farms; this award follows a 2004 Federal Circuit decision vacating an earlier takings award in this case; following a second trial on remand focused on factors relevant to the *Penn Central* analysis, the Court of Federal Claims ruled that the U.S. Department of Agriculture effected a taking by barring plaintiff from selling so-called table eggs, and forcing the plaintiff to sell its eggs as lower-value "breaker eggs;" in concluding that the economic impact factor supported a finding of a taking the Court relied on estimates of plaintiff's lost profits over the two-

year period rather than on a more traditional assessment of the reduction in the market value (if any) of the plaintiff's property as a result of the regulation).

5. Huntleigh USA Corp. v. United States, 2007 WL 817296 (Mar. 15, 2007) (in an interesting, high-profile case, the U.S. Court of Federal Claims rejected a taking claim brought by one of the companies engaged in airline passenger and baggage screening displaced by the government's post 9/11 decision to transfer these functions to federal employees; the Court rejected the takings claim on the ground that plaintiff lacked a compensable property interest because it had no protected property right in its business, especially in light of pervasive regulation of this business activity, and given that the interference with the plaintiff's contracts with the airlines amounted to a frustration of the purpose of the contracts rather than a taking of any contract rights).

6. Putnam County National Bank v. City of New York, 829 N.Y.S.2d 661 (Feb. 13, 2007) (the New York Supreme Court appellate division affirmed a trial court order dismissing a complaint alleging the City of New York effected a taking by enforcing water quality regulations in Putnam County by barring a 36-unit subdivision with a centralized septic system and instead authorizing a 17-unit development with individual septic tanks, ruling that the complaint did not present a viable *Penn Central* claim "because the alleged economic impact on the [plaintiff] was insufficient as a matter of law to outweigh the substantial public interest in the City's enforcement of the Watershed Regulations").

7. Reagan v. County of St. Louis, 211 SW3d 104 (Mo. Ct .App. Feb 6, 2007) (applying a thoughtful *Penn Central* analysis, the Missouri Court of Appeals reversed a trial court ruling that the rezoning of plaintiff's property from industrial to residential effected a taking, emphasizing that the economic impact factor did not support a finding of a taking, given that the owner retained a "significant use" that was "economically viable," and that the owner lacked reasonable investment-backed expectations given the residential character of the surrounding neighborhood and the fact that every landowner must anticipate changes in land use regulations to protect the public welfare).

8. Wilson v. Board of County Commissioners, 153 P.3d 917 (Mar. 14, 2007) (the Wyoming Supreme Court affirmed a trial court's dismissal of developers' takings claim based on a County requirement that the plaintiffs set aside part of their property for open space and affordable housing as a condition of receiving subdivision approval; the Court ruled that the claim was "untimely" on the ground that a developer cannot accept a development permit with conditions, raise no objection to the conditions but proceed with the development authorized by the permit, and then only later sue to challenge the constitutionality of the conditions; the Court stated, in accord with various precedents from other jurisdictions, that "there must be a limit on when a landowner can bring a takings action, especially when, as here, the landowners did not object to the conditions at the time of approval, and actually took advantage of the benefit of increased density offered by the regulations).

9. Tapps Brewing Inc. v. City of Sumner, 2007 WL 562586 (W.D.Wash. Feb.16, 2007) (the federal District Court for the Western District of Washington ruled that plaintiff's federal takings claim, based on a municipal requirement that a developer install a large storm water drainage project as a condition of receiving a development permit (a) was ripe because plaintiff had pursued the available state compensation remedy and (b) failed on the merits because the action was not subject to review under the *Nolan/Dolan* standards and did not constitute a taking under *Penn Central*; the court also rejected the plaintiff's taking claim under Washington state's idiosyncratic regulatory takings doctrine).

10. Mount St. Scholastica, Inc v. City of Atchison, 2007 WL 782196 (D. Kan. Mar. 12, 2007) (the federal District Court for the District of Kansas granted summary judgment for the defendant city on plaintiff's claim that denial of a permit to demolish an historic, church-owned building constituted a taking, ruling that (1) the claim was ripe in federal court because it was "unclear" whether plaintiff's regulatory taking claim would succeed under Kansas precedents, and (2) plaintiff's claim under *Penn Central* failed based on the parcel as a whole rule (the building was part of a larger complex of buildings) and because plaintiff failed to demonstrate any interference with investment-backed expectations).

11. Amerisource Corp. v. United States, 2007 WL 949805 (Mar. 23, 2007) (the U.S. Court of Federal Claims rejected a takings claim by a wholesale distributor of pharmaceuticals who had its drugs seized by government agents for use as evidence in a criminal proceeding against third parties, on the ground that the government was acting pursuant to its "police power").

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April 9, 2007