

## 'Takings' Snapshots Volume 33, May 12, 2000

**1. Cooley v. United States**, 2000 WL 528380 (Ct.Fed.Cls., April 28, 2000) (in one more path-breaking opinion from Loren Smith, Chief Judge of the Court of Federal Claims, the court awarded \$2 million in compensation for a permanent regulatory taking as a result of the Army Corps' denial of a permit to fill 33 acres of wetlands; the court reached this result despite the Corps' indication of its willingness to consider a less destructive development proposal as well as the Corps' unilateral decision, after the lawsuit was filed, to issue a permit allowing filling of part and, later, all of the wetlands on the property; the decision breaks dramatic new ground by holding a takings claim ripe despite the plaintiff's failure to scale back an initial, ambitious development proposal as well as by denying the government the ability to exercise the right (recognized in First English) to rescind a regulatory decision and avoid a permanent taking).

**2. SDS Lumber Co v. State of Washington** (Wash.Super.Ct., May 12, 2000) (earlier this week, a jury entered a compensation award of over \$2,000,000 against the State of Washington based on forestry regulations restricting logging activity around an active spotted owl nesting site; before the case was submitted to the jury, the court rejected a large number of State defenses, including that the claim was not ripe because the company had not sought an incidental take permit; and that the claim was precluded by the parcel as a whole rule, by a lack of investment-backed expectations, and by the background principle of Washington property law that wild animals are owned by the state for the benefit of all the citizens) (The Environmental Policy Project filed a brief in the case on behalf of the Washington Environmental Council, which is available on the EPP website).

*CORRECTION: This edition of takings net, contained an error. The description of the Montclair decision from the 9th Circuit inaccurately described the case as involving Pullman abstention. In fact, the case involved the branch of abstention doctrine established by Younger v. Harris. The corrected item reads as follows:*

**3. Montclair Parkowners Association v. City of Montclair**, 2000 WL 553827 (9th Cir., May 8, 2000) (the Ninth Circuit court of appeals vacated a trial court order abstaining from hearing a takings claim based on Younger abstention; the appeals court ruled that since the parallel state litigation had terminated while the appeal was pending (with dismissal of the takings claim under state law), Younger abstention was no longer appropriate; because the court resolved plaintiff's appeal on this basis, the court had no need to consider whether Younger abstention was inappropriate on the ground the California courts provide an inadequate opportunity to raise federal questions, as asserted by plaintiffs' counsel, the Pacific Legal Foundation; the court noted, however, that this question is 'often raised,' citing Justice Scalia's dissent from certiorari in Lambert v. City and County of San Francisco).

**4. Town Council of New Harmony v. Parker**, 2000 WL 419698 (Indiana, April 18, 2000) (The Indiana Supreme Court reversed a finding of a taking, affirmed by the intermediate court of appeals, where (1) the town placed a chain across a dead end road abutting the plaintiff's property (but the evidence showed that the plaintiffs were not thereby denied reasonable access to their property); (2) plaintiffs alleged that the town had placed a de facto moratorium on development of their property (despite the fact they never even had applied for a development permit); and (3) the town rejected the plaintiffs' demand that the town provide water and sewer service to their land without assessing them any portion of the cost of extending such services).

**5. State v. Armstrong**, 2000 WL 502605 (Ala., April 28, 2000) (where state acquired 1.7 acres of plaintiff's property for road widening through eminent domain, owners were not entitled to pursue an inverse condemnation claim demanding that the state acquire the entire 4.4 acre parcel; state was entitled to condemn only the portion of the property it needed, with compensation measured based on the difference between the value of the entire property and the value of the portion remaining).

**6. City of Seattle v. McCoy**, 2000 WL 434078 (Wash.Ct.Apps., April 24, 2000) (in another entry in the takings-as-assault-on-family-values series, the Washington intermediate court of appeals held that closure of a restaurant and lounge for one year pursuant to a drug nuisance statute was a total temporary taking requiring payment of just compensation under First English; the court rejected the nuisance defense to the takings claim on the ground that the plaintiffs never consented to, and did not fail to exercise reasonable care to prevent, illegal drug activity on the premises).

**7. Harsdale Investment Co v. State of Ohio**, 2000 WL 459704 (Ohio Ct.Apps., April 14, 2000) (in a factually complex case, the Ohio intermediate court of appeals affirmed a finding of a taking based on the state's decision to bar plaintiff owners' access to their property after it was discovered that methane gas from an adjacent abandoned coal mine was venting into the plaintiff's commercial bowling alley; the court rejected the government's nuisance defense on the (odd) grounds that the state usually files suit to abate a nuisance and had not done so in this case and because the plaintiffs were denied any opportunity to abate the alleged nuisance).

**8. Metropolitan Development Commission v. Schroeder**, 2000 WL 490741 (Ind.App., April 27, 2000) (appeals court affirmed finding that enforcement of variance condition prohibiting overnight parking of inoperative automobiles on owners' property did not effect a taking; court reached this result despite allegation that condition eliminated all economically viable use of the property, given that plaintiff purchased the property subject to this condition; this ruling therefore supports the Federal Circuit ruling in *Good* (recently undermined by the court's subsequent ruling in the Palm Beach Isles case) that a lack of investment- backed expectations bars a regulatory taking claim, regardless of the magnitude of the alleged loss.

**9. Citizens Accord, Inc. v. Town of Rochester**, 2000 WL 504132 (N.D.N.Y., April 18, 2000) (federal district court dismissed a takings claim by a citizens group based on the town's grant of a permit allowing continued operation of an automobile racetrack; court held that claim was not ripe because plaintiffs had not pursued compensation claim through established state procedures; court also said the fact that the plaintiff alleged a physical taking did not alter obligation to exhaust state remedies and that plaintiff could not avoid takings ripeness rules by asserting that a taking occurred because the town's decision violated the plaintiff's substantive due process rights; finally, on the merits, the court rejected the claim on the ground that the noise produced by the racetrack did not amount to a physical taking of plaintiff's property).

**10. EVAC, LLC v. Pataki**, 89 F.Supp.2d 250 (N.D.N.Y., March 3, 2000) (federal district court granted motion to dismiss takings claim challenging state's establishment of free medical transport service that would compete with plaintiff's private service, because (1) plaintiffs lacked a protected property interest in their future business income, and (2) 'the state did not physically invade, permanently appropriate, or nullify all economically viable use of plaintiff's property').

**11. Holland v. Pardee Coal**, 2000 WL 512883 (W.D. Va., April 7, 2000) (in a suit by trustees for mine workers health care fund, district court held that coal operator was liable to pay workers' health care premiums under the Coal Industry Retiree Health Benefit Act; the court rejected the defense that the imposition of this liability effecting a taking; the court ruled that the only feature of the U.S. Supreme Court's *Eastern Enterprises* decision which is binding on the lower courts is that a challenge to the Coal Act can only proceed under the Due Process Clause, and not under the Takings Clause; on the merits, given the traditionally narrow scope of judicial review under the Due Process Clause, the court upheld the constitutionality of the liability on the facts of this case 'without a doubt').