

## **'Takings' Snapshots Volume 36, September 13, 2000**

**1. Chevron, USA v. Cayetano**, No. 99-15108 (9th Cir., September 13, 2000) (available at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov)) (9th Circuit vacated a federal district court ruling that a Hawaii gas-station rent control law effected a taking because it failed to "substantially advance" a legitimate state interest; the district court had concluded that the law effected a taking under this standard because it permitted incumbent gas station lease holders to reap the premium created by rent control and would not have the intended effect of reducing consumer gasoline prices; the 9th Circuit (per Judge Beezer) ruled that the substantially advance test applied in the 9th Circuit's Richardson case governed this case, but that the trial court erred in granting summary judgment for Chevron because there were disputed issues of material fact about the actual likely effect of the law; Judge William Fletcher concurred in the judgment, arguing that the takings claim should be evaluated based on a more deferential standard of reasonableness, like that applied under the due process clause, and that entry of summary judgment was improper under that standard; Judge Fletcher read Richardson as prescribing application of the "substantially advance" test only when it is "clear" that a rent control law will allow incumbent tenants to capture the premium, a test he thought was not satisfied by this case; while both opinions recognize the uncertainties surrounding the "substantially advance" test, neither extends the suggestion in recent Supreme Court cases (Eastern Enterprises and Del Monte Dunes) that means- ends analysis may have no legitimate place at all in takings doctrine).

**2. Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners**, SC 151 (Colo. S. Ct., August 21, 2000) (In February 2000 (see Takings Snapshots XXX), the Colorado Court of Appeals rejected a takings challenge to a county river corridor district; in a slightly schizophrenic decision, the court ruled that the relevant parcel was limited to the restricted portion of the property, but also held that there was no taking because the designation did not preclude all economic uses of the restricted portion and the plaintiff's partial regulatory takings theory had no merit; the Colorado Supreme Court has now granted review in the case to address the following questions: (1) Whether a compensable regulatory taking can occur under Colo.Const. art. II, section 15, when the complained of regulation "goes too far" and substantially diminishes the value of the property, even in circumstances where the property retains some economically viable use; (2) whether a regulation that prohibits the mining of property constitutes a compensable taking of the property owner's mineral rights under Colo.Const., art, II, section 15; and (3) whether, in analyzing a portion of property to determine if a land use regulation results in a "taking," the court must consider the impact of the challenged action on the property as a whole?"

**3. Philip Morris, Inc v. Reilly**, No. 96-11599-GAO (D. Mass., September 7, 2000) (a federal district court ruled that the Massachusetts cigarette disclosure law, which requires cigarette manufacturers selling their products in the state to disclose the ingredients in their cigarettes, effects an unconstitutional taking; the court arrived at this result without even citing or discussing venerable U.S. Supreme Court precedent stating that it is "too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is being sold," and that "The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the states, in the exercise of the police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth;" the district court previously entered a preliminary injunction against implementation of the disclosure law based on the taking claim, and that ruling was affirmed on appeal by the First Circuit Court of Appeals, see 159 F.3d 670 (1st Cir. 1998)).

**4. Schoolcraft Egg, Inc. v. Schoolcraft Township**, No.216268 (Mich. Ct. Apps., August 11, 2000) (unpublished decision; retrievable via [www.findlaw.com](http://www.findlaw.com)) (in another extraordinary ruling, the Michigan Court of Appeals reversed a trial court decision dismissing a regulatory takings claim brought by the operator of a 200,000-chicken factory farm challenging the enactment of a municipal ordinance that prevented the expansion of his facility; the Court of Appeals ruled that the plaintiff was entitled to proceed on his takings claim on the theory that the regulation failed to

"substantially advance" a legitimate state interest (in part because the township lacked "statistical or scientific data" to support its new restriction on the size of factory farms), and that the plaintiff also was entitled to proceed on a "balancing" takings claim under Penn Central and K & K Construction; the court also found a violation of substantive due process and reversed the dismissal of an equal protection claim; a petition for review is pending in the Michigan Supreme Court).

**5. Machipongo Land & Coal Co., Inc v. Commonwealth of Pennsylvania**, Docket No. 248 M.D. 1992 (Penn. Commwlth. Ct, August 21, 2000) (in this long-running takings case, the trial court issued an "Adjudication and Decree Nisi" tentatively concluding that the designation of certain lands as "unsuitable for mining" under the Pennsylvania Surface Mining Conservation and Reclamation Act effected a taking; the court previously ruled that the relevant parcels would be limited to the regulated portions of the properties at issue, so long the regulated portions were economically viable as stand alone mining projects; applying that standard, the trial court has now found a taking; both sides have filed post-trial motions seeking correction of certain alleged factual and legal errors; the state has raised a host of challenges to the tentative order, including that the trial court defined the relevant parcel incorrectly; the trial court improperly barred the state from presenting a nuisance defense, on the theory that mining could never be a nuisance under Pennsylvania law; and the trial court improperly failed to dismiss the claim of one set of plaintiffs based on a lack of reasonable investment backed expectations).

**6. San Remo Hotel v. City and County of San Francisco** 98 CalRptr.2d 792 (Cal.Ct.Apps., August 8, 2000) (Relying on the California Supreme Court's Ehrlich decision, court of appeals held that validity of fee imposed pursuant to city's hotel conversion ordinance had to be evaluated using the Nollan/Dolan heightened scrutiny standard, and also ruled that the fees at issue effected a taking under this standard).

**7. Cook v. Cleveland State University**, 104 F. Supp. 752 (N.D.Ohio, July 10, 2000) (rejecting land owner's claim that state university had effected a taking by targeting plaintiff's property for future acquisition, given that plaintiff failed to demonstrate any permanent physical occupation of his land, or to establish that the university deprived him "of all "or even some " of the economically viable usages of his land.")

**8. Thomas Tool Services, Inc v. Town of Croydon**, 2000 WL 1210644 (N.H., August 28, 2000) (the New Hampshire Supreme Court ruled that a state statute permitting a town to acquire a tax-delinquent property worth \$65,000 for \$370.26 effected a taking under the New Hampshire Constitution because it imposes an "unduly harsh penalty;" the court noted that most other courts, interpreting the federal takings clause, had found no taking in similar circumstances).

**9. Boling v. United States**, 220 F. 3d 1365 (Fed. Cir., August 10, 2000) (vacating trial court dismissal, on statute of limitations grounds, of takings claims based on alleged property loss caused by erosion resulting from construction of federal waterway; court ruled that plaintiffs in these circumstances are not required to bring suit until the damage has made substantial inroads onto the property so that the permanent nature of the taking is evident and the extent of the damage is foreseeable; court also ruled that neither the continuing claim theory nor equitable tolling could excuse the plaintiffs' failure to file a timely claim).

**10. Pendleton v. United States**, 2000 WL 1234296 (Ct.Fed.Cls., August 28, 2000) (actions by Kentucky Natural Resources and Environmental Protection Cabinet to address a landslide caused by surface mining of coal, which actions allegedly effected a taking of plaintiff's property, did not support a taking claim against the United States, where the federal government's role was limited to setting standards for the work, approving grant contracts, and inspecting and paying for the work).