

Takings Snapshots, Volume 74, December 9, 2004

1. *Avenal v. State of Louisiana*, 2004 WL 2365216 (La., Oct. 19, 2004) (in a major victory for Louisiana's coastal restoration program, the Louisiana Supreme Court unanimously reversed a \$1.3 BILLION takings award to oyster men holding leases in submerged lands allegedly damaged by hydrologic changes caused by Mississippi River diversion projects designed to stem disastrous erosion along the Louisiana shore; the court rejected most of the claims under the Louisiana Constitution based on language in the leases indemnifying the State from liability; the court rejected the remaining claims under the Louisiana Constitution based on the applicable statute of limitations; the court also rejected claims under the federal Constitution, relying on the reasoning of the Federal Circuit decision in the federal court version of this litigation, based on plaintiffs' lack of reasonable investment-backed expectations; in the alternative, the court rejected Lucas-type claims under the federal Constitution based on background principles of Louisiana property law and the "actual necessity" doctrine). (The amicus brief GELPI filed in the case is available on the GELPI website, www.gelpi.org).

2. *Alonzo v. State of Louisiana*, 884 So.2d 634 (La. App., Sept. 8, 2004) (in a companion case to the Louisiana *Avenal* litigation (now probably effectively rendered moot by the Louisiana Supreme Court decision in that case), the Louisiana Court of Appeals reversed a \$291 million takings award to oyster lease holders affected by coastal restoration projects; the trial court, relying on the doctrine of *res judicata*, had found takings liability and calculated a compensation award based on the results of the earlier *Avenal* case; the court of appeals reversed on the ground that *res judicata* does not apply when, as in this case, there is no identity of parties).

3. *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir., Aug. 26, 2004) (in a significant decision dealing with the interaction of state and federal court jurisdiction over takings claims, the Sixth Circuit affirmed the district court's dismissal of a taking claim based on denial of a mining permit, but on different grounds than those relied upon by the district court; the plaintiff initially filed suit in state court under the state constitution (purportedly "reserving" its federal constitutional claim with an England reservation), and the state court rejected that claim for failure to exhaust administrative remedies; in the subsequent federal court action, the federal district court dismissed the federal takings claim on ripeness grounds and based on the *Rooker-Feldman* doctrine; on appeal, the Sixth Circuit ruled: (1) *Rooker-Feldman* does not apply, because adjudication of the federal claim would not necessarily challenge any of the state court

rulings; (2) plaintiff satisfied Williamson County's compensation-exhaustion requirement because the state court decision definitively disposed of the case (albeit on procedural grounds); (3) the England reservation filled by plaintiff in state court precluded assertion of a res judicata defense by the government in federal court (though not necessarily issue preclusion, an issue the court did not need to reach), (4) unresolved factual questions precluded a resolution of whether the Williamson County finality-ripeness requirement was satisfied, but (5) in any event, the claim for monetary relief under the federal Takings Clause against the state was barred by the Eleventh Amendment; in dictum, the court opined that state sovereign immunity would not bar a claim under the federal Takings Clause in state court; Judge Baldock, concurring, would have ruled that Rooker-Feldman did apply and that, in any event, plaintiff's claim in federal court was barred by res judicata).

4. *John R. Sand & Gravel Co. v. United States*, 62 Fed.Cl. 556 (Ct. Fed. Cls., Oct. 29, 2004) (in a significant "background principles" decision, the court of federal claims (Hewitt, J.) rejected a physical-occupation taking claim based on an EPA order requiring the erection of a fence around the site of plaintiff's sand and gravel operations, which had been declared a superfund site; first, in an apparently novel ruling, the court ruled that plaintiff's lease interest in the area was "noncompensable" under "equitable principles" because plaintiff had been actively involved in the disposal of hazardous waste on the site that led to the superfund designation and in turn to the need for the fence; second, the court ruled that the claim was barred under background principles of Michigan nuisance law because the fence served to prevent interference with remediation of the site in violation of Michigan's statute and also served to protect the public from the risk of methane explosions; the court addressed the relevance of plaintiff's alleged lack of state permits to operate the site as going to the issue of what level of compensation (if any) might be due rather than to the issue of liability).

5. *County of Clark v. Hsu*, (Nev., Sept. 30, 2004) (the Supreme Court of Nevada, reversing a \$22 million takings award, concluded that county restrictions on building height adjacent to the county airport did not effect a taking; the court rejected plaintiffs' per se takings claims on the ground that a height restriction does not represent the kind of physical occupation at issue in *Causby* or *Griggs* that would support a finding of a per se taking; the court also ruled that plaintiffs' regulatory takings claims were not ripe because they had failed to submit a meaningful application and the futility exception to ripeness doctrine did not apply in this case).

6. *Gacke v. Pork Xtra, LLC*, 684 NW 2d 168 (Iowa, June 16, 2004) (the Supreme Court of Iowa, reaffirming its landmark 1998 decision in *Bormann v. Board of Supervisors*, ruled that a statute similar to that at issue in *Bormann*, granting immunity from nuisance suits to operators of animal feeding operations, constituted a taking under the Iowa Constitution; the court rejected the argument that *Bormann* was incorrectly premised on the theory that this type of statutory immunity constituted a *per se* taking, stating: "Whether the nuisance easement created by [the statute] is based on a physical invasion of particulates from the confinement facilities or is viewed as a nontrespassory invasion akin to the flying of aircraft over the land, it is a taking under Iowa's Constitution. We decline to retreat from this view;" having resolved the issue under the state constitution, the court determined that it was unnecessary to determine whether the statute violated the federal Takings Clause).

7. *Hollywood Park Humane Society v. Town of Hollywood Park*, 2004 WL 390807 (W.D. Tex., January 23, 2004) (in an interesting entry in the debate over takings claims based on wildlife management regulations, the federal district court in Texas rejected, in the context of a motion for a preliminary injunction, the claim that a municipal program to "trap, transport and process" wild deer effected a taking of citizens' property interests in the deer; although the deer were wild, the plaintiffs claimed that they had property interests in the deer because they cared for the deer, fed them, and "regarded them as family;" the court ruled that so long as the deer had not been reduced to possession they remained "*ferae naturae*" and could not be treated as private property; absent a threshold property interest, the taking claim necessarily failed).

8. *Abney v. Alameida*, 334 F. Supp. 2d 1221 (S.D.Cal., Aug. 20, 2004) (the federal district court rejected a taking claim by a state prisoner based on deductions by prison officials from his prison trust account to pay restitution fines imposed as part of his criminal sentence; the court ruled that since plaintiff was effectively challenging the government's right to take the property in the first place, the claim more appropriately lay under the Due Process Clause; the court also ruled that since the purpose of the deductions was to make payment to the victim of plaintiff's crime, "fairness and justice," the animating concerns of takings jurisprudence, did not support the claim).

9. *Vaizburd v. United States*, 384 F.3d 1278 (Fed.Cir., Oct. 1, 2004) (the U.S. Court of Appeals for the Federal Circuit, vacating a decision of the Court of Claims, ruled that the plaintiffs were not entitled to compensation based on a traditional before-and-after calculation of property

value, because plaintiffs failed to show any reduction in the value of their property as a result of a deposit of sand on the property caused by a project of the Army Corps of Engineers; nonetheless, the appeals court vacated the claims court decision dismissing the claim and remanded the case for consideration of whether plaintiffs might be entitled to recover based on a "cost of cure" theory, that is, based on the out-of-pocket expenses they might have incurred in removing sand from their property).

10. *Wilmington Hospitality, LLC v. Newcastle County*, 2004 WL 2419157 (unpublished) (Del. Super., Oct. 8, 2004) (reaffirming a prior decision dismissing a regulatory taking claim based on zoning restrictions, the Delaware Superior Court ruled that it had properly dismissed the claim, which was based on a Lucas theory, because the evidence that the plaintiff's lender foreclosed on the property, and thereby granted plaintiff a measure of debt relief, demonstrated as a matter of law that plaintiff had not been denied all economically viable use of the property by the county's regulatory actions; the court observed, "The law is clear that a categorical taking only occurs when there has been a complete elimination of value or a total loss.").