

## **Takings Snapshots, Volume 76, April 20, 2005**

1. *Klamath Irrigation District v. United States*, 64 Fed.Cl. 378 (Feb. 28, 2005) (in a very significant decision, the Court of Federal Claims (Allegra, J.) granted the motion of the Pacific Coast Federation of Fishermen's Associations to intervene in this controversial takings case arising from restrictions on water use imposed under the federal Endangered Species Act to protect salmon and other endangered species in the Klamath River basin; applying FRCP 24(a), the court ruled that PCFFA has an economic interest in the salmon that spawn in the Klamath River sufficient to support their intervention in the litigation; the court rejected the argument that PCFFA would not be affected by the litigation because a taking claim seeks financial compensation from the government rather than an injunction; the court also rejected the position, adopted in some prior rulings of the court of claims on intervention motions, that the "limited jurisdiction" of the court of claims mandates a narrow reading of the rules on intervention; finally, the court concluded that PCFFA's interest would not be adequately represented in this case by the United States, observing that the United States "does not claim to the contrary, nor, in good faith, could it, given the tensions that arose when defendant recently settled *Tulare Lake Basin Water District v. U.S.*...., a case involving similar issues.") (on April 12, 2005, plaintiffs filed a motion for reconsideration of the order granting intervention or, in the alternative, for leave to pursue an interlocutory appeal to the Federal Circuit).

2. *Moden v. United States*, 2005 WL 857436 (Fed.Cir., April 15, 2005) (the Federal Circuit, affirming the Court of Federal Claims, rejected the takings claims of landowners alleging that the groundwater under their land had been contaminated as a result of the use of a solvent in cleaning airplane parts at an adjacent U.S. Air Force base; the court stated that to establish liability on a takings theory the plaintiffs were required to show that the government should have predicted or foreseen (1) that the chemical solvent used in the cleaning process included a contaminant, (2) that the solvent would be released into the groundwater, and (3) that the contaminant would naturally migrate to plaintiffs' property; the court ruled that plaintiffs failed to present any material issue of fact as to the second element, and therefore affirmed the trial court's grant of summary judgment to the government, without addressing the government's other arguments; the Federal Circuit specifically rejected the position that proof of causation of injury is sufficient to establish a taking; instead, the court said, a claimant also must show that the government "should have predicted or foreseen" the injury).

3. *Hansen v. United States*, 2005 WL 832332 (Ct.Fed.Cls., April 11, 2005) (the Court of Federal Claims, in a decision issued just four days prior to the decision in the *Moden* case (see above), reached an opposite conclusion based on closely analogous facts; in a detailed opinion surveying the jurisprudence on the distinction between takings and tort claims, the court (per Block, J.) ruled that a landowner whose groundwater is contaminated by chemicals that were deposited on and migrated from an adjacent Forest Service property stated a viable claim for relief under a takings theory; apparently in contradiction with the Federal Circuit's reasoning in *Moden*, the court suggested that proof of causation in fact is sufficient to establish liability, and that there is no requirement of foreseeability of injury).

4. *Hash v. United States*, 2005 WL 742881 (Fed. Cir., April 4, 2005) (in a case arising from a rail-trail conversion in Idaho, the Federal Circuit, reversing a decision of the Federal District Court in Idaho, ruled that when the federal government granted a railroad right of way across federal lands a century ago it granted only an easement across the property, meaning that when the railroad was eventually abandoned the successors in interest of those who received federal land grants subject to the easements acquired full fee interests in the railroad right of way; accordingly, the court concluded that conversion of the railroad right of way to trail use effected a compensable taking of claimants' property).

5. *Beres v. United States*, 2005 WL 615737 (Ct.Fed Cls, March 16, 2005) (in another rail-trail takings case involving the same issue as the Hash case (see above) the Court of Federal Claims, in an exhaustive analysis, concluded that the United States did not retain a reversionary interest when it conveyed a railroad easement under the General Railroad Act of 1875 and, therefore, upon abandonment of the line by the railroad, title to the right of way did not revert to the United States but instead passed to the successors in interest of those who received land grants from the federal government subject to the easement).

6. *Ganci v. New York City Transit Authority*, 2005 WL 850915 (S.D.N.Y., April 13, 2005) (in a fascinating federal district court decision ( the basis for the court's jurisdiction was problematic under Williamson County, an issue not discussed by the court), the court rejected a taking claim based on the theory that the process for turning in expired NYC subways tokens after a fare increase was so burdensome that the process effectively took the value of the tokens, the court ruled that the purchase of a token creates an implied contract entitling the holder to a refund; however, the court ruled that while some contracts can create protected property interests for the purpose of the Takings Clause a routine government service contract of this type does not give rise to a property right; in the alternative, the court ruled that the plaintiff had not suffered a taking because the economic impact of the refund process was de minimis and the refund process, which was very longstanding, did not interfere with investment-backed expectations).

7. *City of Coeur D'Alene v. Simpson*, 2005 WL 286936 (Id., Feb. 8, 2005) (the Idaho Supreme Court, in a 3-2 decision, affirmed a trial court ruling rejecting a taking claim based on enforcement of an order prohibiting erection of a fence along the borders of a lakefront lot; applying the parcel as a whole rule, the court ruled that the lakefront parcel was properly aggregated with plaintiffs' upland parcel; based on this parcel definition, the court had no difficulty ruling that the taking claim had no merit; the dissenting justices argued that the city regulation constituted a taking because it effectively authorized the public to physically invade plaintiffs' private property).

8. *BHA Investments, Inc. v. City of Boise*, 108 P.3d 315 (Id., Feb. 18, 2004) (in another entry in the "takings and errors" debate, the Idaho Supreme Court ruled that the City of Boise effected a taking by imposing a transfer fee on the sale of liquor licenses; the court relied on a prior Idaho Supreme Court decision holding that the city lacked the legal authority to impose this fee, and distinguished an essentially identical case, involving the State as defendant, in which the taking claim was rejected and where the state had had

legal authority to impose the fee; unfortunately, while the court's resolution of the takings issue rested squarely on the illegality of the government action, the decision contains no analysis of why the substantive legality or illegality of government action should affect the government's liability under either the federal or Idaho Takings Clauses).

9. *The Committee for Reasonable Regulations of Lake Tahoe v. Tahoe Regional Planning Agency*, 2005 WL 885470 (D.Nev., April 14, 2005) (the Federal District Court for Nevada ruled that the Committee for Reasonable Regulation of Lake Tahoe, formed to promote "effective, fair, and reasonable regulation" of development around Lake Tahoe, lacked standing to bring an as applied, Penn Central takings challenge to the Tahoe Regional Planning Agency's new "scenic review system;" the court ruled that the Committee failed to meet the requirement for associational standing that assertion of the claim not require participation of individual association members; the court reasoned that resolution of this as applied claim would require individualized consideration of each land owner's investment-backed expectations and of the economic impact of the review system on individual land owners, and therefore the suit could not go forward without the land owners' participation; the court rejected the argument that the Committee could overcome this hurdle on the basis that it was seeking equitable rather than financial relief).

10. *Patchen v. Florida Department of Agriculture & Consumer Services*, 2005 WL 856890 (Fl., April 14, 2005) (the Florida Supreme Court, in the latest entry in the series of takings cases arising from the State's efforts to deal with agricultural pests threatening Florida's citrus industry, ruled that a claim for compensation based on destruction of uninfected, healthy noncommercial citrus trees within 1900 feet of a tree infected with citrus canker was not governed by a prior decision by the Florida Supreme Court rejecting a taking claim based on the destruction of healthy commercial citrus stock within 125 feet of infected trees; however, the Court ruled, without squarely addressing the constitutional issue, that the plaintiffs were entitled to compensation under a new statutory compensation program; one concurring justice and one dissenting justice, while reaching different conclusion on the statutory issue, would have gone on to address the constitutional takings issue).

11. *Regency Outdoor Advertising Inc. v. City of Los Angeles*, 126 Cal App.4th 1281 (Feb. 17, 2005) (in relatively entertaining case, the California Court of Appeals affirmed the ruling of a trial court rejecting the claim that the owner of billboards in the vicinity of Los Angeles International Airport suffered a taking when the city planted palm trees and constructed lighted pylons that obstructed the public visibility of its billboards; the court recognized that interference with physical access to a commercial property can constitute an "actionable interference" with private property rights, but ruled that, under California precedents, mere interference with public visibility cannot support a taking claim).

12. *Land Grantors in Henderson, Union, & Webster Counties v. United States*, 2005 WL 741852 (Ct.Fed.Cls., April 1, 2005) (in a massive opinion in a case based on a 1993 congressional reference, the Court of Federal Claims concluded that numerous Kentucky land owners (or their heirs), who agreed to sell their lands during WWII under threat of

condemnation for the creation of a large military facility, were entitled to the contract remedy of restitution on the ground that their agreements to sell their properties to the United States were based on a mutual mistake of fact (i.e. both parties believed there were no valuable oil and gas deposits beneath the land); the court ruled that, based on the unique and complicated facts of this case, plaintiffs were entitled to the benefit of the doctrine of equitable tolling and, therefore, their claims were not barred by the statute of limitations; addressing what it called “a question of first impression,” the court expressed the tentative view that, because it had found the plaintiffs had a “legal basis” for obtaining relief, it should enter judgment in favor of plaintiffs, avoiding the need to make a recommendation to Congress on whether it should grant plaintiffs financial relief on an equitable basis).

13. *City of Gettysburg v. United States*, 2005 WL 627792 (Ct.Fed.Cls., March 16, 2005) (in a takings suit based on physical damage to a municipal water supply system allegedly caused by federal agency management of a water reservoir, the Court of Federal Claims ruled that the claim was barred by release language contained in both the easement allowing the municipality to construct the system across federal lands and in the Rivers and Harbors Act section 10 permit authorizing construction of the system).

14. *Forsgren v. United States*, 2005 WL 659143 (Ct.Fed.Cls., March 21, 2005) (the Court of Federal Claims rejected a government motion to dismiss, based on the applicable statute of limitations, a claim of a temporary taking arising from federal agency activities that resulted in flooding of plaintiffs’ land; the court ruled that the statute of limitations did not begin to run until the extent of the property damage due to the flooding had become apparent, and in any event the government’s offer to mitigate the damage caused by the flooding delayed the running of the statute of limitations).

15. *Benchmark Resources Corp. v. United States*, 2005 WL 627565 (Ct.Fed.Cls., March 17, 2005) (the Court of Federal Claims ruled that the Office of Surface Mining’s failure to follow regulations requiring individual notice to land owners meant that the plaintiffs were not barred by the applicable six-year statute of limitations from pursuing a takings claims filed in 2003 based on the designation in 1987 of an area as unsuitable for mining under the Surface Mining Control and Reclamation Act; the ruling apparently creates a potentially significant exception to the general rule that the statute of limitations begins to run when, based on “reasonable diligence,” a plaintiff could have discovered the basis for a claim against the United States).

16. *Renewal Body Works, Inc. v. United States*, 2005 WL 741706 (Ct.Fed.Cls., April 1, 2005) (based on the Federal Circuit’s 2004 Caldwell decision, the Court of Federal Claims ruled that a taking claim challenging creation of a rail-trail was barred by the applicable statute of limitation because the claim accrued when the Interstate Commerce Commission issued the Notice of Interim Trail Use and plaintiff filed its claim more than six years after that date).

17. *Murphy v. New Milford Zoning Com’n*, 2005 WL 678733 (2nd Cir., March 25, 2005) (illustrating the breadth of the finality prong of the Williamson County ripeness rules, the

U.S. Court of Appeals for the Second Circuit vacated, based on the Supreme Court's 1985 decision in *Williamson County*, a trial court ruling based on the First Amendment barring a municipality from enforcing a regulation prohibiting regularly scheduled prayer meetings of 25 or more persons who are not family members within a private home; the court ruled that, given that plaintiffs had not pursued available avenues for obtaining administrative relief, the First Amendment claim was not ripe for adjudication).

18. *In Re Condemnation by the Municipality of Penn Hills*, 2005 WL 564113 (Pa. Cmwlth., March 11, 2005) (affirming a ruling by the Court of Common Pleas, the Pennsylvania Commonwealth Court ruled that a 29-month injunction on development pending resolution of a question about the location of the boundary line between two different municipalities did not constitute a compensable taking under the tests articulated by the U.S. Supreme Court).

19. *Munari v. City of El Paso Robles*, 2005 WL 668454 (Cal App., March 23, 2005) (not officially published) (the California Court of Appeals affirmed dismissal of takings claims against the city based on alleged delay in holding a hearing on an Environmental Impact Report and in requiring the plaintiff to pursue a special plan amendment; the court ruled that the city's actions delayed the plaintiff's proposed project but did not prohibit use of the property altogether).

20. *Town of Clinton v. Schrempp*, 2005 WL 407716 (Conn. Super, Jan. 14, 2005) (in an action brought by a town seeking authorization, pursuant to a Connecticut statute, to conduct various tests for groundwater contamination, the Connecticut Superior Court, based on an exhaustive analysis of the takings issues potentially raised by intrusive investigations of environmental conditions on private property, authorized limited visual inspection of the property and reserved the issue of whether the court might permit more intrusive investigations on the property in the future).