

Georgetown Environmental Law and 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 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.

1. *John R. Sand & Gravel Co. v. United States*, U.S. No. 06-1164 (U.S. Sup. Ct., cert. granted, May 28, 2007) (the U.S. Supreme Court granted certiorari in this case to resolve whether the U.S. Court of Appeals for the Federal Circuit, in an appeal from the dismissal of a takings claim on the merits, properly ruled that the claim was barred by the applicable statute of limitations, even though the United States had not argued that the claim was time barred; in other words, the Supreme Court will consider whether a statute of limitations defense to a takings claim involves a jurisdictional issue that the appeals court can raise at any time or whether instead it represents a non-jurisdictional issue and thus will be waived if not raised by the United States).

2. *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 2007 WL 1189449 (8th Cir. Apr. 24, 2007) (in an interesting case addressing various key issues, the U.S. Court of Appeals for the Eighth Circuit affirmed a district court decision rejecting a takings challenge to Iowa legislation outlawing an electronic lottery game; in affirming rejection of the claim, the appeals court ruled that (1) the plaintiff lottery operator possessed cognizable property interests in its business and lottery machines, but not in state licenses and contracts governing the lottery operations, which were expressly made subject to future legislation; (2) plaintiff's allegations did not state a claim for a permanent physical invasion of private property; (3) plaintiff's *Lucas* claim failed because the *Lucas per se* rule applies only to land and not to personal property; (4) in any event, plaintiff's *Lucas* claim failed because the plaintiff retained at least the salvage value of the lottery machines; and (5) plaintiff's case also failed under *Penn Central*, primarily because there was no showing of interference with reasonable investment-backed expectations).

3. *Severance v. Patterson*, 2007 WL 1296218, (S.D. Tex. May 2, 2007) (in a suit challenging the constitutionality of the Texas Open Beaches Act, which recognizes and provides for enforcement of a rolling public access easement along the Texas coast, the Federal District Court for the Southern District of Texas ruled that (1) state sovereign immunity does not bar a suit seeking injunctive and declaratory relief under the Takings Clause; (2) the claim challenging the potential removal of plaintiff's houses from the beach area covered by the easement was not ripe because the record before the Court was unclear as to when or if the state would act to remove the homes; and (3) the claim based

on an alleged continuing physical occupation of plaintiff's property due to public access was ripe and had to be dismissed because the Texas rule regarding rolling easements is rooted in the Texas common law and therefore represents an applicable background principle of state law barring a takings claim).

4. *Stockton East Water Dist. v. United States*, 2007 WL 1464512 (Ct. Fed Cls. May 18, 2007) (in this high profile takings and contract action arising from implementation of the Central Valley Project Improvement Act, the Court of Federal Claims denied, in its entirety, plaintiffs' motion for reconsideration of its February 20, 2007 opinion rejecting plaintiffs' claims; most notably, in rejecting one of the government's alternative defenses, the Court adhered to its prior position that in a breach of contract suit the determination that a government action is a sovereign act is merely a prelude to application of the traditional common law impossibility defense; this ruling conflicts with the ruling of another judge of the claims court in the *Klamath* case, which found that the sovereign acts doctrine represents a free-standing defense).

5. *United States v. 191.07 Acres of Land*, 482 Fed. 3d 1182 (9th Cir. Apr. 4, 2007) (in a case raising a complicated procedural question, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court order by a vote of 2 to 1, ruling that the property owner was not entitled to a jury trial on the issue of the amount of compensation due where (1) the government acquired the plaintiff's mineral interests through a direct condemnation action (in which a jury trial on the compensation issue is generally available) and (2) the owner brought an inverse condemnation counter suit (in which a jury trial on compensation is generally not available) under the Mining in the Parks Act on the theory that the government had taken the property at an earlier date by imposing regulatory restrictions on plaintiff's mineral interests; the dissent argued that because the claimant was originally entitled to a jury trial in the direct condemnation action, his filing of an inverse condemnation counter suit should not be deemed to strip him of his right to a jury's determination on the compensation issue).

6. *Rockstead v. City of Crystal Lake*, 2007 WL 1052885 (7th Cir. Apr. 10, 2007) (the U.S. Court of Appeals for the Seventh Circuit (Posner, J.) affirmed the district court's dismissal under *Williamson County* of an inverse condemnation claim based on a city's construction of a pipeline that allegedly caused intermittent flooding of plaintiff's land; the Court reasoned that the *Williamson County* "futility" exception did not apply even though Illinois precedents generally bar recovery based on government actions causing intermittent flooding, given the antiquity of the precedents and the evolution of the legal standards applicable to wetland areas, which the Court believed created at least a possibility that the Illinois courts might grant relief to plaintiff; in addition, pointing to the Supreme Court's *San Remo* decision, the Court observed that once the state law claim was litigated in state court, the litigation in state court is the end of the road, meaning that the plaintiff would be barred from relitigating the claim under the Full Faith and Credit Clause).

7. *Island, Inc. v. City of Bradenton Beach*, Case No. 2004 CA 595 (Fl. Cir. Ct. May 8, 2007) (in a somewhat novel case, the Florida Circuit Court rejected a takings claim,

based on the owner's lack of reasonable investment-backed expectations, where the plaintiff purchased the property subject to a preservation land designation pursuant to which the prior owner of the property had received transferable density rights for use on another portion of the property; the Court stated that "[b]uyers are deemed to purchase property with constructive knowledge of the applicable land use regulations and compensable takings and inverse condemnations do not occur where the property continues to exist in the state in which the purchasers have contracted to acquire it.")

8. *Braun v. Ann Arbor Charter Township*, 2007 WL 430757 (E.D. Mich., Feb. 5, 2007) (in a thoughtful decision, the Federal District Court for the Eastern District of Michigan ruled that a federal takings claim based on a township's refusal to rezone agricultural land for development was not ripe under *Williamson County*, even though the owner had previously filed suit in state court and the state court had rejected the claim as unripe based on a lack of a final order, because the state court had not yet had an opportunity to address the question of whether the plaintiff was entitled to compensation).

9. *Banks v. United States*, 2007 WL 1437453 (Ct. Fed. Cls. May 3, 2007) (on remand from the Federal Circuit's 2003 decision reversing an earlier dismissal of the case as time barred, the U.S. Court of Federal Claims rejected the government's argument that additional discovery disclosed that the claims of various plaintiffs should be deemed time barred notwithstanding the appeals court ruling; the Federal Circuit had ruled that the plaintiffs' takings claims based on coastal erosion allegedly caused by a government navigation project accrued once there was no ground for a justifiable uncertainty that the plaintiffs had suffered permanent injury; the court of claims rejected the government's argument that evidence regarding certain plaintiffs' actual knowledge of the relevant circumstances precluded them from claiming a justifiable uncertainty within the limitations period; in rejecting this argument the court reasoned that the justifiable uncertainty test represents an objective standard and its application does not turn on the subjective knowledge of individual plaintiffs).

10. *Jones v. City of McMinnville*, 2007 WL 1417293 (May 9, 2007) (unpublished decision) (the U.S. Court of Appeals for the Ninth Circuit affirmed a District Court order declining to remand a state law inverse condemnation claim to state court, where the plaintiffs presented ripe federal substantive due process, equal protection, and other legal claims and the District Court exercised its discretion to accept supplementary jurisdiction over the state law inverse condemnation claim, even though the plaintiff's federal takings claim was not ripe for consideration in federal court under *Williamson County*; the Court expressly ruled that the second prong of *Williamson County* (the state exhaustion requirement) does not mandate that available state law compensation remedies be pursued in state court; the appeals court also barred plaintiffs from pursuing a substantive due process claim because it merely restated the takings claim, a conclusion that may be inconsistent *Lingle*, although the appeals court never describes the nature of the plaintiffs' takings claim).

11. *Lowe v. United States*, 2007 WL 1160325 (Ct. Fed. Cls. Apr. 16, 2007) (in a case involving scattered allegations by a *pro se* litigant challenging a wide range of alleged

government wrongdoing, the U.S. Court of Federal Claims dismissed plaintiff's Fifth Amendment takings claim on the ground that the Court lacked jurisdiction over takings claims arising from "unauthorized" government action, stating that "an actionable taking . . . can only result from authorized federal actions," and "unauthorized actions by federal officials such as those alleged in the Complaint, are torts, and must be pursued in the United States district courts").

12. *Edelmann v. United States*, 2007 WL 1229433 (Ct. Fed. Cls. Apr. 24, 2007) (in another *pro se* case involving numerous claims arising from the claimant's criminal prosecution, the U.S. Court of Federal Claims concluded that it lacked jurisdiction over plaintiff's takings claims because "this court lacks jurisdiction over a taking claim that requires the court to scrutinize the actions of another tribunal").

13. *Doney v. Pacific County*, 2007 WL 1381515, (W.D. Wash. May 9, 2007) (the Federal District Court for the Western District of Washington issued an order remanding to state court a developer's takings claim based on a development moratorium, after the defendant County initially removed the action to federal court, on the ground that the claim was not ripe in federal court under *Williamson County*; the Court rejected the County's argument that the claim should be dismissed rather than remanded, reasoning "[t]he holding of the Supreme Court in *San Remo* changed the landscape of federal regulatory takings claims, making clear that the failure to simultaneously pursue federal claims in state court with state inverse condemnation claims will likely result in a state court judgment that has a preclusive effect in a later federal action," and, therefore, "[g]iven the holding of *San Remo*, it is more appropriate, in the interest of fairness, to remand plaintiff's federal takings claim along with plaintiff's state inverse condemnation claim, so that plaintiff may pursue those claims simultaneously;" finally, reflecting the Ninth Circuit's continuing confusion about the viability of due process claims following *Lingle*, the Court dismissed the plaintiff's due process claim on the ground that "the takings clause provides an explicit textual source of constitutional protection against private takings" and therefore precludes an independent due process claim).

14. *Kircher v. City of Ypsilanti*, 2007 WL 1308680 (E.D. Mich. May 3, 2007) (the Federal District Court for the Eastern District of Michigan dismissed a federal takings claim based on state court proceedings that a city had commenced to abate nuisance conditions on plaintiff's property, which eventually led to a judicial order that the property be sold; the Court ruled that the claim was barred under *Younger* abstention doctrine because the state court proceedings were still pending, and in any event the federal takings claim was not ripe under *Williamson County*).

15. *C & C Realty v. North Olmsted Bd. of Zoning Appeals*, 2007 WL 1365965 (Ohio App. May 10, 2007) (affirming a trial court ruling, the Ohio Court of Appeals ruled that a city Zoning Board of Appeals did not effect a taking by denying a car dealership's application to rezone a portion of its property from residential to commercial use; applying the traditional "property as a whole" rule, the Court ruled that the plaintiff's claim under *Lucas* failed, despite the fact that the land-locked character of the parcel for which rezoning was sought allegedly precluded its use for residential purposes).

16. *Burt Dev. Co. v. Bd. of Comm'rs of Lee County*, 2007 WL 1339856 (11th Cir. May 8, 2007) (unpublished decision) (affirming a district court decision, the U.S. Court of Appeals for the Eleventh Circuit ruled that a developer's challenge to a county zoning regulation was barred under the *Rooker-Feldman* doctrine given that the plaintiff had previously pursued an identical takings claim unsuccessfully through the Georgia court system; however, in one modification to the lower court decision, the appeals court ruled that the district court should have dismissed the case for lack of jurisdiction instead of granting summary judgment to the defendant County).

17. *Coates v. Hall*, 2007 WL 1091329 (W.D. Tex. Apr. 10, 2007) (in another case reflecting continuing post-*Lingle* confusion, the Federal District Court for the Western District of Texas, on a motion to alter or amend its judgment dismissing various constitutional challenges to groundwater regulation, reaffirmed its prior conclusion that plaintiff's arbitrary and capricious substantive due process claims were subsumed by plaintiff's separate regulatory takings claim).

18. *Patel v. City of Everman*, 2007 WL 1159668 (N.D. Tex. Apr. 18, 2007) (following a city's removal from state court of a takings claim based on a city demolition order, the Federal District Court for the Western District of Texas ruled that the federal claim was not ripe under *Williamson County* and therefore should be remanded; the Court also ruled that the plaintiff's various due process arguments in opposition to the city's affirmative defenses to the takings claim were intimately intertwined with the federal takings claim and therefore were also not ripe).

19. *Kitchen v. City of Newport News*, 2007 WL 1295812, (E.D. Va. May 1, 2007) (the Federal District Court for the Eastern District of Virginia dismissed, under *Williamson County*, an inverse condemnation action against a city based on an allegation that the city acted improperly in failing to prevent or reduce flooding damage; the Court ruled that the claim was not ripe in federal court given that plaintiffs had filed their federal suit during the pendency of a parallel state action and is still awaiting a decision from the state supreme court).

20. *McIntyre v. Bd. of County Comm'rs*, 2007 WL 926883 (D. Co. Mar. 16, 2007) (the Federal District Court for the District of Colorado ruled that an inverse condemnation claim based on the County's prosecution of an unsuccessful quiet-title action designed to establish public rights in plaintiff's land under the doctrine of prescription was time barred; the Court ruled that the claim accrued when the trial court first entered a TRO in favor of the county eight years prior to the filing of the inverse condemnation suit and therefore was out of time).

21. *Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder County*, 2007 WL 987480 (D. Co. Mar. 30, 2007) (the Federal District Court for the District of Colorado rejected a *Nollan/Dolan* challenge to a county's condition on a special use permit that the plaintiff developer dedicate fourteen acres of land for conservation purposes; the Court ruled that the alleged exaction occurred more than two years prior to

the filing of the suit and therefore the claim was barred by the applicable statute of limitations).

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