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Court Rulings During 1998 on Constitutional Takings Claims Against the United States

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Summary

In light of congressional activity on property rights bills during 1998, CRS extends its practice of compiling reported court decisions, involving federal actions and/or federal statutes, that resolved Fifth Amendment "property rights takings" challenges on the merits. Decisions in 1998 meeting this criteria numbered 33, of which three found a taking. The federal programs implicated in this year's decisions echo the broad diversity of such programs customarily involved in takings litigation against the United States. Areas generating multiple takings decisions in 1998 were telecommunications access, the fighting or intentional setting of forest fires, Indian tribal land rights, bankruptcy law, response to failed S&Ls, and the federal wetlands permitting program.

During 1998, the second session of the 105th Congress continued consideration of "process type" property rights bills begun in the first session. Process bills, in the context of the property rights debate, are those that do not propose a standard for what constitutes a "taking" of property by government, but instead seek to streamline the judicial process for asserting such claims under the Fifth Amendment's Takings Clause. In March, 1998, the House passed H.R. 992, which would end the current jurisdictional split between the U.S. Court of Federal Claims and the federal district courts, allowing landowners to seek compensation for the impacts of government action, and seek invalidation of such action as unlawful, in the same court. In the Senate, the Judiciary Committee reported S. 1256, which combined the jurisdiction-enhancing approach of H.R. 992 with that of H.R. 1534 (passed by the House in the first session), reducing certain threshold barriers to asserting takings claims in federal court. The hybrid Senate bill came to the floor as S. 2271, where it was defeated in July, 1998 on a cloture vote.

As noted, these bills dealt with process issues, not with the substantive question whether a particular government action constituted a taking. Still, because congressional interest in the takings issue continues, CRS continues to issue annual compilations of judicial activity in this area. These compilations list court decisions, published in a West

reporter, in which a Fifth Amendment "taking" claim involving a federal action or federal statute was resolved on the merits.[1]

For 1998, research reveals 33 decisions meeting the above criteria, of which three found a taking -- "four" if the Supreme Court decision in *Eastern Enterprises v. Apfel* is included. (See table entry for this decision on page 4, describing the justices' fractionated opinions.) These figures are in line with the corresponding numbers from previous years.[2]

In interpreting such numbers, bear in mind they do not represent all outcomes of takings cases involving federal actions or federal statutes. Other resolutions of such cases, not listed here, are by unpublished decision, non-merits disposition (e.g., expired statute of limitations, lack of ripeness), voluntary dismissal, or settlement. Also note that this report, as the others in the series, is written from the vantage point of the last day of the covered year. Thus, events following that date, even though occurring before the date of the report's issuance, are not mentioned.

Case	Challenged gov't action	Holding/rationale
Alves v. United States, 133 F.3d 1454 (Fed. Cir. Jan. 12)	Alleged failure by BLM to contain trespasses by livestock of nearby Indian ranchowner	**No taking**. Neither plaintiff's grazing permit nor his grazing "preference" (priority in receiving grazing permit over adjacent public land) is a property right. Moreover, government cannot be liable for failure to regulate animals under its regulatory control. A fortiori, government cannot be liable for failing to control privately owned animals.
Phillips & Green, M.D., P.A. v. Clark-Amaker, 992 F. Supp. 450 (D.D.C. Jan. 30)	DOD deduction of $75 administrative fee from amount garnished from its employee's wages and paid to plaintiff	**No taking.** In return for the $75, plaintiff received a service from DOD. Garnishment was but one of many ways plaintiff could have recouped money owed by defendant. Having selected garnishment, plaintiff cannot complain of the administrative cost, as required by Congress.
Teamsters Pension Trust Fund v. Cristinzio, Inc., 994 F. Supp. 617 (E.D. Pa. Feb. 24)	Suit by multiemployer pension plan trustee seeking to recover withdrawal liability from withdrawing employer	**No taking.** There was no reasonable expectation that limited liability under retirement plans would last forever, especially when employer entered collective bargaining agreements on at least three occasions after 1980 enactment of statute imposing withdrawal liability. Every circuit to consider takings challenges to statute has rejected them.
Allenfield Assocs. v. United States, 40 Fed. Cl. 471 (Mar. 2)	Veteran's Administration's continued occupancy of property after expiration of sublease	**Taking.** When U.S. occupies private property without consent of owner, it is liable under the Fifth Amendment for the fair market rental of the property. Government's sublease could not give it rights beyond expiration of prime lease.

[1] CRS Report 91-171 (1990 decisions); CRS Report 92-337 (1991 decisions); CRS Report 93-779 (1992 decisions); CRS Report 94-728 (1993 decisions); CRS Report 95-790 (1994 decisions); CRS Report 96-771 (1995 decisions); CRS Report 97-1035 (1996 decisions); CRS Report 98-989 (1997 decisions).

[2] See CRS reports listed in note 1.

Case	Challenged gov't action	Holding/rationale
Gulf Power Co. v. United States, 998 F. Supp. 1386 (N.D. Fla. Mar. 6)	Federal statute requiring that utilities provide cable TV operators with access to their poles, ducts, and rights of way	**Taking.** Mandatory access provision in Telecommunications Act of 1996, requiring that qualifying utilities give cable companies access to their poles, ducts, etc., is per se taking. Original Pole Attachments Act, at issue in *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), did not compel access.
FDIC v. Mahoney, 141 F.3d 913 (9th Cir. Apr.1)	RTC repudiation of failed bank's lease, as receiver for bank	**No taking.** Claim to which security interest attaches does not exist. Hence, security interest, and claim that it was taken, necessarily vanish.
In re Gomes, 219 B.R. 286 (D. Or. Apr. 7)	Bankruptcy trustee's effort to recover, as fraudulent transfers, pre-bankruptcy-petition tithes made by debtor to church	**No taking.** Loss is within reasonable investment-backed expectations of church. Under provisions of bankruptcy code in existence since 1978, church reasonably could expect that its receipts from tithes might be subject to recoupment by a bankruptcy trustee where donator was insolvent when contributions were made.
Greenbrier v. United States, 40 Fed. Cl. 689 (Apr. 9)	Repeal of low-income housing owners' right to prepay HUD-insured mortgages after 20 years and thereby end affordability restrictions on owners	**No taking** (or taking claim not ripe). Twenty-year prepayment right was not contractual. HUD was not a party on the mortgage notes between owners and lenders containing the prepayment term; term was prescribed by HUD regulations which noted that terms were subject to amendment. Since not contractual, there can be no taking claim based on breach of contract.
Pacific National Cellular v. United States, 41 Fed. Cl. 20 (Apr. 28)	FCC's dismissal of permit application, then concluding it had violated law and granting permit, resulting in non-use of financial commitment letters	**No taking.** Fact that dismissal of application resulted in plaintiff's financial commitment letters, allegedly contracts, being deprived of economically viable use is not taking of contract right. At most was frustration of such rights. Moreover, communications arena is heavily regulated field, by FCC in particular. Entity entering that arena should expect continued regulation by FCC.
Yi v. Citibank (Maryland), N.A., 219 B.R. 394 (E.D. Va. Apr. 29)	Application of bankruptcy law to disallow claim of creditor holding third deed of trust	**No taking.** Lien avoidance under federal bankruptcy power is not a taking. Bankruptcy proceedings frequently modify property rights established under state law. Fifth Amendment protects creditor's rights only to extent of its interest in the collateral as that interest is defined by bankruptcy laws.
Seldovia Native Ass'n v. United States, 144 F.3d 769 (Fed. Cir. May 14)	Alaska Native Claims Settlement Act amendments redefining lands available for selection by village corporation	**No taking.** No property rights in ANCSA-specified choices.
Thune v. United States, 41 Fed. Cl. 49 (Fed. Cl. June 5)	Destruction of hunting camp on federal land when controlled burn set by U.S. escaped	**No taking**. At most, a tort is involved. If we assume fire's escape resulted from wind changes that government could not have anticipated (as record suggests), no taking liability since taking requires government intent to take or intent to do an act the direct, natural, or probable consequence of which was to take.

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Osprey Pacific Corp. v. United States, 41 Fed. Cl. 150 (June 10)	GSA seizure of boat U.S. had donated to state, on finding state had violated federal property regulations	**Taking.** Plaintiff charterer had valid right to possess boat.
Westinghouse Elec. Corp. v. United States, 41 Fed. Cl. 229 (Fed. Cl. June 17)	Alleged DOD breach of promise to make plaintiff sole provider for anti-submarine system beyond contract term	**No taking.** Plaintiff failed to present sufficient evidence that it possessed right to be sole-source provider beyond term of contract. U.S. could not have taken what plaintiff did not possess.
Eastern Enterprises v. Apfel, 524 U.S. 498 (June 25)	Federal statute requiring company to fund health benefits of miner who worked for it decades earlier, where company left mining businesss before promise of lifetime benefits in collective bargaining agreements became explicit in 1974	**Unconstitutional** as applied to plaintiff. Four justices supporting judgment hold that taking occurs when, as here, statute imposes severe retroactive liability on limited class of parties that could not have anticipated the liability, and extent of liability is substantially disproportionate to company's experience in mining field. Remaining justice supporting judgment sees no taking, but rather a substantive due process violation. Four dissenters find no taking or due process violation.
BMR Gold Corp. v. United States, 41 Fed. Cl. 277 (June 30)	Traversing of plaintiff's land by U.S. marines to reach downed helicopter	**No taking.** Plaintiff (lessee of property) concedes that it gave permission to marines to traverse its property. Consent precludes taking.
In re CF&I Fabricators of Utah, Inc., 150 F.3d 1233 (10th Cir. June 30)	Statutory amendment authorizing payment of fees to bankruptcy trustee, as applied to bankruptcy proceedings with already confirmed plans	**No taking**. Taking requires interference with *reasonable* expectations. Here, purported expectations consist of disbursements from debtor's estate. In a bankruptcy case as complex as this, however, patently unreasonable to expect no variability in final amount available to plan distributees.
Maricopa-Stanfield Irrig. Dist. v. United States, 158 F.3d 428 (9th Cir. July 7)	Federal tribal water rights statute, alleged to take Arizona irrigation districts' water rights under earlier statute	**No taking.** Irrigation districts had no right in excess water under earlier statute (Ak-Chin Settlement Act), so U.S. reallocation of excess water under later law effected no taking.
Karuk Tribe v. United States, 41 Fed. Cl. 468 (Aug. 6)	Partitioning of reservation by Hoopa-Yurok Settlement Act	**No taking.** Neither 1864 act creating reservation nor benefits conferred thereunder vested any compensable property rights.
Vermont Assembly of Home Health Agencies, Inc. v. Shalala, 18 F. Supp. 2d 355 (D. Vt. Aug. 26)	Interim payment plan established by Balanced Budget Act of 1997 to control home health care costs by reducing Medicare reimbursement for such services	**No taking.** Plaintiffs accuse interim payment plan of limiting reimbursement to such an inadequate level as to constitute a regulatory taking. But plaintiffs' participation in Medicare is voluntary.

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Schism v. United States, 19 F. Supp. 2d 1287 (N.D. Fla. Aug. 31)	U.S. requirement that military retirees pay Medicare premiums for their health benefits, after promises at time of enlistment of free lifetime medical care	**No taking.** 1956 enactment of statute reducing benefits did not constitute taking of any vested property right, since benefits were noncontractual in nature. Despite what recruiters may have said to plaintiffs in 1942, pre-1956 regulations did not establish free lifetime medical care for retirees.
Jones v. Clinton, 12 F. Supp. 2d 931 (E.D. Ark. Sept. 1)	Court's retaining seal on certain discovery materials following summary judgment in case	**No taking.** Plaintiff had no property interest in discovery materials she had amassed.
Palm Beach Isles Assocs. v. United States, 42 Fed. Cl. 340 (Oct. 19)	Corps of Engineers' denial of dredge and fill permit	**No taking.** No taking of acreage below high water mark, since subject to federal navigation servitude. As to remaining acreage above mark, *Penn Central* factors cut against taking – e.g., "regulatory climate" at time property was acquired precludes reasonable expectations of development, and parcel as a whole was entire original parcel.
United States v. Vertac Chemical Corp., 33 F. Supp. 2d 769 (E.D. Ark. Oct. 23)	Retroactive application of Superfund Act liabiliity scheme	**No taking.** Court has previously found Superfund Act constitutional in the face of a retroactivity argument. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), does not apply.
Watercraft Recreation Ass'n v. TRPA, 24 F. Supp. 2d 1062 (E.D. Cal. Oct. 28)	Tahoe Regional Planning Agency ordinance barring discharge from watercraft propelled by carbureted two-stroke engines	**No taking.** As a threshold matter, TRPA ordinances are federal law, since they are created under mandate of congressionally ratified interstate compact which is itself federal law. As to taking claim, ordinance substantially advances legitimate state interests (conservation of Lake Tahoe) and does not deny economic use of boats but merely prohibits use on Lake Tahoe.
Teegarden v. United States, 42 Fed. Cl. 252 (Nov. 10)	Forest Service's actions in fighting forest fire, causing damage to owner of timber lands	**No taking.** Decision of Forest Service to concentrate efforts in areas of higher priority did not constitute taking of plaintiff's timber lands.
Sunrise Village Mobile Home Park v. United States, 42 Fed. Cl. 392 (Dec. 9)	Damage to mobile home park allegedly caused by improper federal supervision of contractor's remedial work following hurricane	**No taking.** Taking claim in Court of Federal Claims cannot be based on unauthorized government acts. Moreover, if government's actions allegedly breached a contract, appropriate remedy is breach of contract claim, not taking. Companion case (same holding and rationale): Dureiko v. United States, 42 Fed. Cl. 568 (Dec. 9).
Robbins v. United States, 178 F.3d 1310 (Fed. Cir. Dec. 10)	Buyer's rescission of land sale contract after Corps of Engineers indicated property contained wetland	**No taking**. Affirming, without published opinion, decision of trial court at 40 Fed. Cl. 381 (1998).

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U.S. West Communi-cations, Inc. v. Worldcom Technologies, Inc., 31 F. Supp. 2d 819 (D. Or. Dec. 10)	State public utility commission decision, pursuant to federal telecommunications act, under which incumbent local exchange carrier might receive less compensation under interconnection agreement than amount to which it allegedly is entitled	**No taking.** No evidence presented that interconnecting company has purchased any services pursuant to agreement, nor that it ever will. Even if interconnecting company does purchase services, deals are as yet undetermined. Companion cases (same holding and rationale): U.S. West Communications v. TCG Oregon, 31 F. Supp. 2d 828 (D. Or. Dec. 10); U.S. West Communications, Inc. v. AT&T Communications of the Pacific Northwest, 31 F. Supp. 2d 839 (D. Or. Dec. 10).
Monarch Assurance P.L.C. v. United States, 42 Fed. Cl. 258 (Dec. 18)	Nonpayment by U.S. on note allegedly executed by CIA agent, payable to plaintiffs	**No taking.** No credible evidence that person who signed note was agent of U.S. authorized to sign.