

# **Bond Case Briefs**

*Municipal Finance Law Since 1971*

---

## **EMINENT DOMAIN - FEDEERAL**

### **Midas Resources, Inc. v. United States**

**United States Court of Federal Claims - November 7, 2023 - Fed.Cl. - 2023 WL 7320594**

Lessee of mineral estate filed suit against United States, seeking just compensation under Fifth Amendment for alleged physical taking of mineral estate by government's building of border wall on and adjacent to surface estate, under which lessee's mineral estate was leased, thereby allegedly interfering with, negatively affecting, negatively impacting, and denying access to lessee's mineral estate and real property interests.

Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

The Court of Federal Claims held that:

- Lessee failed to state physical takings claim;
- Lessee waived regulatory takings claim; and
- Any regulatory takings claim based on future government action was not ripe.

Mineral estate lessee's allegations that government's building of border wall on and adjacent to surface estate inhibited, burdened, or rendered more expensive lessee's access to mineral estate and property interests were insufficient to state physical takings claim warranting just compensation under Fifth Amendment; under Texas' accommodation doctrine, lessee's interest was to have fair chance of benefiting from its mineral estate, limited by surface estate owner's fair chance to benefit from its estate, but lessee did not allege that all access to its property was cut off by government using surface estate in such manner as to oust lessee from any fair chance of using its mineral estate or that government itself appropriated, confiscated, or destroyed minerals.

Lessee of mineral estate waived regulatory takings claim based on government's building of border wall on and adjacent to surface estate that allegedly inhibited, burdened, or rendered more expensive lessee's access to mineral estate, where lessee made strategic decision not to assert regulatory takings claim, despite having three "bites at the apple" between initial complaint and two amended versions, lessee's response to government's motion to dismiss expressly stated that it was not asserting regulatory takings claim or such theory of recovery, and lessee's counsel of record conceded that claim was pled as physical taking.

Any regulatory takings claim by lessee of mineral estate based on government planning imminent construction of gate at public road crossing border wall built on and adjacent to surface estate that would allegedly impede lessee's access to mineral estate was not ripe for adjudication, since claim depended on future government action that had not yet occurred, so lessee's access to mineral estate was not impeded, as lessee could access, via public right of way, surface estate overlying southern portion of its mineral estate.