In the United States Court of Federal Claims

No. 11-884L

(Filed April 25, 2012)

REOFORCE, INC. and THEODORE SIMONSON,	*
Plaintiffs,	*
v.	*
THE UNITED STATES,	*
Defendant.	*

Richard Meritt Stephens, Groen Stephens & Klinge LLP, Bellevue, Washington, attorney of record for plaintiffs.

William James Shapiro, Department of Justice, Environmental and Natural Resources Division, with whom was ***Ignacia S. Moreno Assistant Attorney General*** for Defendant, and ***Nancy Zahedi***, Of Counsel, Department of the Interior.

OPINION & ORDER

***Futey*, Judge.**

This case comes before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). Plaintiffs, Reoforce, Inc. ("Reoforce") and Theodore Simonson, own three mining claims in Kern County, California, and allege that the government took their property without paying just compensation when it prevented plaintiffs from using the mining claims from 1995 through October 2008. Defendant argues that the takings claims were filed outside of the Court's six-year statute of limitations. 28 U.S.C. § 2501 (2006).

I. Background[1]

Reoforce is a corporation owned solely by Theodore Simonson. Reoforce located twenty-three mining claims in Kern County, California, and planned to mine pumicite, which is a type of volcanic ash, on the land. Reoforce submitted a Plan of Operations to the Bureau of Land Management ("BLM"), which approved the plan on July 2, 1987. According to the complaint, "Throughout the 1980s to mid-1995, Reoforce tested and marketed the pumicite to develop a mine on its claims and engage in commercial production of the pumicite."[2]

Congress enacted the California Desert Protection Act, Pub. L. No. 103-433 (1994) ("CDPA"), on October 31, 1994. Under Section 701 of that law, some federal lands would be transferred to the State of California. *See* 16 U.S.C. § 410aaa-71 (2006) ("[T]he Secretary shall transfer to the State of California certain lands . . . for inclusion in the State of California Park System."). Those lands included Reoforce's mining claims.

When BLM tried to transfer title to the land to the State of California, the state refused to accept title to any land upon which there were federal mining claims. To resolve this dispute, California and BLM signed a Memorandum of Understanding ("MOU") in 1995. The MOU set out guidelines "to provide for the management administration of public lands within the Red Rock Canyon State Park that are not conveyed to the State Parks pursuant to Section 701 of the California Desert Protection Act (108 Stat. 4471) due to being encumbered by unpatented mining claims."[3] The MOU also stated that "BLM will conduct validity examinations of the claims prior to review and approval of any [Plans of Operations] in accordance with" certain procedures.[4]

For claims, like Reoforce's, that had existing Plans of Operations but were not involved in regular mining, the MOU stated that these Plans would be "suspended until a VER [Valid Existing Rights] determination can be completed by a certified mineral examiner. This suspension is necessary as rights against the United States cannot accrue on or after the date of the CDPA. October 31, 1994."[5] Although the MOU suspended Reoforce's Plan of Operations until a Valid Existing Rights ("VER") determination could be done, BLM did not begin that examination until 2004. On September 7, 2006, BLM concluded that the mining claims were invalid.

Following the VER determination, the United States sought a declaration from the Department of the Interior's Office of Hearings and Appeals that Reoforce's claims were invalid. Eventually, the parties reached a settlement in

[1] The background is taken from the complaint.
[2] Compl. 3.
[3] *Id.*
[4] *Id.* at 4.
[5] *Id.*

May 2008 under which the government recognized three of Reoforce's mining claims, while Reoforce gave up its title to twenty other mining claims. The settlement also recognized the validity of Reoforce's Plan of Operations. The government gave Reoforce approval in October of 2008 to mine those three claims.

Plaintiffs filed suit in the Court of Federal Claims on December 19, 2011 and alleged that the government had temporarily taken a property interest in three mining claims from 1995, when the MOU suspended the Plan of Operations pending a VER determination, until October 2008, when Reoforce was able to resume mining. The government filed a Motion To Dismiss And Memorandum In Support on February 17, 2012. Plaintiffs filed a Response To Defendant's Motion To Dismiss on March 19, 2012. Defendant filed its Reply In Support Of Motion To Dismiss on April 5, 2012.

II. Discussion

The government moves to dismiss for lack of subject matter jurisdiction, under RCFC 12(b)(1). According to the government, plaintiffs' claims are time-barred because they accrued in 1995, well outside of the six-year statute of limitations applicable to claims in this court. 28 U.S.C. § 2501.

A. *Motion to Dismiss for Lack of Subject Matter Jurisdiction, RCFC 12(b)(1).*

The Court of Federal Claims is a court of specific jurisdiction, with its "jurisdictional reach" set by the Tucker Act. ***Rick's Mushroom Serv. v. United States***, 521 F.3d 1338, 1343 (Fed. Cir. 2008). Under that act, the court has subject matter jurisdiction for claims "against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491 (2006). The court does not, however, have jurisdiction over claims filed outside of its six-year statute of limitations. *See* ***John R. Sand & Gravel Co. v. United States***, 552 U.S. 130, 134 (2008). When a defendant moves to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), the court must accept as true the complaint's undisputed factual allegations and construe the facts in the light most favorable to plaintiff. *See* ***Reynolds v. Army & Air Force Exch. Serv.***, 846 F.2d 746, 747 (Fed. Cir. 1988).

B. *Plaintiffs' Claims Did Not Accrue Until the Government Reached a Final Decision Regarding the Impact of the Regulations on Plaintiffs' Property.*

The parties disagree as to when plaintiffs' claims accrued. According to the government, the claims accrued in 1995, when BLM and the State of California signed a Memorandum of Understanding that "suspended" plaintiffs' mining activities "until a VER [Valid Existing Rights] determination can be

completed by a certified mineral examiner."[6] Plaintiffs, however, assert that the claims did not ripen—and therefore did not accrue—until 2008, when plaintiffs reached a settlement with the government regarding the validity of their mining claims.

1. A Claim Accrues When All Events Have Occurred to Fix a Defendant's Liability.

Any claim filed in the Court of Federal Claims must be filed within six years of when the claim first accrued. 28 U.S.C. § 2501. A "claim first accrues when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." ***Hopland Band of Pomo Indians v. United States***, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (internal quotations omitted).

In this case, plaintiffs allege a Fifth Amendment taking, which generally accrues when the taking occurs. *See* ***Goodrich v. United States***, 434 F.3d 1329, 1333 (Fed. Cir. 2006). Specifically, plaintiffs argue that there was a temporary regulatory taking under the standards of *Penn Central*.[7] The government is liable for this type of taking when a claimant has a "cognizable Fifth Amendment property interest" with which the government interfered without paying just compensation. ***Acceptance Ins. Cos., Inc. v. United States***, 583 F.3d 849, 854 (Fed. Cir. 2009); *see also* ***Schooner Harbor Ventures, Inc. v. United States***, 569 F.3d 1359, 1362 (Fed. Cir. 2009) ("*Penn Central* considered and balanced three factors: (1) economic impact, (2) reasonable investment backed expectations, and (3) the character of the government action.").

Temporary takings are "analyzed in the same constitutional framework applied to permanent irreversible takings." ***Yuba Natural Res., Inc. v. United States***, 821 F.2d 638, 641 (Fed. Cir. 1987). The same general rules for claim accrual thus apply, and plaintiffs are not required to wait until a regulation ends in order to institute an action. *See* ***Navajo Nation v. United States***, 631 F.3d 1268, 1278 (Fed. Cir. 2011).

Although the normal claim accrual rules apply, the Federal Circuit has acknowledged that "[i]n certain situations, a claim for a temporary regulatory taking does not accrue when a regulation is enacted because the regulation itself is not a final governmental determination depriving a plaintiff of a compensable property right." *Id.* This situation most frequently occurs when the government regulation requires a landowner to obtain a permit; a claim does not ripen—and therefore does not accrue—until the landowner pursues that permit process and allows the government to reach "a final decision regarding the application of the regulations to the property at issue." ***Palazzolo v. Rhode Island***, 533 U.S. 606, 618 (2001); *see also* ***Navajo Nation***, 631 F.3d at 1278 (noting that "a takings claim is not ripe until a government agency denies that landowner's permit

[6] Compl. 3–4.
[7] Pl.'s Resp. Def.'s Mot. Dismiss 6.

application") (citing ***Boise Cascade Corp. v. United States***, 296 F.3d 1339, 1347 (Fed. Cir. 2002)).

2. Plaintiffs' Claims Did Not Accrue in 1995.

Defendant has argued that the claims accrued in 1995, but this argument has the potential to block plaintiffs from seeking redress in court. Furthermore, it forces a permit-requirement into ripeness doctrine, and overextends the Federal Circuit's decision in *Navajo Nation*.

Defendant's argument demands that plaintiffs have a compensable property interest in order to state a claim, but potentially does not allow plaintiffs time to establish this interest. As with all takings cases, defendant notes that "if Plaintiffs had filed a takings claim in 1995, Plaintiffs would have been required to demonstrate the existence of a compensable property interest."[8] *See also* ***Hearts Bluff Game Ranch, Inc. v. United States***, 669 F.3d 1326, 1329 (Fed. Cir. 2012) ("When evaluating whether governmental action constitutes a taking, a court . . . . [first] determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking."). Defendant also, however, states that the validity determination completed in 2006 "resolves the question of whether Plaintiffs had a compensable property interest."[9] Thus, defendant's arguments could foreclose plaintiffs from ever seeking redress for the alleged wrong. If plaintiffs had filed a claim in 1995, then they "would have been required to demonstrate the existence of a compensable property interest,"[10] but this existence was not resolved until the validity determination in 2006. Plaintiffs waited until the conclusion of that validity determination to file suit, so that they might allow the government to reach a final determination as to whether or not a compensable interest exists.

Defendant also argues that this case does not present any ripeness concerns because plaintiffs were never required to apply for a permit. The ripeness doctrine, however, is not limited to cases involving permitting schemes. While most of the decisions related to ripeness and temporary takings have involved permits, there is no explicit limitation of those concerns to schemes that involve permitting. For instance, in ***Stearns, Co. v. United States***, the Federal Circuit noted that a plaintiff had to seek permission both through a VER determination and a compatibility determination before a claim would ripen. 396 F.3d 1354, 1358 (Fed. Cir. 2005). The essence of the ripeness requirement is to allow "the government entity charged with implementing the regulations" the opportunity to reach "a final decision regarding the application of the regulations to the property at issue." ***Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank***, 473 U.S. 172, 186 (1985). Once this "final decision" has been reached, a court will know "to a reasonable degree of certainty what limitations

[8] Def.'s Reply Supp. Mot. Dismiss 3 n.2.
[9] *Id.* at 3.
[10] *Id.* at 3 n.2.

the agency will, pursuant to regulations, place on the property." ***Morris v. United States***, 392 F.3d 1372, 1376 (Fed. Cir. 2004). A final decision might come after a permit is sought and denied, or it might come, as here, after a VER determination is pursued and concluded.

Finally, defendant contends that the Federal Circuit's decision in *Navajo Nation* established that temporary takings always accrue at the start of the takings period. The decision, however, also left leeway for claims that accrue later. ***Navajo Nation***, 631 F.3d at 1278. In that case, there was a long-running dispute between the Navajo Nation and the Hopi Tribe over ownership to certain lands. *Id.* at 1269–70. In 1980, Congress passed a law that required that each tribe obtain the consent of the other tribe before developing any land within a specific area, and in 1982, the Hopi Tribe denied its consent for all current and future developments within that area. *Id.* at 1270–71. Eventually, in 2006, a federal district court approved a settlement of the tribal dispute. *Id.* at 1271. Although the Navajo Nation argued that the claim accrued in 2006, the Federal Circuit disagreed. The court wrote that it has "previously rejected the notion 'that the cessation of [a] regulation is a necessary condition to liability' of the United States for a temporary regulatory takings claim." *Id.* at 1278 (quoting ***Bass Enters. Prod. Co. v. United States***, 133 F.3d 893, 896 (Fed. Cir. 1998)). Defendant appears to cast this language as holding that temporary takings always accrue when a restriction is imposed.[11]

Navajo Nation, however, allowed that "[i]n certain situations, a claim for a temporary regulatory taking does not accrue when a regulation is enacted because the regulation itself is not a final governmental determination depriving a plaintiff of a compensable property right." ***Navajo Nation***, 631 F.3d at 1278. A takings claim only becomes ripe when "'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *Id.* (quoting ***Palazzolo***, 533 U.S. at 618).

Although the final decision in *Navajo Nation* occurred at the outset of the takings period, there was no final decision at the outset in this case. In *Navajo Nation*, the Federal Circuit noted that the 1980 Amendment "was a final congressional directive prohibiting the Navajo Nation from developing land . . . without Hopi Tribe approval." ***Navajo Nation***, 631 F.3d at 1278. That Amendment "unequivocally took [the right to exclusive control of the property] away" from the tribe and therefore "[t]he latest date . . . that any takings claim could have accrued was July 8, 1980." *Id.* at 1279. The claim thus accrued with that action. In this case, however, the MOU was only a temporary suspension of plaintiffs' mining claims. The MOU was not "a final governmental determination

[11] *See id.* at 9 ("The Court should apply the binding precedent set forth in *Navajo Nation*, and conclude that Plaintiffs' temporary regulatory takings claim accrued when the United States allegedly imposed the restriction, not when the United States lifted it.").

depriving a plaintiff of a compensable property right." ***Navajo Nation***, 631 F.3d at 1278. Defendant itself essentially admits this, when it notes that the VER determination in 2006, eleven years after the MOU, "resolves the question of whether Plaintiffs had a compensable property interest."[12] Until the outcome of that determination, it was unclear whether or not plaintiffs had compensable property interests in their mineral claims. Plaintiffs' takings claims thus did not become ripe until the government had a chance to reach that final decision.

3. Plaintiffs' Claims Ripened Before the 2008 Settlement.

Plaintiffs argue that their claims did not ripen until 2008, when the government and plaintiffs reached a settlement regarding the validity of three of the mining claims. A final decision was reached earlier, however, in 2006, when the VER determination was completed.

The MOU had temporarily suspended plaintiffs' mining claims "until a VER [Valid Existing Rights] determination can be completed by a certified mineral examiner."[13] That determination was completed on September 7, 2006, and the examiner concluded that plaintiffs had no valid mineral rights. Once this determination was complete, plaintiffs knew whether or not the government had reached a "final governmental determination depriving [them] of a compensable property right." ***Navajo Nation***, 631 F.3d at 1278. Although the later settlement gave plaintiffs the right to mine three of their claims, the MOU's temporary suspension still ended in 2006, with the examiner's decision. The claims thus accrued then.

Plaintiffs rely on an older Federal Circuit decision to argue that temporary takings accrue at the end of the takings period, but the court's discussion of that point occurred only in dicta. In that case, ***Creppel v. United States***, landowners sued the government for blocking a land reclamation project. 41 F.3d 627, 629 (Fed. Cir. 1994). The project was originally approved in 1964, but then suspended by an Army Corps of Engineers' official in 1976. *Id.* at 629–30. In 1984, a federal district court ordered that the project proceed. *Id.* at 630. The EPA, however, issued a Final Determination in 1985 that permanently blocked the project, and a district court upheld this order in 1988. *Id.* Plaintiffs alleged a temporary taking from the 1976 suspension through the 1988 affirmance of the EPA's Final Determination. *Id.* at 631. The Federal Circuit ultimately held, however, that the temporary taking had concluded in 1984, when the district court ordered that the project proceed because the landowners had regained some of the value in their land at that point. *Id.* at 633.

In discussing when the claim accrued in *Creppel*, the Federal Circuit noted that "property owners cannot sue for a temporary taking until the regulatory process that began it has ended" because "they would not know the extent of their

[12] *Id.* at 3.
[13] Compl. 4.

damages until the Government completes the 'temporary' taking." *Id.* at 632. Thus, according to the Federal Circuit, only after the completion of the taking "may property owners seek compensation." *Id.* (citing ***First English Evangelical Lutheran Church of Glendale v. County of Los Angeles***, 482 U.S. 304, 321–22 (1987)). As defendant points out, the Federal Circuit's discussion of *when* a temporary taking accrues is unnecessary to its holding and thus dicta; regardless of whether the taking accrued in 1976, at the beginning of the taking, or 1984, at the end of the taking, the claim was time-barred because the suit was filed in 1991. *See also* ***Algonquin Heights Assocs. L.P. v. United States***, 100 Fed. Cl. 792, 797 (2011) (noting that "[w]hether the claim accrued at the beginning or the end of the taking period was ultimately irrelevant . . . . As a result, the Federal Circuit's decision of when the temporary takings claim accrued was not essential to its disposition of that claim. It therefore carries no binding effect.") (citing ***Smith v. Orr***, 855 F.2d 1544, 1550 (Fed. Cir. 1988) ("[A] general expression in an opinion, which expression is not essential to the disposition of the case, does not control a judgment in a subsequent proceeding.")). Plaintiffs note that a recent case, *Navajo Nation*, cited *Creppel* approvingly with the following parenthetical: "(temporary regulatory takings claim accrued only after a district court ordered a land reclamation project to proceed)."[14] That parenthetical, however, like the non-essential language in *Creppel*, is dicta and not binding on this Court.

III. Conclusion

Plaintiffs' claims accrued on September 7, 2006, and this action was filed on December 19, 2011. The action is thus timely, and defendant's Motion To Dismiss is DENIED. The parties are directed to file a Joint Status Report by May 25, 2012 concerning further proceedings.

IT IS SO ORDERED.

s/Bohdan A. Futey

BOHDAN A. FUTEY

Judge

[14] Pl.'s Resp. Def.'s Mot. Dismiss 12 (citing ***Navajo Nation***, 631 F.3d at 1278).