



FEDERAL CLAIMS BAR ASSOCIATION

Winter 2007 Newsletter

SPECIAL INAUGURAL ISSUE OF
EXECUTIVE SUMMARY,
OUR NEW PUBLICATION PROVIDING TIMELY
SUMMARIES OF RECENT COURT DECISIONS AND
OTHER VALUABLE INFORMATION ON ALL MAJOR
AREAS OF THE COURT'S JURISDICTION, INSIDE!!

Letter from Chief Judge Edward J. Damich **Winter Forecast 2007**



I'm writing in January for what will be a February newsletter, but in keeping with the spirit of the first month of the new year, named for the Roman god who looked both behind and ahead, I am pleased first to provide a recap of the closing months of 2006.

In August, we reconstituted the court's Advisory Council, pursuant to Rule 83.4 of the Rules of the Court of Federal Claims. **Clarence Kipps** of Miller & Chevalier, the Chair, and **James Brookshire**, Executive Director of the Federal Circuit Bar Association, Co-Chair, had indicated to me their desire to retire from their duties as officers and turn the Advisory Council over to newer hands.

They have been stalwart friends of the court and have given generously of their time, their wise counsel, and their considerable talent to the betterment of the court for many, many years. We continue to owe them an immense debt of gratitude.

Gregory A. Smith, now of Cooley Godward Kronish LLP, has agreed to serve as the new Chair of the Council. We have reorganized the membership to update its reflection of the court's subject-matter practice areas, established and/or confirmed the three-year terms of membership, and put the Council to continued good work in providing advice "on matters pertaining to the administration of the court and its relationship to the bar and the public."

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President's Message

New Year's Resolutions



This is the time of the year when, if you are like me, many of those New Year's resolutions you made begin to fall by the wayside. But there is one resolution that still is going strong and promises to continue long into the future.

At our January Board of Governors meeting, the Board committed to bringing renewed enthusiasm and vitality to the Bar Association. Hopefully, by the time you read this message, you will have begun to see the fruits of our labors and will agree that 2007 is shaping up to be a very exciting year.

Let me highlight just a few of the many things we have in store and also thank a few of the many individuals who selflessly are devoting their time and talents to the Bar Association. First, the fact that you are reading this message is proof that we have resumed publication of *Newsletter*. My thanks to **Steve Gillingham**, our new *Newsletter* Editor-in-Chief, for getting publication back on schedule and for filling this issue with helpful and timely information.

As you flip through the pages of this Newsletter, you will see the inaugural issue of another new and exciting publication, *Executive Summary*. *Executive Summary* provides timely information on recent court decisions and other significant events in all major areas of Court of Federal Claims practice, including Government Contracts, Fifth Amendment Takings, Tax, and Vaccine litigation. While we are providing this inaugural issue to everyone, future issues will be only available to members of the Bar Association. Preparing a publication like this on a regular basis is no small accomplishment. Thanks go to Executive Summary Editor-in-Chief **John Williamson**, and to the many contributing editors, for making this valuable publication a reality.

This year we also will publish a new edition of the acclaimed *Deskbook for Practitioners*. This will be the first revision of the *Deskbook* since 1998 and will feature updated case law discussions on all areas of the Court's jurisdiction. As anyone who has practiced in the Court of Federal Claims knows, the *Deskbook* is "must reading." Creation of this 100+ page document is a Herculean task, and it could not have been accomplished without the tireless efforts of **Jeanne Davidson** and numerous contributing editors.

I hope you also have seen the many changes we recently have made to our Association website, www.cfcbar.org. **Evan Pritchard** has done an amazing job in adding content to the site, and in the coming weeks you will see much more, including a new overall look. We want the website to be a

valuable resource for you, and I encourage you to "bookmark" the site on your web browser. One exciting innovation will be an on-line attorney referral database, which will be accessible to the public. As a member of the Bar Association, you will be able to add your name, areas

of expertise, and contact information to the database, putting your firm within easy reach of the tens of thousands of businesses and individuals who file claims in the Court of Federal Claims each year.

These are just a few of the things we have in store for 2007. Please read the rest of this *Newsletter*, and stay tuned to future announcements, for important information on the many exciting events and programs the Court and the Bar Association have in the works. These will include the Court's annual Law Day program on May 2; the Bar Association's 20th Anniversary celebration, which will be held in conjunction with Law Day; a 25th Anniversary gala celebration for the Court of Federal Claims in the Fall; and the Court's first-ever Judicial Conference west of the Mississippi, to be

***** SAVE THE DATE *****

LAW DAY CELEBRATION
Keynote Speaker
Solicitor General of the United States
Paul D. Clement

MAY 2, 2007 at Noon
Willard Intercontinental Hotel

held on October 10-11 in Boulder, Colorado. In addition, we have many "Brown Bag" CLE programs planned for the year, so please check our website regularly for updates.

Finally, let me encourage you all to make a belated "New Years' resolution" that 2007 will be the year that you become more active in the Bar Association -- by attending our conferences and CLE programs; by contributing to our various publications; and by

becoming a member of one of our many committees.

Now, if I can just get myself to the gym more often!

Regards,

Marc Smith, President
Court of Federal Claims Bar Association

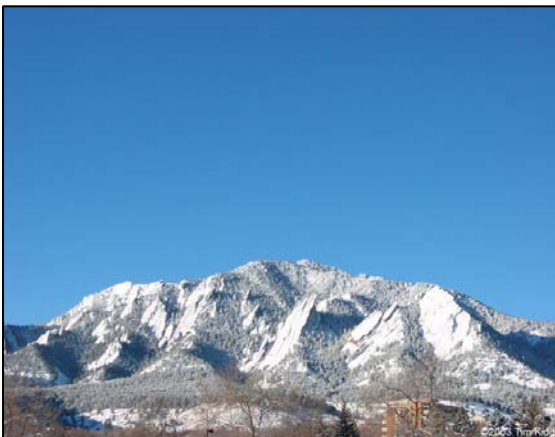
Court Announces 20th Judicial Conference

The Court of Federal Claims will hold its annual Judicial Conference on October 10-11, 2007 in Boulder, Colorado. This will be the first time that the Court has held its annual conference outside of the East Coast, and helps to fulfill the Court's goal of being truly a national court in all respects. The conference represents part of the Court's continuing reach out to Bar members in other areas of the country.

The program's agenda will focus on issues of importance to Western lawyers, including panel presentations on water rights, Native American claims, and Fifth Amendment takings of private property. The conference also will include a panel addressing patent litigation.

Set in the foothills of the majestic Rocky Mountains, and just a short drive from Denver International Airport, this judicial conference will certainly have no parallel in terms of venue! The plenary sessions will be held at the brand-new home of the Colorado University Law School. Dedicated in September 2006, this state-of-the-art building is also the home of the Natural Resources Law Center, the American Indian Law Clinic, and the Byron White Center for the Study of American Constitutional Law.

The Bar Association is busily working with the Court to plan this program. Please check the Association's website in the coming months for more details and registration information for this exciting event.



University of Colorado's Wolf Law School



View of Foothills from Colorado University Campus

Letter from Chief Judge Damich continued from page 1

In October, the court held its annual Judicial Conference. The host hotel, the Willard Intercontinental, in Washington, D.C., has graciously agreed to post a bronze plaque on its front wall facing Pennsylvania Avenue to commemorate the first meeting of our predecessor court, the United States Court of Claims, in May 1855.

The Judicial Conference featured a special reception unveiling the plaque at the conclusion of the conference, with brief remarks by **Chief Judge Paul Michel** of the Court of Appeals for the Federal Circuit and myself. The plaque was just recently posted officially; thus, tourists of Washington, D.C., general passers-by, and court friends with an eye for history can now take note of the overlapping paths of “the people’s court” and the original “Willard’s Hotel.” Take a look if you find yourself in the vicinity!

At the awards luncheon during the conference, I was delighted to present the following awards on behalf of the court to three very special members of the court family. The court’s Golden Eagle Award, given to an individual from the larger court family who has contributed notably to the betterment of the court, was presented to **Douglas Henderson**, of Finnegan, Henderson, Farabow, Garrett & Dunner LLP, a former member of the court’s Advisory Council and a former law clerk at the Court of Claims. The Loren A. Smith Award, established by former **Chief Judge Lawrence M. Baskir** and named for his predecessor former **Chief Judge Loren Smith**, was presented to our esteemed colleague **Senior Judge Robert H. Hodges, Jr.** Last, the court’s Madison Award, given periodically to a member of the court family who has contributed to the advancement of justice and the rule of law, was awarded to **Senior Judge Bohdan A. Futey** for his work on behalf of the rule of law in Eastern Europe and Ukraine in particular.

The Bar Association of the Court of Federal Claims is also to be commended, once again, for its steadfast and time-consuming work in sponsoring the annual Judicial Conference. We have been fortunate indeed to have had such an unending string of remarkably devoted and capable bar association leaders. Let me express my

appreciation for a job well done to the immediate past President **Nancie G. Marzulla**, of Marzulla & Marzulla, and to this year’s President **Marc A. Smith**, Assistant Chief, Natural Resources Section, of the Environment and Natural Resources Division, U.S. Department of Justice. As the new year began, Marc and President-elect **Brad Fagg** of Morgan, Lewis & Bockius, have already begun working to continue the membership growth that the Bar Association has seen in recent years. Officers or Association representatives will be appearing at the monthly court sessions for new admittees to welcome those new members and urge their membership and participation in bar association functions.

The court itself is becoming increasingly better represented in the Judicial Conference of the United States. In addition to **Judge Francis M. Allegra’s** continued membership on the Committee on Information Technology, **Judge Emily C. Hewitt** has been appointed by the Chief Justice to the Committee on Financial Disclosure.

Practitioners and other friends of the court whose schedules may bring them to the court in person may notice the dramatic physical improvement in the layout of our Operations Department on the first floor. New carpeting and neat and organized (and more visually attractive) modular work stations have been installed and should make for a quieter, more welcoming venue for staff, researchers, and visitors. On a somewhat “in-house” note, in my capacity as Chief Judge, I have occasionally awarded a member of the court staff (including chambers staff) a “Lincoln Award” for extraordinary work. As a prelude to the court’s holiday party in December, I was pleased to present the Lincoln Award to **Debbie Samler** of the Operations staff. Her knowledge of court rules and her hard work in operations are a credit to this often overlooked, but integral component of the court’s administration.

In mid-January, I bid farewell and Godspeed in retirement to my own chambers Judicial Assistant, **Shirley Scott**. She has been the public “face” – or at least “voice” – of my chambers for almost three years and has kept me and my law clerks organized (or as organized as humanly possible) and functioning. No thanks are ever enough, but I do thank her for a job very well done. I am fully confident that her successor, **Genevieve (Genny)**

McGee, who just joined me on February 5 from the chambers of Judge Paul Huck of the U.S. District Court for the Southern District of Florida, will prove equally as wonderful. If you have a chance, please join me in welcoming Genny aboard.

On January 26, the bar associations of the Federal Circuit and the Court of Federal Claims jointly hosted a party in the Dolley Madison House for **David M. Cohen**, who has just retired as Director of the Commercial Litigation Branch of the Civil Division of the Department of Justice. David was with the Federal Government for 37 years and his contribution to the development of our court, his vigorous defense of the public's interest, and his keen insights into the rules and administration of the court have earned him a prominent spot in the court's heart. David Cohen has been the epitome of the finest of public servants and will be missed. Although his shoes are tough ones to fill, indeed, I have asked **Jeanne Davidson**, Acting Director of the Commercial Litigation Branch, to fill his position on the Advisory Council.

I am further pleased to report that, at our monthly meeting earlier this month, the judges of the court voted unanimously to reappoint **Special Masters Richard Abell, John Edwards, and Laura Millman** to new four-year terms in the court's Office of Special Masters.

What else is new in 2007? We have a terrific program in store for the court's 4th annual Law Day commemoration. Solicitor General of the United States, **Paul D. Clement**, has agreed to speak at our Law Day luncheon, to be held at the Willard Hotel on Wednesday, May 2. This program not only commemorates the principle of the rule of law

as an essential foundation for a free and just society, it is also an occasion for acquainting legal practitioners outside the court's regular family with the role that our court has played historically in American jurisprudence. Please mark your calendars now and consider bringing a friend with you to the program this year.

In October 2007, the court's annual judicial conference will take a notable turn in venue. As befitting a court of national jurisdiction, we have worked in cooperation with the Bar Association to schedule the program to be held not in Washington, D.C., or a relatively nearby site, but well outside D.C. The conference will be held on October 10 and 11 in Boulder, Colorado, and will feature a more focused set of topical panels and discussions. Further information on topics, etc., is addressed elsewhere in this newsletter. I hope many of you will plan to attend for it should be a highly informative, more intimate, and invigorating occasion.

As always, I sincerely welcome hearing from court practitioners with any praise or constructive critique you may have to share with regard to court operations and the efficient administration of justice. We strive to continue to improve our service to all the branches of the court's varied constituency.

Edward J. Damich, Chief Judge
United States Court of Federal Claims

Solicitor General To Speak At Law Day



The Court's annual Law Day celebration will feature a keynote speech by the Solicitor General of the United States, Paul D. Clement. Mr. Clement has argued over 35 cases before the United States Supreme Court, including *McConnell v. FEC*, *Tennessee v. Lane*, *Rumsfeld v. Padilla*, *United States v. Booker*, and *Gonzales v. Raich*, in addition cases in the lower courts involving challenges to the conduct of the war on terrorism.

The event will be held in the Crystal Room of the [Willard Intercontinental Hotel](#). Please check this website in the coming weeks for information on registration for this event.

DOJ's David Cohen Retires

On January 26, 2007, three courts, two bar associations and scores of well-wishers offered their thanks and well wishes to one of our Bar Association's first presidents, David Cohen, on the occasion of his retirement, following 37 years of government service. During his career, David played a seminal role in the development of the Court of Appeals for the Federal Circuit, Court of Federal Claims, and Court of International Trade, through a variety of congressional staff and advisory positions, and as a director of the Department of Justice's Commercial Litigation branch.



"Mr. Cohen," as the speakers noted he was most often called, was honored by **Chief Judge Paul Michel** of the Federal Circuit, who called David a "patriot" who had helped "create three national courts and assisted each in becoming what Congress intended." **Chief Judge Edward Damich** cited David's contributions to the Court of Federal Claims, and underscored the "humanity of the person." **Chief Judge Restani** of the Court of International Trade cited David's "integrity, intelligence and dignity" and noted his role as a key player in passage of the Customs Court Act of 1980. Peter Keisler, the Assistant Attorney General for the Civil Division, referred to David's reputation for "credibility, expertise, and the

thoughtfulness of his arguments," referred to his "irreplaceable breadth and depth of knowledge," the substantial role he played in so many areas of the law, as well as his preparation and devotion to reaching a principled result in analyzing any legal question. Remarks also were offered by **Jeanne Davidson** (David's Deputy Director), **Marc Smith** (President of the Court of Federal Claims Bar Association), and **James Brookshire** (Executive Director of the Federal Circuit Bar Association), who recalled David's legal excellence, broad vision, leadership, and contributions to the bench and bar.

At the conclusions of the scheduled remarks, David turned his analytic ability on his own career, in a laugh-evoking, but earnest speech in which he recalled his being present at a variety of seminal moments from congressional meeting rooms to the Tayloe House, as the three courts and bar associations he served so long unfolded before him. He also recalled the many people with whom he served, including past judges, Assistant Attorneys General, Solicitors General, attorneys of the private and public bar and the many attorneys he supervised. Finally, he expressed his faith in the direction of the court and bar and its steady devotion to the rule of law.

2007 Bar Association Officers and Board of Governors

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Major Changes for Bar Association Website

Dramatic changes are coming this Spring to the Bar's website, including a new attorney search feature, which will enable the public to search for legal representation before the Court of Federal Claims, by areas of expertise and geographic location. Soon, members of the bar will be able to update their online profiles to include biographical information, areas of practice, and additional contact information such as their firm's website address. Members also will be able to specify which portions of their profile information, if any, they would like to make publicly available via the search engine. We also are in the process of redesigning the website to give it a more polished look and feel. Look for both of these changes in the weeks ahead at www.cfcbar.org. The illustrations below demonstrate how all this might work:

Member Information

First Name: *

M. I.:

Last Name: *

Generation:

Firm or Agency:

Address 1:

Address 2:

City: *

State: * AL

Zip Code: *

Phone: *

Fax:

CLE State: Alabama - AL

Practice Areas:

Government Contracts (includes bid protests) Takings

Tax Vaccine

Indian Claims Military Pay Civilian Pay Patents

Other

Biography:

Submit Delete

Member Login → My Account → Edit

Account Settings

Account Information

Contact settings

Public database listing

Allow your name and the personal information you specify below to be available to the public through the "Find An Attorney" database.

email

phone number

fax number

address

practice areas

biography

Submit Delete

Find An Attorney*

City:

State: ID

Practice Area: Patents

Search

*DISCLAIMER: The information contained in this database has been provided by the individual attorneys listed, who are solely responsible for any representations made regarding their areas of practice or expertise. Search results are provided by the Court of Federal Claims Bar Association for informational purposes only and do not constitute an attorney referral or endorsement.

2 ATTORNEY SEARCH RESULT(S) for "ID" and "Patents"

Name: Joe Blow
 Email: joe.blow@idaholawfirm.com
 Phone number:
 Practice Areas: Patents
 Biography: Attorney in private practice since 2001. B.S., Electrical Engineering, University of Idaho, 1990. J.D., University of Idaho School of Law, 2001.
 Hobbies: cliff diving, shark wrestling, spelunking and Sudoku

Name: Joe Schmo
 Email: joe.schmo@idaholawfirm.com
 Phone number:
 Practice Areas: Patents
 Biography: Attorney in private practice since 2001. B.S., Computer Science, University of Idaho, 1990. Ph.D. in Dance History and Theory, University of California Riverside, 1994. J.D., University of Idaho School of Law, 2001.
 Hobbies: interpretive dance, mixed martial arts, computers

Court of Federal Claims Bar Association
Executive Summary
February 2007

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Welcome to Executive Summary

We introduce this month a new publication, *Executive Summary*, which summarizes recent decisions of the Court of Federal Claims and the Court of Appeals for the Federal Circuit. The case summaries are intended to be concise, objective reports of noteworthy decisions.

We have grouped the case summaries according to the principal categories of cases decided by the Court of Federal Claims, including Government Contracts, Takings, Tax, and Vaccine Litigation. This month we have also included a Native American tribal trust case and two cases that address procedural issues. The summaries include links to the full text of the decisions that are posted on the websites of the Federal Circuit and the Court of Federal Claims.

We hope that this new publication will be useful to members of the Bar Association. This month Executive Summary is included with the Bar Association's Newsletter and made available on the website. In coming months, it will be distributed separately to members of the Bar Association.

We welcome contributions, particularly about developments that may not be reported on the courts' websites, such as Fed. Cir. R. 36 affirmances. If you would like to contribute a case summary, please send it to jwilliamson@mcguirewoods.com.

GOVERNMENT CONTRACTS

Contra Proferentem

***Gardiner, Kamya & Associates, P.C., v. Jackson*, No. 05-1524 (Nov. 8, 2006), 467 F.3d 1348 (Fed. Cir. 2006)**, <http://www.fedcir.gov/opinions/05-1524.pdf>

The Court of Appeals for the Federal Circuit provided clarification of the applicability of the doctrine of *contra proferentem* in the interpretation of contracts, in which contractual ambiguities are construed against the drafter. In *Gardiner*, the court affirmed the decision of the Department of Housing and Urban Development (“HUD”) Board of Contract Appeals (“BCA”) in the interpretation of certain contract modifications with respect to the retroactivity of certain adjustments to the unit prices.

Though the court upheld the BCA’s ultimate interpretation, the court found that “the BCA’s approach to construction of contract language and to the doctrine of *contra proferentem* is misplaced.” *Id.* at 1352. The court clarified that “*contra proferentem* is a ‘rule of last resort’ that ‘is applied only where there is a genuine ambiguity and where, after examining the entire contract, the relation of the parties and the circumstances under which they executed the contract, the ambiguity remains unresolved.’” *Id.* (citing *Chris Berg, Inc. v. United States*, 197 Ct. Cl. 503, 455 F.2d 1037, 1044 (Ct. Cl. 1972)). The court further noted the doctrine is inapplicable “if the intention of the parties . . . otherwise appear[s].” *Id.* at 1352-53.

The Court then proceeded to analyze the language of the contract as a whole and found the contract to be unambiguous in that the price modification was not retroactive. *Id.* at 1353. The Court also looked to the negotiating history of the modification, noting that – even if it had found ambiguity in the contract – it would be appropriate to look to extrinsic evidence before resorting to the doctrine of *contra proferentem*. *Id.* at 1354. The court found that the negotiations history likewise demonstrated that under the circumstances, if the parties had wanted to increase unit prices retroactively, they would have done so explicitly. *Id.*

Award Fee Determination Authority

***The Boeing Company, Successor-in-Interest to Rockwell Int’l Corp. v. United States*, 2007 WL 113947 (Fed. Cl. Jan. 17, 2007) (Lettow, J.)**
<http://www.uscfc.uscourts.gov/Opinions/Lettow/07/LETTOW.BOEING.11707.PDF>

The Court of Federal Claims found that the government breached its cost-plus-fixed-fee contract with Rockwell – to operate a nuclear weapons plant under the supervision of DOE officials – by causing the award fee for two periods in 1989 to be mandated by the Department of Energy’s (“DOE”) headquarters rather than by an official formally designated the Award Fee Determination Official, as required by the contract. In relevant part, the contract provided that “[t]he amount of the award fee actually to be paid to the Contractor shall be determined by the Award Fee Determination Official.” In 1989, the Award Fee Determination Official (“AFDO”) forwarded his recommended award fee to DOE’s headquarters, pursuant to the new Secretary of Energy policy whereby fee determinations were reviewed by Headquarters prior to issuance to the contractor. During this same time period, and pursuant to an independent evaluation of operations at the facility, the AFDO was removed from substantive oversight responsibility and was limited to ministerial functions. The award recommendation was reviewed and revised by Headquarters, with the ultimate award to Rockwell significantly lower than that recommended by the AFDO. Rockwell submitted a claim to the Contracting Officer and then filed a complaint, initiating the action in 1991.

Though the government argued for a functional test whereby the “AFDO” referred not just to the individual who retained the title, but also the Secretary of Energy or other high level officials, the court rejected this argument, pursuant to the “plain language” rule. It found that by use of the definite article “the” (among other things), the contractual language strongly indicated that at any given time, one person would serve as that official and the identity of the AFDO as meant by the contract was thus limited. “In short, the contractual description of the AFDO as the ‘Manager, or anyone acting as Manager, Albuquerque Operations,’ means just what it says and cannot be stretched to encompass anyone performing some functions of the Manager.” Furthermore, the mere fact that the Secretary had authority over personnel decisions did not relieve DOE from its contractual obligations, which designated one particular official to make certain factual determinations. To the extent that circumstances changed, the government could seek modification of the contractual

terms or name a different individual to the AFDO position, but it could not override the provision. Finally, because that individual was contractually designated to make a subjective determination, that determination could not be overridden by DOE Headquarters.

NATIVE AMERICAN CLAIMS

Tribal Trust

***Rosebud Sioux Tribe v. United States*, No. 05-1023L (Fed. Cl. Jan. 5, 2007) (Merow, J.)**

<http://www.uscfc.uscourts.gov/Opinions/Merow/07/MEROW.ROSEBUD010507.pdf>

Plaintiff alleged that the United States breached its fiduciary duties owed to the Tribe arising out of the government's 1998 approval of 15-year lease of Tribal lands to a third party for the construction and operation of a large-scale pork production facility, a subsequent declaration that the lease was void, the handling of numerous lawsuits and subsequent settlement of claims that related to the lease. Defendant moved for judgment on the pleadings for lack of jurisdiction on the grounds that (1) the Tribe's claims were barred by the statute of limitations and/or laches, (2) those claims were an impermissible attack on a final consent judgment entered in one of the related lawsuits, and (3) the complaint failed to identify a statutory or regulatory provision that can be fairly interpreted to mandate compensation.

The court granted defendant's motion as to any causes of action that accrued six years prior to the filing of the complaint but otherwise denied the motion, finding that factual issues precluded summary dismissal of the entire complaint. The court further determined that refinement of the claims and issues was warranted and ordered the plaintiff to identify each specific claim of breach of fiduciary duty, the time frame of each claim, the legal theories and factual bases for each claim, and a corresponding itemized list of damages.

PROCEDURE

Interlocutory Appeals

***Nebraska Public Power Dist. v. United States*, No. 01-116C (Fed. Cl. Dec. 19, 2006) (Allegra, J.)**

<http://www.uscfc.uscourts.gov/Opinions/Allegra/06/ALLEGRA.NEBRASKA121906.pdf>

In this spent nuclear fuel contract case, the Court of Federal Claims issued a decision on October 31, 2006, finding a writ of mandamus issued by the Court of Appeals for the D.C. Circuit to be void for want of jurisdiction and ordering defendant to brief its defenses under the "unavoidable delays" clause of the subject contract. The plaintiff moved to have the trial court's opinion and order certified for interlocutory appeal.

Noting that interlocutory appeals under 28 U.S.C. § 1292(d)(2) are reserved for "exceptional" or "rare" cases, the court found that certification of its decision for interlocutory appeal was appropriate because all of the requirements for certification were satisfied. Applying the three-prong test set forth in section 1292(d)(2), the court found: (1) that the question of whether the mandamus is void and, therefore, whether defendant may present a defense based on the unavoidable delays clause, is a controlling question of law; (2) that, based on the "healthy tension" between Federal Circuit and D.C. Circuit rulings, there are "substantial grounds for difference of opinion" on this controlling question; and (3) that interlocutory review of this controlling question may materially advance this litigation, and also may impact the dozens of spent nuclear fuel cases pending before the court.

Statute of Limitations

***Chaney v. United States*, No. 06-519C (Fed. Cl. Feb. 2, 2007) (G. Miller, J.)**

<http://www.uscfc.uscourts.gov/Opinions/GMiller/07/GMILLER.CHANEY020207.pdf>

In this Military Pay Act case, the plaintiff appealed from a decision by the Air Force Board for Correction of Military Records ("the Board") rejecting her request to amend her records to show a disability retirement. The government moved

to dismiss for lack of jurisdiction on the ground that the plaintiff's claim was time-barred by the applicable statute of limitations. In granting the motion to dismiss, the Court of Federal Claims addressed the "[c]onsiderable debate" that has arisen as to whether a motion to dismiss a complaint as time-barred by the statute of limitation should come as a motion to dismiss for failure to state a claim upon which relief can be granted or as a motion to dismiss for lack of jurisdiction.

Following a survey of decisions of the Court of Appeals for the Federal Circuit, the court concluded that it was bound to follow the Federal Circuit's *en banc* decision in *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003), and its more recent decision in *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006), *reh'g en banc denied* (Nov. 30, 2006), both of which concluded that statutes of limitations for causes of action against the United States are jurisdictional in nature. The court also declined to toll the statute of limitations based on a legal disability, finding that the plaintiff's demonstrated capacity to pursue her claims before the Board indicated that she had the capacity to understand the nature of her legal rights during the time period in question.

TAKINGS

Relevant Parcel Determination

***Cane Tennessee, Inc. v. United States*, Nos. 96-237L and 00-513L (Oct. 27, 2005), 71 Fed. Cl. 432 (Hewitt, J.), <http://www.uscfc.uscourts.gov/Opinions/Hewitt/05/HEWITT.Cane102705.pdf>**

In this regulatory takings case, the plaintiffs alleged a taking of their mineral interest in approximately 10,000 acres of land in Tennessee based on the Secretary of the Interior's designation of the lands as unsuitable for surface coal mining operations under the Surface Mining Control and Reclamation Act. Following a trial on the question of the economic impact of the designation on the plaintiffs' property interests, the Court of Federal Claims issued a decision on October 27, 2005, in which it applied the multi-factor Penn Central analysis and held that the designation did not result in a taking of the plaintiffs' property. 71 Fed. Cl. 432.

The plaintiffs appealed this final decision to the Federal Circuit and specifically challenged the trial court's relevant parcel determination, its analysis of the reasonableness of the plaintiffs' investment-backed expectations, and the conclusion that there was no taking. On January 10, 2007, the Federal Circuit issued a *per curiam* affirmance of the trial court's decision without a written opinion under Fed. Cir. R. 36. *Cane Tennessee, Inc. v. United States*, No. 06-5045, 2007 WL 188155 (Fed. Cir. Jan. 10, 2007).

Physical "Occupation" or Appropriation

***Evans v. United States*, No. 06-439C, 2006 U.S. Claims LEXIS 400 (Fed. Cl. Dec. 22, 2006) (Lettow, J.) <http://www.uscfc.uscourts.gov/Opinions/Lettow/06/LETTOW.EVANS122206.pdf>**

Raisin growers brought a Fifth Amendment takings claim, alleging a *per se* physical taking by the United States through its implementation of the Agricultural Marketing Agreement Act of 1937 ("AMA"). Under a marketing order promulgated under the AMA, raisin handlers are required to separate the raisins they purchase from producers into two categories – "free tonnage" raisins, which are to be sold by the handler on the open market, and "reserve tonnage" raisins, an annually-specified portion of the purchase that is automatically transferred to the government's Raisin Administrative Committee ("RAC"). As a result of the regulations promulgated under the AMA, "handlers pay producers for the 'free tonnage' portion of the raisins, but not for the 'reserve tonnage' raisins." Producers instead receive only an equitable interest in the "distribution of the net proceeds from the RAC's disposition of the 'reserve tonnage' raisins." Asserting that the "net proceeds from the sale of these 'reserve tonnage' raisins has been worthless or nearly so in recent years," plaintiff producers argued that the uncompensated seizure of the "reserve tonnage" raisins by the government constituted a *per se* physical taking in violation of the Fifth Amendment. The Court of Federal Claims disagreed. Finding that there had been no physical "occupation" or appropriation of the plaintiffs' property, and that the transfer of the reserve tonnage raisins to the RAC was tantamount to "an admissions fee or a toll" for marketing raisins, the court ruled in favor of the government, granting its motion to dismiss.

While the plaintiffs had failed to state a cause of action for which relief could be granted, the court observed there were four other potentially viable causes of action available to the plaintiffs that they had not pursued. Two of the potential

actions reviewed by the court involved challenging the administrative process, and the other two involved bringing takings cases under alternative causes of action. The explained that the raisin growers could try bringing a regulatory takings claim, "arguing that the RAC, by returning only meager pool proceeds to plaintiffs, effected a taking." Or, second, the plaintiffs could pursue an illegal exaction claim which, the court explained, carries with it various bases for relief. Under an illegal exaction theory, a plaintiff could allege that a sum was improperly exacted or retained by the United States in violation of the Constitution, a statute, or a regulation, or the plaintiff could plead "that a 'particular provision of law relied upon grants [him], expressly or by implication, a right to be paid a certain sum' and that he has not been so paid."

Ripeness

***Benchmark Resources, Corp. v. United States*, No. 03-178L, 2006 WL 3412259 (Fed. Cl. Nov. 22, 2006) (C. Miller, J.), <http://www.uscfc.uscourts.gov/Opinions/Miller/06/CMILLER.Benchmark112206.pdf>**

In this case, plaintiffs alleged a regulatory taking of their mineral interests in approximately 31,000 acres of land in Tennessee as a result of the designation of a portion of the land as unsuitable for surface mining by the Interior Department's Office of Surface Mining Reclamation and Enforcement ("OSM"). The United States moved to dismiss the claim on the grounds that the claim was not ripe because plaintiffs had never submitted an application to mine the property as required by the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1256(a).

Despite a finding that plaintiffs had presented some evidence that submission of a permit application would be futile, because the analysis of the viability of mining is "consigned to the expertise of the OSM," the claim did not fall within the futility exception to the ripeness doctrine. Thus, because plaintiffs had not filed an application for a permit to mine the property their claim was not ripe. The court also concluded that one of the plaintiffs' claims was time-barred by the Tucker Act's six-year statute of limitations, 28 U.S.C. § 2501.

TAX

Statute of Limitations

***Minehan v. United States*, No. 05-924T (Fed. Cl. Jan. 26, 2007) (Bush, J.)**
<http://www.uscfc.uscourts.gov/Opinions/Bush/07/BUSH.MINEHAN012607.pdf>

On January 26, 2007, the Court of Federal Claims granted the motion of the United States to dismiss this *pro se* refund suit for 1998. Plaintiff's complaint was based on the retroactive conversion of taxable retirement benefits, received during 1998, to non-taxable disability benefits. Plaintiff did not receive the favorable determination regarding the conversion of the benefits until March, 25, 2002, and did not file a refund claim until July 14, 2003--more than three years after she filed her original 1998 return.

The court held that the three-year period to file claims set in 26 U.S.C. §6511 is not subject to equitable tolling, and therefore bars plaintiff's refund suit. The court further found that (1) certain oral conversations with IRS representatives alleged by plaintiff did not constitute a valid informal refund claim; (2) the Tucker Act does not grant the court jurisdiction over plaintiff's complaint to the extent that it sounds in tort; and (3) statements regarding the IRS's mission in IRS publications cannot form the basis for a contract implied-in-fact.

Res Judicata

***Andrew and Priscilla Tempelman v. United States*, No. 06-414T (Fed. Cl. Jan. 9, 2007) (Wolski, J.)**
<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/07/WOLSKI.Tempelman.pdf>

On January 9, 2007, Judge Wolski granted the motion of the United States to dismiss the complaint for lack of jurisdiction and, alternatively, on *res judicata* grounds. After entering into a stipulated decision in the Tax Court agreeing to certain deficiencies, plaintiffs attempted to repudiate the agreement by alleging in two subsequent district court suits that they had been coerced into signing the stipulation, and that the tax liens and subsequent sale of their restaurant were illegal. The district court held for the government in both cases, and both decisions were affirmed on appeal.

In addition to its alternative *res judicata* determination, the Court of Federal Claims determined that it lacked jurisdiction because (1) the filing of the petition in the Tax Court divested it of any jurisdiction it might otherwise have had, under the Internal Revenue Code, 26 U.S.C. §6512; (2) the taxes at issue were not fully paid; (3) the refund claims were untimely; and (4) the court lacks jurisdiction to decide claims under the Internal Revenue Code, 26 U.S.C. §7433, or the Racketeering Influenced and Corrupt Organizations Act of 1970 ("RICO").

VACCINE

Zatuchni v. Secretary of Health and Human Servs., No. 94-58V (Fed. Cl. Spec. Mstr., May 6, 2006)

<http://www.uscfc.uscourts.gov/Opinions/Specmast/Hastings/hastings.Synder-Remand-correction.pdf>

In 1994, Barbara Snyder filed a petition for vaccine injury compensation alleging that she suffered chronic joint pain and fibromyalgia syndrome as the result of receiving MMR vaccination. This case involved a prolonged and unusual procedural history. In 2005, the special master dismissed the case, finding insufficient evidence of a vaccine-injury. Snyder v. Secretary of Health and Human Servs., No. 94-58V, 2005 WL 1230787 (Fed. Cl. Spec. Mstr. May 6, 2005).

Ms. Snyder died several days before the issuance of the special master's decision, although counsel for the parties and the court did not learn of her death until after the decision issued. Ms. Zatuchni, executrix of Ms. Snyder's estate, was later substituted for petitioner. Following a motion for review, the Court of Federal Claims reversed, concluding that Ms. Snyder's condition was caused in fact by the vaccination. Zatuchni v. Secretary of Health and Human Servs., No. 94-58V, 69 Fed. Cl. 612 (2006). The court directed the special master to determine whether her death was vaccine-related, and to award damages.

On remand, the special master concluded that Ms. Snyder's death was vaccine-related, and thus awarded the statutory death benefit of \$250,000 pursuant to 42 U.S.C. § 300aa-15(a)(2). Zatuchni v. Secretary of Health and Human Servs. No. 94-58V, 2006 WL 1499982 (Fed. Cl. Spec. Mstr. May 10, 2006). Petitioner sought additional damages, including lost wages, pain and suffering from the time of injury until death, vaccine-related out-of-pocket expenses and payment of the Medicaid lien, all totaling \$554,323.90, which the special master denied. Again, petitioner sought review by the Court of Federal Claims, which again reversed the special master's ruling and awarded both the death benefit and the additional compensation petitioner sought. Zatuchni v. HHS, No. 94-58, 73 Fed. Cl. 451 (2006). On December 28, 2006, respondent filed a Notice of Appeal to the Court of Appeals for the Federal Circuit.

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