FEDERAL CLAIMS BAR ASSOCIATION

# Inside 717

Vol. 10, No. 4, October 2018 – December 2018

Summarizing recent rulings from the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit at 717 Madison Place, NW

## WHAT'S INSIDE

## MESSAGE FROM THE EDITORS-IN-CHIEF

We want to thank all our contributors!

If you are ever interested in joining the editorial board, please let us know. In particular, we could use additional contributors for the Pay practice area.

As always, feel free to share any ideas or comments. You may reach us at Sgrigsby@bsfllp.com, Amanda.Tantum@usdoj.gov, or Colleen.Hartley@usdoj.gov. Thank you.

## COURT PROCEDURE

**Court Denies Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, and thereafter, Grants Government's Motion to Dismiss Pursuant to RCFC 12(b)(1) for Lack of Subject Matter Jurisdiction.** *Timberline Helicopters, Inc. v. United States,* Fed. Cl. 18-1474C, 140 Fed. Cl. 117 (Oct. 2, 2018). [Kaplan, J.]; *Timberline Helicopters, Inc. v. United States*, Fed. Cl. 18-1474C, 140 Fed. Cl. 614 (Nov. 2, 2018) (*Reissued*, Nov. 13, 2018). [Kaplan, J.]

This post-award bid protest case arises out of a solicitation by the Department of Interior, Bureau of Land Management ("BLM") helicopter flight services in aid of its fire-fighting efforts. These services covered both aerial dispensing of fire-retardant liquids and the transportation of firefighters. The protester, Timberline Helicopters, Inc. ("Timberline"), did not submit an offer, but filed a protest at GAO prior to the close of the solicitation, arguing that the solicitation was defective because no helicopter could meet the solicitation requirements without violating applicable Federal Aviation Administration ("FAA") regulations. GAO denied the protest, and BLM eventually awarded the contract to PJ Helicopters. Shortly after the award, the FAA conducted a review and confirmed that the special purpose license for the helicopters did not cover the transportation of ground firefighters. In light of this opinion, BLM issued the awardee a variance, authorizing it to continue transporting ground firefighters. Subsequently, Timberline filed a bid protest in the Court of Federal Claims, arguing that BLM's failure to clarify that it would issue a variance discouraged competition and violated the Competition in Contracting Act ("CICA"). Thereafter, Timberland requested that the Court grant a temporary restraining order and/or preliminary injunction ordering a halt to performance and allow Timberline to submit its proposal for the remainder of the contract.

In an October 2, 2018 decision, the Court denied the request for an injunctive relief on two grounds. First, it questioned whether Timberline had standing as an actual or prospective protester. Although the Court noted the existence of a narrow exception when a party files suit prior to close of the solicitation period and diligently and continuously pursues the protest, Timberline did not file a protest in court until approximately 15 months after GAO denied its protest. Relatedly, the Court noted that the purpose of a preliminary injunction is to preserve the status quo. In this case, the Court concluded that Timberline was not seeking to preserve the status quo but was "asking the Court to stop PJ Helicopters' performance on a contract that it was awarded over a year ago."

In a second opinion, issued a month later, the Court found that Timberline lacked standing to challenge the solicitation because it was neither an actual nor prospective offeror. Additionally, the Court concluded that it lacked jurisdiction to hear Timberline's claim that the issuance of the variance violated CICA because the variance was issued post-award, and was hence a matter of contract administration and was not made in connection with a procurement or proposed procurement. Therefore, the argument fell outside the Court's bid protest jurisdiction.

Read the October 2018 decision here. Read the November 2018 decision here.

**Court Rejects Construction Contractor's Breach of Good Faith and Fair Dealing and Differing Site Conditions Claims Arising Out of Army Corps of Engineers Contract.** *Walsh Construction Co. v. United States*, Fed. Cl. 16-845C, 140 Fed. Cl. 385 (Oct. 3, 2018). [Braden, S.J.]

Following a trial, the Court held that a construction contractor failed to establish that the Army Corps of Engineers ("Army Corps") breached its duty of good faith and fair dealing. The Court also held that the

contractor was not entitled to recover costs to address cave-ins and water problems at the construction site under a differing site condition claim.

The Army Corps awarded the plaintiff, Walsh Construction Co. ("Walsh"), a firm, fixed-price contract to build a Defense Logistics Agency facility in New Cumberland, Pennsylvania. After Walsh began performance, one of its subcontractors called upon to install concrete drilled piers into limestone on the site began experiencing "caving," fractured rock, and water problems. Also, approximately 90 piers that the subcontractor drilled failed inspection and required additional drilling. The contracting officer denied Walsh's request for an equitable adjustment due to differing site conditions.

In its complaint, Walsh brought two claims: a claim for breach of the implied duty of good faith and fair dealing based on the Army Corps' allegedly inadequate designation of drilling depths, and a claim to recover costs resulting from an alleged "Type I" differing site condition. Because Walsh failed to present the breach of good faith and fair dealing claim to the contracting officer before filing its complaint, the Court stayed the case to allow Walsh to do so.

Following a trial, the Court denied both claims. First, the Court rejected Walsh's claims that the Army Corps breached its duty of good faith and fair dealing, finding that Walsh's allegations that the Army Corps engaged in abusive inspections and other conduct that interfered with Walsh's performance were not supported. The Court also found that the Army Corps was not responsible for certain additional drilling costs because those costs were caused by the subcontractor's decision to move drilling equipment.

Second, the Court denied Walsh's differing site condition claim. Under the Differing Site Conditions clause, FAR 52.236-2, a contractor may be entitled to recover costs in the event that it encounters "subsurface or latent physical conditions at a project site which differ materially from those indicated in the contract." A contractor who finds such a "Type I" differing site condition must provide written notice to the contracting officer, who is required to investigate the site and determine if a materially differing site condition exists. FAR 52.236-2(b). The Court held that a reasonable contractor could not view the contract documents as making any representations about the presence of subsurface water at the site, noting that the contract documents did not "affirmatively represent" that the site conditions would be "completely free from cave-ins or flowing water." Further, the Court held that the possibility of cave-ins, collapses, and flowing water should have been reasonably foreseeable to Walsh at the time of contracting, noting that, prior to bidding, Walsh had received a geotechnical report warning that voids and groundwater could be expected at the location of the facility. The Court relied in part on expert witnesses called by both parties and fact witnesses.

Read the decision here.

**Court Awards Expert Consultant Fees Under The Equal Access to Justice Act, But Excludes From The Fee Award Costs Incurred By The Company Rather Than Its Attorneys.** *Quimba Software, Inc. v. United States*, Fed. Cl. 12-142C, 140 Fed. Cl. 624 (Nov. 9, 2018). [Smith, S.J.]

Can a small business that prevails in litigation against the Government obtain reimbursement for costs to retain a non-testifying consultant? The Court answered "yes" to this question in a case involving an Air Force contractor that hired an expert consultant with expertise in the Federal Acquisition Regulation ("FAR") and the Cost Accounting Standards ("CAS"). But the Court denied costs incurred by the plaintiff itself rather than its attorneys.

Under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, a small business that prevails in litigation against the United States may obtain an award of attorney fees and expenses if the company can show that the United States' litigation position was not substantially justified or that special circumstances make an award just. 28 U.S.C. § 2412(d)(1)(A).

The plaintiff, Quimba Software, Inc. ("Quimba"), was a small business that contracted with the United States Air Force Research Laboratory, Air Force Material Command to provide information technology research services. After Quimba prevailed in its Contract Disputes Act suit seeking recovery of certain deferred compensation costs, the Court held that Quimba was entitled to recover its attorney fees and expenses. At issue here was the amount of fees to which Quimba was entitled.

Quimba argued that it was entitled to $237,073 in attorney fees, attorney's costs, the FAR/CAS expert consultant's fees, compensation for Quimba's founder's time spent supporting the litigation effort, and reimbursement for direct costs – those that Quimba incurred directly in connection with the litigation, such as travel and lodging expenses for its founder. The Government contended that Quimba should only receive $81,881 in attorney fees, and that amounts spent on the FAR/CAS consultant should be excluded because the EAJA covers only expenses incurred by attorneys and Quimba – not its attorneys – incurred the consultant's expenses.

The Court held that Quimba was entitled to recover costs (albeit for a nominal amount) spent to retain the services of its FAR/CAS consultant. The Court noted that under section 2412(d)(2)(A), a plaintiff may recover "the reasonable expenses of expert witnesses, the reasonable cost of any study, *analysis*, engineering report, test, or project which is found by the court to be necessary for the preparation of the party' case." (emphasis added). The Court held that because it was "reasonable and necessary for Quimba to retain the FAR/CAS consultant to review, analyze, and provide an opinion, and that such an opinion was instrumental to litigation[,]" Quimba was entitled to recover such expert expenses under the EAJA.

The Court held, however, that Quimba could not recover compensation for its founder's time spent supporting litigation efforts and could not recover expenses that it directly incurred related to his travel. The Court observed that the EAJA "does not permit recovery of expenses incurred directly by a plaintiff" and "does not permit recovery of costs for time associated with plaintiff's labor supporting litigation." The Court held that because Quimba's attorneys did not directly incur these costs, they were not recoverable.

Read the decision here.

**Court Denies Plaintiff's Motion for a Temporary Restraining Order in a Bid Protest Action as Untimely.** *Facility Servs. Mgmt., Inc. v. United* States, Fed. Cl. 18-1224C, 140 Fed. Cl. 323 (Nov. 19, 2018). [Campbell-Smith, J.]

In this post-award bid protest action, the protester challenged an award by the U.S. Army for installation support services. The issue in the matter involved the protester's motion for a temporary restraining order to enjoin the Army's decision to truncate a bridge contract with the incumbent-intervenor and accelerate the phase-in of the incumbent's performance under the new contract.

The Court rejected the motion as untimely. First, the Court noted that in an earlier joint status report, the protester and the Army had agreed that "there is no need for a voluntary stay, and the Army intends to phase in [the new contract] before the expiration of [the] 3-month bridge contract." The Court also rejected the protester's argument that it had been misled about the bridge contract, noting that even

after the protester learned of the relevant facts, it waited three weeks before filing its motion for injunctive relief. Finally, the Court indicated that to the extent that the protester was challenging the conduct of the bridge contract, such a challenge falls outside the Court's bid protest jurisdiction and "cannot be appended to the existing case." Instead, the protester would need to file a separate action under the Contract Disputes Act and 28 U.S.C. § 1491(a).

Read the decision here.

**Court Denies Government's Motion to Dismiss and Grants Bid Protester's Motion to Amend Complaint Involving Award with USAID.** *Innovative Element, LLC v. United States*, Fed. Cl. 18-897, 140 Fed. Cl. 743 (Nov. 27, 2018). [Braden, S.J.]

At the outset of this action, protester Innovative Element challenged an award made by the United States Agency for International Development ("USAID") to Dnutch Associates. The contract award involved the management of day-to-day operations in USAID's Washington Learning Center.

The government subsequently terminated the award for convenience and announced that it intended to cancel the solicitation. The Government, accordingly, moved to dismiss the protest as moot. Innovative Element, in response, argued that the case was not moot because USAID had not provided formal cancellation of the solicitation, and moved to amend the complaint to challenge the cancellation of the solicitation. Ultimately, the Court granted this request over the Government's objection, concluding that allowing the amendment would be more efficient than requiring the protester to file a new protest. Moreover, the Court noted that Innovative Element was an actual bidder and had a direct economic interest in USAID's decision to cancel the solicitation because that decision precluded Innovative Element from continuing to compete for contracts awarded under the same.

Read the decision here.

## GOVERNMENT CONTRACTS

**Court Upholds Agency's Override Of A Stay Of Contract Performance, Resulting From The Filing Of A Protest At The Government Accountability Office (GAO).** *Safeguard Base Operations, LLC v. United States*, Fed. Cl. No. 18-1515c, 140 Fed. Cl. 670 (Oct. 25, 2018) (Reissued, Nov. 5, 2018). [Horn, J.]

The Department of Homeland Security, through the Federal Law Enforcement Training Centers, provides training to law enforcement officers and agents to over 95 partner organizations at its training center. Trainees are required to dorm at the training center. Safeguard submitted a proposal for a contract to provide dormitory maintenance services at the training center. When the agency did not award the contract to Safeguard, Safeguard filed a bid protest at GAO, which triggered an automatic stay of performance of the contract. The agency determined that urgent and compelling circumstances justified overriding the stay. This lead to Safeguard's protest, before the Court, of the stay override.

Safeguard argued that the agency could not demonstrate that it faced an immediate harm to health, welfare, or safety, and that in any event, any urgency was of the agency's own making because the agency could have issued a bridge contract to Safeguard. Although the Court agreed that *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705 (2006), which identified a four-part test for evaluating an agency's decision to override, was not binding, the Court concluded that the *Reilly* factors nonetheless were a

useful tool in assessing the agency's decision to override the stay. Ultimately, the Court upheld the override decision.

The Court found that without the dormitory services, the agency's ability to produce qualified, well-trained federal law enforcement officers would be greatly diminished, as demonstrated by the fact that the agency had previously issued four sole source awards to Safeguard on the basis of unusual and compelling circumstances. The Court also concluded that the agency had no reasonable alternative to the override because, by the time Safeguard had filed its GAO protest, the agency did not have sufficient time to provide the requisite notice to Congress or to otherwise complete a sole-source to Safeguard award without facing a lapse in services. Next, the Court rejected Safeguard's argument that the agency had not quantified the economic harm to that agency if GAO sustained the protest. The Court reasoned that the agency had adequately considered the cost of proceeding with the override when the agency concluded that the total risks were worth overriding the stay. Finally, the Court concluded that the agency had given sufficient consideration to the impact of the override on the procurement system. Namely, the agency had compared the impact of the override with the impact of other potential, although not workable, avenues such as a sole-source to a non-8(a) contractor (Safeguard) for a contract that was an 8(a) set-aside. As a result, the Court upheld the override.

Read the case here.

**Court Examines Application Of "Substantial Chance" And "Non-Trivial Competitive Injury" Standards In Pre-Award Bid Protests.** *Veteran Shredding, LLC v. United States*, Fed. Cl. No. 18-981, 140 Fed. Cl. 798 (Nov. 26, 2018)(Reissued, Dec. 6, 2018). [Lettow, S.J.]

A recent decision of the Court in a pre-award bid protest involving the procurement of document destruction services explains that different tests for standing apply to pre-award protests "pre-bid" and "post-bid." The Department of Veterans Affairs ("DVA") sought document destruction services for several facilities in Minnesota using the simplified acquisition procedures of Part 13 of the Federal Acquisition Regulation ("FAR"). The solicitation was set aside for service-disabled veteran-owned small businesses and stated that quotes would be evaluated under a lowest-price technically acceptable methodology. Veteran Shredding and four other offerors submitted quotes. Veterans Shredding's quote that made its price the third lowest of the five offerors. Because all the quotes were substantially higher than the independent government cost estimate, the DVA decided to cancel the solicitation. No award was made.

After an unsuccessful protest at GAO – which that office dismissed as untimely – Veteran Shredding protested at the Court, arguing that the cancellation was arbitrary. The Government moved to dismiss, arguing that Veterans Shredding lacked standing because, given its third-lowest price, it could not show the requisite "direct economic interest" in the award or failure to award the contract. The Government argued that because there were two other technically acceptable proposals that offered lower prices, even if the Court invalidated the DVA's cancellation of the solicitation, Veteran Shredding could not show it was prejudiced (*i.e.*, that it had a "substantial chance" at winning the contract). The Court agreed, and granted the motion to dismiss.

Interestingly, Veteran Shredding argued that it had standing because in the "pre-award" context, the "substantial chance" standard does not apply, and that the Court should apply the "non-trivial competitive injury" standard from *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009). The Court rejected this argument. While acknowledging that one way to measure prejudice in the pre-award context is by the "non-trivial competitive injury" standard, the Court explained that this standard applied

when there is a lack of a bid or other factual basis to evaluate a protestor's chance at an award. The Court determined that in this case, because the protest was submitted after bids were received (albeit still pre-award), the "substantial chance" standard applied instead. Because the protestor offered the third highest technically acceptable bid, and did not challenge the proposals of the two lower-priced offerors, the Court concluded that the protestor could not show the requisite direct economic interest, and therefore lacked standing.

Read the case here.

## TAKINGS

**Court Considers Application Of Statute Of Limitations To Breach Of Contract And Takings Claims Related To Operation Of A Spillway And Damage To Railroad Bridges Claimed As A Result.** *Illinois Central R.R. Co. v. United States*, Fed. Cl. No. 17-826L, 140 Fed. Cl. 128 (Oct. 4, 2018) [Wheeler, J.]

A railroad company filed suit against the United States, alleging a Fifth Amendment taking and breach of contract based on the Army Corps of Engineers' ("Army Corps") operation of a spillway to divert water from the Mississippi River to reduce flowage rates as the river approached New Orleans, Louisiana, to reduce the risk of flooding in the city. The Army Corps had a flowage easement over lands that would be flooded if the spillway were used, including over Illinois Central's right of way for its railway lines; a condition of the easement was that the discharge rate would not exceed 250,000 cubic feet per second. Illinois Central constructed bridges over the land within the spillway designed to withstand water discharge up to 250,000 cubic feet per second.

The Army Corps opened the spillway from May until June 2011, permitting it to operate at times with a flowage rate in excess of 250,000 cubic feet per second. Illinois Central alleged that it inspected the bridges, after the Army Corps closed the spillway, and discovered that they had been seriously damaged. Illinois Central filed its suit in the Court more than six years after the Army Corps's operation of the spillway.

The Court dismissed Illinois Central's breach of contract claim, rejecting the argument that the statute of limitations did not begin to run until Illinois Central could determine the full extent of damage to its bridges. The Court instead concluded that Illinois Central knew or should have known that the flowage rate exceeded the easement on the date that it occurred. The Court found the breach claim to be barred by the six-year statute of limitations in 28 U.S.C. § 2501. With respect to Illinois Central's taking claim, the Court instead determined that it was not time-barred. The Court found applicable the "stabilization doctrine," which governs "a claim for a taking by a gradual physical process." Under this doctrine, the statute of limitations begins to run "once it is clear that the process has resulted in a permanent taking, and the extent of the damage is reasonably foreseeable." The Court concluded that Illinois Central could not foresee the extent of the damage before it could perform an inspection, and it could not do so while the spillway was open, given that the Army Corps had directed Illinois Central not to interfere with the spillway and directed it to obtain a permit for the inspection.

Read the decision here.

**Applying Missouri Law, Court Grants Government's Motion for Summary Judgment on Various Claims in Rails-To-Trails Litigation.** *Burnett v. United States*, No. 16-995L, 139 Fed. Cl. 797 (Oct. 9, 2018). [Griggsby, J.]

Thirty-eight plaintiffs in this rails-to-trails litigation filed suit against the government for an alleged taking of their property rights in Missouri land adjacent to the Rock Island Line owned by the Missouri Central Railroad Company ("MCRR"). The parties filed cross-motions for summary judgment addressing eighteen claims involving twenty-three plaintiffs. The Court granted the government's cross-motion for summary judgment on standing and title issues, and denied the plaintiffs' motion for partial summary judgment on liability.

Applying Missouri law and analyzing the deeds at issue in the case, the Court determined that MCRR owned a fee simple interest in the parcels of land associated with eight claims. In so finding, the Court agreed with the government that certain deeds predated the four deeds upon which the plaintiffs relied. The Court also rejected the plaintiffs' argument that the conveyance lacked valuable consideration and only included an easement, observing that Missouri law recognizes valuable consideration as "any sum of money 'in excess of one cent, one dime, or one dollar,'" and non-monetary benefits. Next, the Court concluded that one set of plaintiffs failed to show that their parcel was adjacent to the rail corridor. Turning to the remaining nine claims, the Court analyzed the deeds conveying easements and concluded that their scope was broad enough to encompass public recreational trail use. It reasoned that there exists no presumption that easements are limited to railroad purposes under Missouri law, the phrase "grant, bargain and sell" indicated that the parties intended to convey to the railroad a broad easement, and secondary easements did not limit the scope of the primary conveyances to MCRR.

Read the decision here.

**Court Approves Indiana Rails-to-Trails Class Action Settlement Agreement.** *Courval v. United States*, Fed. Cl. No. 12-482L, 140 Fed. Cl. 133 (Oct. 10, 2018). [Lettow, S.J.]

In this rails-to-trails class action related to property located in Kokomo, Indiana, the Court addressed whether to approve a negotiated settlement agreement. After class counsel filed a settlement notice, the court conducted a fairness hearing in Indiana. It ultimately considered various procedural and substantive requirements under Rule 23(e) and approved the settlement agreement.

Addressing whether the proposed settlement was "fair, reasonable, and adequate," Rule 23(e)(2), the court analyzed the "'paramount' twin elements of procedural and substantive fairness." The Court concluded that the settlement was both procedurally and substantively fair. With respect to procedural fairness, the court noted that an independent appraiser participated in the parties' negotiations (despite subsequently disappearing under odd circumstances) and the negotiations were conducted in good faith. The Court also determined that class counsel acted zealously to advocate on behalf of class members, observing that the notice to class members provided a "detailed explanation" about how settlement amounts were calculated, the appraisal process utilized, how to object, and the amount of attorneys' fees and costs assessed. Turning to substantive fairness, the Court described the parties' use of a joint appraiser and cited factors demonstrating that they engaged in arms-length negotiations that gave no special preference to one class member over another. Observing that members of the settlement class "overwhelmingly approved" the proposed settlement agreement, the Court praised class counsel for responding to one class member's concerns and addressing an issue related to an incomplete response from another class member.

The Court then concluded that the settlement was fair to the class as a whole, noting that the parties retained an appraiser to prepare valuation reports and the proposed agreement gave class members a certain and definite resolution of the case without the need for a trial. Finally, the court determined that the amount of attorneys' fees and costs provided in the proposed settlement was reasonable, acknowledging that counsel engaged in a multi-year negotiation at arm's length, disclosed the amounts to class members, and no class members objected.

Read the decision here.

**Court Finds that the Trails Act Does Not Interfere with a Landowner's Preexisting Right under State Law to Cross a Corridor to Access and Use Their Land**. *Schulenburg v. United States*, Fed. Cl. No. 16-371L, 139 Fed. Cl. 716 (Oct. 23, 2018). [Williams, S.J.]

The parties in this rails-to-trails action were engaged in settlement discussions. To facilitate their negotiation of just compensation, the parties requested that the Court resolve whether (1) there exists a right under Indiana law to cross the rail corridor and (2) Section 8 of the Trails Act preempts or extinguishes state law crossing rights.

The Court answered the first question in the affirmative. Turning to Indiana law, the Court concluded that the plaintiffs acquired a right to cross the corridor when the railroad right-of-way was established and severed their land. That crossing right "runs with the land and passes to subsequent owners of the land." Answering the second question in the negative, the Court explained that the Trails Act does not preempt the rights held by owners of the servient estate, including crossing rights that were created, recognized, and protected under state law. Accordingly, the Court concluded that the Trails Act did not interfere with the plaintiffs' preexisting right to cross the corridor to access and use their land that the corridor severed.

Read the decision here.

**Court Rejects Request To Transfer Venue For Takings Claim To Article III District Court.** *Trinco Investment Co. v. United States*, Fed. Cl. No. 11-857L, 140 Fed. Cl. 530 (Oct. 31, 2018). [Damich, S. J.]

The plaintiffs in this takings case possessed interests in five properties located in California that were affected by wildfires in the northwestern portion of the country. As part of its efforts to combat the wildfires, the United States Forest Service set control fires ahead of the fire path. As a result, 1,782 acres of the plaintiffs' merchantable timber, valued at approximately $6.6 million, were destroyed. The plaintiffs filed suit in December 2011 seeking compensation based upon the government's physical taking of the merchantable timber.

The plaintiffs moved to transfer the case to California federal district court, contending that the Court of Federal Claims lacked constitutional authority to adjudicate takings claims against the government under the Fifth Amendment. According to the plaintiffs, the Takings Clause of the Fifth Amendment is self-executing, meaning that Congress need not pass legislation creating a right to just compensation and sovereign immunity does not apply. Plaintiffs further argued that takings claims against the government must be decided in an Article III court because takings claims are rooted in the common law and must be decided by a jury.

The Court rejected these arguments. Citing section 1 of Article III, the Court observed that all federal courts other than the Supreme Court are "creatures of Congressional legislation." The Court further noted

that Congress may establish legislative courts under Article I. The Court also rejected the plaintiffs' interpretation of the self-executing nature of the Takings Clause as authorizing citizens to sue the government in an Article III court. Doing so, the Court stated, "would be news to judges and legal scholars in the first one hundred years of this nation's existence under the present constitution." Instead, the Court explained that sovereign immunity applies to rights granted by the Constitution. Furthermore, the Court deemed a takings case not a cause of action under common law, observing that "cases before the Court of Claims were not really common law causes of action because they could be precluded by sovereign immunity."

The Court acknowledged that takings claims generally were not heard in Article III courts and, before 1855, just compensation was provided by Congress through private bills. The Tucker Act conferred upon the Court (and its predecessor) "clear statutory authority" over takings claims. Nevertheless, after extensive review and analysis of Article I and Article III cases, the Court stayed proceedings and certified to the Federal Circuit the following question: whether it is a violation of Article III for Congress to provide that the Court of Federal Claims has jurisdiction to hear claims for just compensation pursuant to the Fifth Amendment.

Read the decision here.

## TAX

**Court Holds that Plaintiffs Failed to Establish Reasonable Cause.** *Peng v. United States*, Fed. Cl. No. 16-1263 T, 139 Fed. Cl. 630 (October 24, 2018). [Campbell-Smith, J.]

Plaintiffs brought this action seeking a refund of failure-to-file and failure-to-pay penalties assessed for the 2012 tax year under 26 U.S.C. § 6651(a)(1) and (2). Plaintiffs contended that their failure to timely file their 2012 tax return and pay the tax when due was due to reasonable cause and did not result from willful neglect. Plaintiffs alleged that family circumstances, including the deaths of Mr. Peng's father and grandmother, and the birth of their daughter, provided reasonable cause for their delay in filing their return and paying the tax due for the 2012 tax year. Plaintiffs also argued that they had reasonable cause for failing to meet the filing and payment deadlines because they justifiably relied upon their accountant to file an extension of time and to prepare and to file their tax return for the 2012 tax year.

The Court held that plaintiffs did not receive any advice from their accountant which resulted in the late filing of their return. Therefore, the Court held that plaintiffs' reliance on their accountant did not constitute reasonable cause. In addition, the Court held that plaintiffs' family-related circumstances were not so severe that plaintiffs were unable to attend to their personal affairs. Thus, the Court held that plaintiffs failed to meet their heavy burden to prove reasonable cause. The Court also determined that plaintiffs failed to carry their burden of proving that they did not willfully neglect their obligation to timely file their 2012 tax return.

Read the decision here.

**Court Holds that Plaintiff Willfully Failed to File FBAR and Upholds Imposition of $698,000 Civil Penalty.** *Kimble v. United States*, Fed. Cl. No. 17-421, 141 Fed. Cl. 373 (December 27, 2018). [Braden, S.J.]

The Court upheld the $698,000 penalty assessed against plaintiff in this willful FBAR refund suit. Plaintiff, Kimble was the co-owner (with her parents) of an account at UBS in Switzerland for over 30 years. She admitted in her deposition that she intended to keep the UBS account a secret from everyone, including the U.S. Government, as the account was meant as an "escape mechanism" in the event her family was ever subject to persecution. The Court found that plaintiff: (1) failed to disclose her foreign accounts to her accountant; (2) never asked her accountant how to report her foreign investment income; (3) never reviewed her individual income tax returns for accuracy; and (4) answered "No" to Question 7(a) on her 2007 income tax return, which constituted a false representation that she had no foreign bank accounts. This conduct, the Court determined, demonstrated that plaintiff "reckless[ly] disregard[ed]" her legal duty to file an FBAR.

The Court also let stand the IRS's determination of the amount of the FBAR penalty as 50% of the balance in plaintiff's UBS account. In this regard, the Court determined that plaintiff failed to show that the analysis used by the IRS constituted an abuse of its discretion. The Court also declined to follow the decision in *United States v. Colliot*, 2018 U.S. Dist. LEXIS 83159 (W.D. Tex. 2018), which limited the willful FBAR penalty to the $100,000 amount listed in regulations that were superseded by statute in 2004. More specifically, the Court found that, in amending the statute in 2004, Congress enlarged the "cap" that had been provided for in the pre-2004 statute, and thereby nullified the now-inconsistent regulations that had been issued under that statue.

Read the decision here.

## VACCINE

**Special Master Finds Petitioner Entitled to Compensation for Severe Chronic Headaches Following HPV Vaccination.** *B.A. v. HHS*, Fed. Cl. No. 11-51V, 2018 WL 6985218 (Dec. 6, 2018) (Reissued Jan. 10, 2019). [Gowen, S.M.]

The petitioner filed a case in the National Vaccine Injury Compensation Program ("NVICP") alleging severe, chronic headaches and various other sequelae, as a result of a human papillomavirus ("HPV") vaccination. Multiple expert reports were filed by petitioner's expert neurologist alleging two theories. First, that petitioner actually suffered from acute disseminated encephalomyelitis ("ADEM"), which was caused by molecular mimicry between the vaccine antigens and myelin basic protein. Second, petitioner's expert opined that her chronic headaches were a result of the combined effect of the HPV antigens together with the alum adjuvant, leading to stimulation of Nalp3 inflammasomes in trigeminal ganglion neurons, which in turn activated the production of IL-1# resulting in headache pain. The respondent submitted expert reports from a neurologist and toxicologist disputing petitioner's two theories. Following an entitlement hearing, and further briefing, the special master found that petitioner did not establish that she developed ADEM. However, the special master accepted the petitioner's second theory, based on available evidence, as a sound and reliable, in susceptible patients. In so finding, the special master, noted, "[t]he emerging role of the innate immune system in causing inflammatory reactions as well as in directing adaptive immune responses appears to be an important element of the puzzle in this case."

Likewise, the special master found that respondent did not show that a psychological component was more likely than not the alternative cause for petitioner's symptoms.

This case is currently in the damages phase.

Read the decision here.

**Federal Circuit Affirms Court of Federal Claims Decision Affirming the Special Master's Denial of Entitlement in Petition Alleging HPV Vaccine Caused Rheumatoid Arthritis.** *Olson v. HHS*, Fed. Cl. No. 13-439, Fed. Cir. 2018-1467, 758 F. App'x 919 (Fed. Cir. Dec. 21, 2018). [Wallach, J., Taranto, J., Hughes, J.] [Per Curiam]

In the underlying case, petitioner alleged that she developed rheumatoid arthritis ("RA") as a result of the HPV vaccine, administered to her in 2010, when she was 52 years old. At the time of vaccination, petitioner suffered from a variety of medical conditions, including hypothyroidism, vitamin D deficiency, osteochondroma, Achilles tendon rupture, anemia, asthma, sinus pressure, facial pain, lung congestion, and chronic sinusitis. Almost five and a half months later, petitioner complained to her gynecologist that she had persistent knuckle enlargement with pain since her vaccination, and she was referred to a rheumatologist. The rheumatologist diagnosed her with reactive arthritis. Testing revealed biological indicators of a prior resolved infection consistent with reactive arthritis, but was negative for two indicators strongly associated with RA. A second rheumatologist diagnosed her with seronegative RA in 2013, and attributed it to petitioner's immune system over-reaction to the HPV vaccine. The special master denied petitioner entitlement to compensation under the Vaccine Act, and the Court of Federal Claims affirmed the decision.

On appeal, the Federal Circuit determined that the special master made plausible findings based on the record under *Althen* prong one when he found that petitioner's specific theory of causation failed to reputably show that the HPV vaccine *can* cause RA. The Federal Circuit concluded that petitioner's arguments against the Special Master's findings were unavailing because the Special Master correctly applied the law of *Althen* prong one throughout his analysis of the evidence. His determination that petitioner's expert, her treating rheumatologist, lacked the expertise to persuasively explain and defend the theory of causation did not, as petitioner claimed, impermissibly elevate her burden of proof. The Federal Circuit determined that the special master's assessment of petitioner's expert's credibility was appropriate, given his role as fact finder, and the expert's acknowledgement of his limitations when discussing alum and its potential immune system effects, as well as the fact that he did not begin to see petitioner until three years from the date of her HPV vaccination. Accordingly, the Federal Circuit affirmed the decision of the Court of Federal Claims.

Read the opinion here.

## INDIAN CLAIMS

**Court Grants in Part and Denies in Part Motion to Dismiss Tribe's 2nd Amended Complaint for Breach of Trust.** *Inter-tribal Council of Arizona, Inc. v. United States*, Fed. Cl. No. 15-342L, 140 Fed. Cl. 447 (October 17, 2018). [Firestone, S.J.]

The Inter-Tribal Council of Arizona ("ITCA") alleged breach of the government's obligations under the Arizona-Florida Land Exchange Act (the "AFLEA"); under 25 U.S.C. § 162a; and under the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (the "Trust Fund Reform Act"). Under the AFLEA, Barron Collier Co. ("Collier") was to make payments pursuant to an exchange of land owned by Collier in Florida for former Indian School property in downtown Phoenix,

Arizona. The Court found that it lacked jurisdiction under the 28 U.S.C.§ 2501 6-year statute of limitations over ITCA claims of failure to invest prudently and over ITCA claims that the government should make up payments that Collier failed to make. As to ITCA claims that the government failed to secure payments with sufficient security, the Court found that ITCA failed to state a claim in that the government fulfilled its obligation when it sued Collier in federal district court for the amounts owed. That case was settled.

ITCA, citing *Onega v. United States*, 91 Fed. Cl. 629 (2010), argued that its claims should not be time-barred because the government had an on-going duty to ensure that Collier maintained adequate security. That argument, based on the continuing claims doctrine outlined in *Onega,* was rejected by the Court, which found that ITCA's Claim was based on a challenge to the establishment of the obligation, not a continuing violation of that obligation. Relying on *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1031 (Fed. Cir. 2012), ITCA further argued that it had neither actual knowledge nor any reasonable way of knowing that the Government had failed to secure sufficient security until it was informed by the government less than six years ago. The Court also rejected that argument, finding that ITCA knew about the terms of a Trust Fund Payment Agreement with Collier including the amount of security that Collier was required to hold more than six years before it filed this lawsuit.

Read the decision here.