Inside 717

Vol. 10, No. 2 ~ April 2018-July 2018

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

WHAT'S INSIDE

MESSAGE FROM THE EDITORS-IN-CHIEF ... 1
COURT PROCEDURE ... 3
An Agency's Improper Conduct Does Not Constitute a "Special Factor" Justifying an Award of Attorney Fees Above the Default Rate In the Equal Access to Justice Act, Federal Circuit Holds... 3
Court Denies Partial Motion To Dismiss Contractor's Claims Arising Out Of Contract To Build Nuclear Processing Facility and Enters Partial Summary Judgment. ... 3
GOVERNMENT CONTRACTS ... 4
Court Sustains Bid Protest Challenging Agency's Decision Overriding CICA Stay, Finding Agency Had Not Shown That Performance Of The Task Order Was In The Best Interests Of The United States. ... 4
Court Denies Protest as Untimely, Rejecting the Protester's Efforts to Characterize an Objection to an RFP Amendment as a Challenge to the Technical Evaluation ... 5
PAY ... 6
Court Holds That It Has Jurisdiction to Hear Military Pay Actions Brought by Air Force Majors Challenging Their Separation From the Air Force, but Denies Their Claims on the Merits ... 6
TAKINGS ... 7
Federal Circuit Reverses Decision Of The Court Finding That The Government's Construction, Operation, And Maintenance Of A Navigation Canal Resulted In A Temporary Taking Due To Flooding. ... 7
Court Approves Rails-to-Trails Class Action Settlement, Finding the Parties' Agreement Fair, Reasonable, and Adequate ... 8
Court Finds That Issuance of a Notice of Interim Trail Use Effected A Temporary Taking of Property and Rendered the Government Liable for Compensation Under the Fifth Amendment. 9
Court Finds the Environmental Protection Agency's Confiscation of Kish, Slag, and Scrap Generated at a Defunct Steel Mill Constituted a Compensable Fifth Amendment Taking. ... 9
In Hurricane Harvey Flooding Litigation, Court Disagrees With the Government's Analysis of Plaintiffs' Claims at the Pleadings Stage But Defers Ruling on the Motion to Dismiss Until Trial. 10
Court, Applying Washington State Law, Finds That Plaintiffs in Rails-To-Trails Action Lacked Cognizable Rights to the Land Underlying the Railroad Corridor At Issue. ... 11

Court Dismisses Claim That An Agency's Failure To Pursue An Investigation Constituted A Regulatory Taking. 11
Court Grants in Part and Denies in Part the Parties' Cross-Motions for Summary Judgment in North Carolina Rails-To-Trails Case Involving Parcels Adjacent to a Railroad Right of Way or Adjoining Public Road Rights-of-Way. 12
Court Rules in Favor of Government in Rails-to-Trails Litigation Where, Under Florida Law, Plaintiffs Lacked A Cognizable Interest in the Railroad Corridor At Issue. Castillo 12
TAX 13
Court Rules that Plaintiff Lacked Standing to Seek Recovery of a Listed Transaction Penalty 13
VACCINE 13
Court Affirms Special Master's Award of Interim Damages to Petitioner for Vaccine Injury Compensation. 13

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.

EDITORIAL BOARD

EDITORS-IN-CHIEF

AMANDA TANTUM
DOJ-Civil Division

STACEY GRIGSBY
Boies Schiller Flexner LLP

COLLEEN C. HARTLEY
DOJ-Civil Division

CONTRIBUTING EDITORS

Court Procedure
ALEXANDER O. CANIZARES
DOJ-Civil Division

ROGER V. ABBOTT
Mayer Brown

Government Contracts
ALEX HONTOS
Dorsey & Whitney

CORINNE NIOSI
DOJ-Civil Division

Indian Claims
DONALD H. GROVE
Nordhaus Law Firm

MARISSA PIROPATO
DOJ-ENR Division

Pay
WILLIAM GRIMALDI
DOJ-Civil Division

Takings
DAVID HARRINGTON
DOJ-ENR Division

ROBERT A. CAPLEN
Hunton Andrews Kurth, LLP

STEPHEN S. DAVIS
Arent Fox, LLP

Tax
MARK RYAN
DOJ-Tax

FREDRICK C. CROMBIE
Coblentz Patch Duffy & Bass LLP

Vaccine
DANIEL A. PRINCIPATO
DOJ-Civil Division

JOSEPH M. PEPPER
Conway Homer, P.C.

COURT PROCEDURE

An Agency's Improper Conduct Does Not Constitute a "Special Factor" Justifying an Award of Attorney Fees Above the Default Rate In the Equal Access to Justice Act, Federal Circuit Holds. *Starry Associates, Inc. v. United States*, Fed. Cir. 2017-2148, 892 Fed. 3d. 1372 (Fed. Cir. June 22, 2018). [O'Malley, J.]

In this appeal of a bid protest from the Court of Federal Claims, the Federal Circuit considered the meaning of the term "special factor" in a provision of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, allowing the trial court to increase the statutory attorney fee rate in certain cases brought by or against the government.

Under 28 U.S.C. § 2412(d)(1)(A), plaintiffs who prevail in cases brought against the United States are entitled to "fees and expenses," in addition to costs, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." EAJA limits the attorney fees that may be awarded under this provision to $125.00 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A).

The trial court held that the protestor, Starry Associates, Inc., was entitled to attorney fees under this section at a rate exceeding $125.00 per hour, after finding that the Department of Health and Human Services had engaged in "egregious" misconduct during its procurement of certain business operations services that constituted a "special factor" warranting a higher hourly fee.

The Federal Circuit reversed, holding that egregious agency misconduct is not a "special factor" under section 2412(d)(2)(A), citing the statute's text, structure, purpose, and legislative history. The Court declined to read the term "special factor" broadly, noting that EAJA operates as a waiver of sovereign immunity that must be construed narrowly, and that Congress' decision to include an example of a "special factor"—the "limited availability of qualified attorneys for the proceedings involved," 28 U.S.C. § 2412(d)(2)(A)—cabins the meaning of the term. The Court reasoned that "special factor" in this context requires "circumstances in which something atypical directly impacts the hourly rate necessary for the litigation in question." Agency misconduct, the Court reasoned, "does not bear any nexus to the reasonable hourly rate an attorney might charge in litigation" and thus cannot justify exceeding the statutory cap of $125.00 per hour. The Court observed that EAJA takes government misconduct into account in other ways, namely by allowing for a higher fee award where agency misconduct results in an attorney spending a greater number of hours on the matter. The Court also noted that its decision was consistent with the majority of other circuits that considered the question.

Read the decision here.

Court Denies Partial Motion To Dismiss Contractor's Claims Arising Out Of Contract To Build Nuclear Processing Facility and Enters Partial Summary Judgment. *CB&I AREVA MOX Services, LLC v. United States*, Consol. Fed. Cl. 16-950C, 17-2017C, 18-80C, 18-522C, 18-677C, 18-691C, 18-921C, 138 Fed. Cl. 292 (June 11, 2018, *reissued*, July 30, 2018). [Wheeler, J.]

The Court of Federal Claims revisited the question of what jurisdictional and procedural requirements a contractor must satisfy to properly bring Contract Disputes Act (CDA) claims before the Court in a case involving a contract to build a nuclear fuel-processing facility.

Plaintiff, CB&I AREVA MOX Services, LLC (MOX Services) entered into a cost reimbursement contract with the Department of Energy, National Nuclear Security Administration (NNSA) to construct a facility to transform weapons-grade plutonium into mixed oxide fuel rods that may be used in commercial nuclear power plants. During the course of the facility construction, MOX Services submitted various individual claims to a contracting officer seeking, among other things, certain incentive fees it alleged it was owed by NNSA. The claims were consolidated before the Court. The parties filed cross-motions for partial summary judgment and defendant also moved to dismiss certain of MOX Service's claims for failure to state a claim under Rule 12(b)(6) and for lack of subject-matter jurisdiction under Rule 12(b)(1).

The Court denied defendant's partial motion to dismiss. The Court rejected defendant's argument that MOX Services' claim for a fixed fee was deficient because it was not based upon a specific contract provision, reasoning that although the claim was styled as a "breach of contract" claim rather than an equitable adjustment claim, "this is a semantic distinction without a substantive difference" and MOX Services complied with the CDA's requirements by submitting a Request for an Equitable Adjustment to the contracting officer and then presented a certified claim for a fixed fee to the contracting officer. The Court also held that this claim was not barred by the CDA's six-year statute of limitations because it did not accrue until certain mandatory pre-claim procedures had been completed, namely NNSA's refusal to adjust the fee to account for certain changes.

The Court also held that it possessed jurisdiction over MOX Services' claim with respect to $21.6 million in provisional incentive fees to which MOX Services alleged it was entitled. The Court held that although MOX Service did not present a certified claim to the contracting officer with respect to the $21.6 million in fees, the Court nevertheless had jurisdiction because it was an "affirmative *government* claim, and does not require presentment to the contracting officer." (Emphasis in original). The Court also granted partial summary judgment for MOX Services, holding that MOX Services was entitled to judgment on its claim that the contract allowed it to retain certain provisional incentive fee payments until construction of the plutonium processing facility was completed.

Read the decision here.

GOVERNMENT CONTRACTS

Court Sustains Bid Protest Challenging Agency's Decision Overriding CICA Stay, Finding Agency Had Not Shown That Performance Of The Task Order Was In The Best Interests Of The United States. *Intelligent Waves, LLC v. United States*, 137 Fed. Cl. 623 (April 13, 2018, *reissued* May 9, 2018). [Hodges, S.J.][1]

Plaintiff Intelligent Waves, LLC is one of twenty-nine entities that has received a contract under the Department of Veterans Affairs' (VA) "Transformation Twenty-One Total Technology Next Generation" multiple award, indefinite delivery/indefinite quantity contract. In March 2018, plaintiff filed a bid protest with Government Accountability Office (GAO), contesting VA's decision to award a task order to another contractor. One week later, VA issued a decision overriding the automatic stay required by the Competition in Contracting Act (CICA), 31 U.S.C. § 3553, on the ground that proceeding with the contract immediately was in the "best interests" of the United States. Intelligent Waves filed a protest with the Court of Federal Claims challenging this override decision.

[1] Contribution submitted by Roger V. Abbott.

CICA provides that an agency may override the automatic stay only up on a written finding that performance of the contract is in the best interests of the United States or that urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General. 31 U.S.C. § 3553(d)(3)(C). The Court noted that, because, "[p]resumably, prompt performance of most contracts awarded by government agencies would be in the country's best interests or the contracts would not be awarded in the first place," "the justification for an automatic stay override mandated by Congress requires something more than showing that the contract's original purpose serves the United States' interests." The Court concluded that the government had not shown how the override was in the best interests of the United States because it had not demonstrated a direct connection between any possible delay in performance of the new task order and a harm that would necessarily affect veterans adversely.

Additionally, the Court rejected the government's argument that the timing in this case was crucial and that any lapse in services posed an "unacceptable risk." The Court concluded that VA "had ample time to consider such a lapse and take appropriate measures to avoid it" and had failed to explain why any harm resulting from a delay to a new task order could not be addressed with a bridge contract.

Finally, in response to the government's contention that injunctive relief is a "drastic and extraordinary remedy that is not to be routinely granted," the Court held that the standard four-part test for injunctive relief does not apply because, in the case of a stay override, declaratory relief simply "preserves the scheme that Congress intended."

Read the decision here.

Court Denies Protest as Untimely, Rejecting the Protester's Efforts to Characterize an Objection to an RFP Amendment as a Challenge to the Technical Evaluation. *Trans Digital Techs., LLC v. United States*, 138 Fed. Cl. 34 (April 20, 2018, *refiled* June 15, 2018). [Bruggink, S.J.][2]

In this bid protest action, protester Trans Digital Technologies, LLC challenged the decision of the U.S. Department of State to award a contract for passport printers to another offeror. As part of its evaluation of technical performance standards related to service, waste, and spoilage, the agency subjected each offeror's printers to a battery of 38 tests, including tests, numbered 23 through 25, to determine if the equipment could provide uninterrupted service and to test the amount of waste and spoilage of passport books. After testing was complete, the agency's contracting officer concluded that Tests 23 through 25 were flawed and issued an amendment to its request for proposals (RFP) removing those tests from the agency's consideration. Plaintiff opted not to file a pre-award bid protest challenging this decision.

After failing to win the award, Trans Digital filed a bid protest. Among other things, plaintiff argued that the agency had irrationally concluded that the awardee would not exceed the waste and spoilage limit in the technical performance standards, even though the results of the cancelled Tests 23 through 25 appeared to indicate otherwise, at least for one particular test run.

Although the Court noted that plaintiff was careful to couch its protest as a challenge to the technical evaluation rather than a challenge to the RFP amendment that eliminated Tests 23 through 25, the Court rejected this argument as barred under the waiver rule set forth in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007): "When an agency changes its mind regarding an evaluation

[2] Contribution submitted by Roger V. Abbott.

scheme and amends the solicitation to match that decision, an offeror may not have it both ways by ignoring the decision at the time, submitting a revised offer, and then abiding the outcome of the procurement before deciding whether to file a challenge. It is no answer for the protestor to couch its protest as aimed at the subsequent evaluation when the very error it alleges results from the changed evaluation scheme." The Court also concluded that plaintiff could not demonstrate prejudice because both plaintiff and the awardee scored within the "Excellent" range for that factor of the evaluation and were awarded that adjectival rating; thus, even if their scores were revised as plaintiff contended they should have been, the actual result from the agency would have been no different.

Read the decision here.

PAY

Court Holds That It Has Jurisdiction to Hear Military Pay Actions Brought by Air Force Majors Challenging Their Separation From the Air Force, but Denies Their Claims on the Merits. *Brian R. Baude et al., v. United States*, Consol. No. 16-49C, 137 Fed. Cl. 441 (April 6, 2018). [Damich, S.J.]

The Court of Federal Claims held that it possessed subject-matter jurisdiction to review Military Pay Act suits brought by Department of the Air Force (Air Force) Majors who had been discharged from the Air Force after being twice been passed over for promotions, finding that their claims were based upon a money-mandating source of law and were justiciable. The Court sustained the Air Force's determinations on the merits, however.

By statute, the military services are subject to an "up-or-out" system, whereby service members who are twice passed over for promotion are required to be discharged unless they are close to retirement. The plaintiffs in this consolidated action were 17 United States Air Force Majors who were twice passed over for a promotion and then not selected for continuation to retirement eligibility by a Selective Continuation Board and then separated from the Air Force. Selective Continuation Boards make recommendations as to whether service members who have been twice non-selected for promotion should be continued in service or separated. After being non-selected and then unsuccessfully appealing to the Air Force Board of Correction of Military Records, the plaintiffs sought a court order directing the Secretary of the Air Force to convene a special board to review their separation. They also sought back pay. The plaintiffs relied, in part, on 10 U.S.C. § 1558, which, among other things, allows a "court of the United States" to review non-retention decisions of Selective Continuation Boards.

The Government moved to dismiss the actions for lack of jurisdiction under Rule 12(b)(1) on grounds that 10 U.S.C. § 1558 did not confer jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) because it provides only equitable relief and does not mandate the payment of money. The Court agreed that section 1558 is not money-mandating because it only awards equitable relief (a remand), but concluded that plaintiffs' complaint, when looked at "as a whole," was "primarily" seeking money damages in the form of back pay. In particular, the Court found, the plaintiffs were seeking damages resulting from their allegedly wrongful non-retention under the Military Pay Act, 37 U.S.C. § 204, which the Court has recognized is a separate, money-mandating source of law. Thus, the Court held that it possessed jurisdiction to review the claims and denied defendant's motion.

The Court also rejected, in part, the Government's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) on grounds that many of the plaintiffs' claims were non-justiciable challenges to the Secretary of the Air Force's personnel decisions. The Court explained that issues that challenge the

"wisdom" of the Secretary's policies are nonjusticiable, but those that challenge the procedures used in separating the plaintiffs were not. The Court found that one of the plaintiffs' four issues, which challenged the reasonableness of the Secretary's decision to reduce the Air Force's manpower, was nonjusticiable.

On the merits, the Court found that the Air Force committed no procedural error when deciding not to continue the Majors in service following their failure to be promoted a second time. Of note, the Court found, contrary to plaintiffs' arguments otherwise, that the Secretary of the Air Force possessed the discretion to alter the continuation criteria and to separate the Majors. Although plaintiffs argued that the policy required the Secretary to retain officers within six years of retirement that policy only set a "norm" that could be altered in unusual circumstances. The Court then found no error in the AFBCMR's finding that the Secretary identified unusual circumstances that required the separation of additional Majors – the need to reduce Air Force manpower while maintaining an appropriate mix of Airmen. The Court entered judgment for the United States. One of the 17 plaintiffs has appealed the decision *pro se*.

Read the decision here.

TAKINGS

Federal Circuit Reverses Decision Of The Court Finding That The Government's Construction, Operation, And Maintenance Of A Navigation Canal Resulted In A Temporary Taking Due To Flooding. *St. Bernard Parish Government, et al. v. United States*, 887 F.3d 1354 (April 20, 2018) [Dyk, J.], reversing *St. Bernard Parish Government, et al. v. United States*, No. 05-1119, 121 Fed. Cl. 687 (2015). [Braden, S.J.]

In May 2015, the Court found the Government liable for a Fifth Amendment temporary taking of land flooded during Hurricane Katrina and subsequent storms in an action brought by New Orleans-area landowners and a local government. The plaintiffs' land was flooded by storm surge along the Mississippi River-Gulf Outlet (MRGO), a navigation canal constructed in the 1960s and maintained by the Army Corps of Engineers to boost commercial activity by providing ocean-going ships a shorter route from the Gulf of Mexico to the Port of New Orleans.

The Court, applying *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), found that the flooding was the foreseeable result of the Government's construction and maintenance of MRGO. The Court explained that in "order for a taking to occur it is not necessary that the [G]overnment intend to invade the property owner's rights, as long as the invasion that occurred was 'the foreseeable or predictable result' of the [G]overnment's actions." The Court found that evidence demonstrating foreseeability included MRGO increasing the salinity of the water, which destroyed protective wetlands, and the Army Corps failing to prevent and remediate erosion of MRGO's banks, which widened the channel considerably. The Court found MRGO's condition created a storm surge "funnel effect," which exacerbated the danger and extent of flooding. Following a separate valuation trial, the Court ordered the Government to pay $5.46 million in compensation. The Government appealed, and the landowners cross-appealed, arguing the Court miscalculated damages.

The Federal Circuit reversed, explaining that the Government is only liable for a taking when it affirmatively acts. Claims for property damage due to the Government's failure to act, such as failing to maintain MRGO, may state a tort claim but not a taking claim. (The Federal Circuit noted that other New Orleans landowners did sue under the Federal Tort Claims Act in Federal district court, but the

United States Court of Appeals for the Fifth Circuit held the Government was immune from liability under the discretionary function exception to the FTCA.) The Federal Circuit explained that the Government was liable, in *Arkansas Game*, for a taking because it affirmatively released water from a dam.

With regard to the two affirmative acts claimed – the Army Corps' construction of MRGO, completed in 1968, and its operation of MRGO – the Federal Circuit held the landowners failed to prove causation, which required them to show that "in the ordinary course of events, absent government action, plaintiffs would not have suffered the injury." The landowners were required to, but failed to, show the amount of flooding sustained during Hurricane Katrina would not have flooded their property if there had been no Government action at all, including the Government's building of *both* MRGO and the entire Lake Pontchartrain and Vicinity Hurricane Protection Project flood-control levee system. The Federal Circuit, thus, concluded that the government was not liable for a taking under the Fifth Amendment based on the construction or operation of MRGO.

The plaintiffs have filed a petition for certiorari.

Read the decision here.

Court Approves Rails-to-Trails Class Action Settlement, Finding the Parties' Agreement Fair, Reasonable, and Adequate. *Sears v. United States*, Nos. 12-889L, 13-404L, 16-1233L, 137 Fed. Cl. 744 (May 8, 2018). [Lettow, J.]

The plaintiffs—158 members of a settlement subclass—in this Rails-to-Trails class action alleged that the government violated the Fifth Amendment when the Surface Transportation Board ("STB") issued a Notice of Interim Trail Use ("NITU") transferring to the Iowa National Heritage Foundation the Iowa River Railroad's interests in a railroad corridor. According to the plaintiffs, the railroad corridor lays across their property, and, in the absence of the NITU and eventual railbanking, the railroad's abandonment of the easement would render their property unburdened by the easement. The plaintiffs sought money damages for the full fair market value of the property taken.

The Court certified the case as an opt-in class action under RCFC 23. Eventually, the parties reached a tentative settlement, but several property owners withdrew and elected to proceed to trial. The court then split the class into settlement and trial subclasses. After the parties reached a settlement agreement that received approval from the STB, the settlement plaintiffs moved for preliminary settlement. The court revised a proffered form of notice to class members and held a fairness hearing.

The settlement agreement specifies that members of the settlement class are entitled to $2,237,169.00 as just compensation, apportioned to each class member according to specific amounts specified. It includes an additional $443,514.16, consisting of interest that accrued on the principal from the date of the taking. Pursuant to RCFC 23(e), the court analyzed the settlement agreement and determined that the parties' proposal was fair (both procedurally and substantively), reasonable, and adequate. It explained that the parties' status report during settlement negotiations reflected a continued desire to reach a settlement, class counsel acted as zealous advocates for class members, and the terms of settlement were fair. The court also approved the settlement agreement's provision for attorneys' fees and costs.

Read the decision here.

Court Finds That Issuance of a Notice of Interim Trail Use Effected A Temporary Taking of Property and Rendered the Government Liable for Compensation Under the Fifth Amendment. *Banks v. United States*, No. 16-1633, 138 Fed. Cl. 141 (May 17, 2018). [Bruggink, J.]

In this Rails-to-Trails case, five plaintiffs owned fourteen parcels of land in Missouri and alleged that the government effected a Fifth Amendment taking of their property when the Surface Transportation Board, acting upon a petition filed by the Union Pacific Railroad, issued a Notice of Interim Trail Use ("NITU") that postponed their immediate right to full use of the surface. The parties filed cross-motions for partial summary judgment. The government sought a preliminary ruling that, for three parcels at issue, the plaintiffs did not own the land in fee simple or waived any objection to the government's conduct.

First, addressing the government's motion for partial summary judgment on the three disputed parcels, the court analyzed Missouri law, which permits railroad companies to hold rail corridors in fee but favors conveyance of easements to railroads. Reviewing the deeds' language, the court concluded that each conveyed fee title to the land underlying the railway and granted summary judgment to the government with respect to the three parcels.

Next, the court addressed general liability, agreeing with the plaintiffs that whether a trail easement has not been imposed or a trail constructed is not relevant to the issue of liability but is part of the damages calculus. Moreover, the court declined to grant the government discovery on fourteen factors it deemed "immaterial to liability or can be addressed without any further discovery." Ultimately, the court concluded that the NITU occurred; the NITU had the effect of blocking the plaintiffs' use of their own land for over six years; and the nature of the taking was foreseeable, severe, not mitigated based on the quality of the land, and could not be anticipated. Consequently, the court entered partial summary judgment as to liability for a temporary taking in favor of the plaintiffs.

Read decision here.

Court Finds the Environmental Protection Agency's Confiscation of Kish, Slag, and Scrap Generated at a Defunct Steel Mill Constituted a Compensable Fifth Amendment Taking. *Gadsden Industrial Park, LLC v. United States*, No. 10-757L, 138 Fed. Cl. 79 (May 18, 2018) [Bruggink, S.J.], *appeals filed*, Nos. 18-2132, -2147 (Fed. Cir. July 9, 2018; July 10, 2018), *appeals deactivated* (July 11, 2018).

In this takings action, plaintiff, the successful bidder at a bankruptcy auction of waste byproducts (slag and kish) from a defunct steel mill, alleged a taking based on the removal or use of byproducts by a government contractor conducting environmental remediation work. Plaintiff hired a firm to recover metal from a pile of slag on part of the property. Meanwhile, the Environmental Protection Agency ("EPA") investigated a claim that contaminants were migrating from the property and planned to use on-site slag as a way to reduce contaminated overflow. While plaintiff entered into metal recovery negotiations with another entity, the EPA hired a contractor, MultiServ, to conduct a recovery operation on the site. MultiServ ultimately processed and sold 245,890 tons of material, grossing more than $13.5 million of metal-bearing materials. Plaintiff did not attempt its own recovery operation during the course of MultiServ's work, but instead purchased slag from MultiServ.

Addressing the parties' dispute over what material plaintiff owned, the Court determined that the plaintiff purchased kish, assorted scrap, and 420,000 cubic yards of slag at the bankruptcy auction.

Because scrap is a finished product, it was not a byproduct; however, the Court interpreted the bankruptcy sale contract to include scrap within the "miscellaneous other materials" that plaintiff purchased. In so finding, the Court rejected the government's arguments that plaintiff only purchased a license to explore portions of the mill property or abandoned its property interest by making no use of it during a six-year period before remediation work commenced. The Court then concluded that plaintiff, at trial, proved that each material was present on the real property at issue and used or sold by the EPA.

The Court found that the plaintiff's proof of the compensation to which it is entitled "fails regarding kish and assorted scrap," because it failed to provide reliable proof of what a willing buyer would have paid for this byproduct. The Court awarded to plaintiff compensation for the EPA's taking of 92,500 cubic yards of slag. Observing that the general rule in measuring compensation is the fair market value of the property on the date of appropriation, the Court analyzed plaintiff's damages calculations and ultimately determined the appropriate measure of compensation was based upon the rate at which MultiServ sold slag to plaintiff.

Read the decision here.

In Hurricane Harvey Flooding Litigation, Court Disagrees With the Government's Analysis of Plaintiffs' Claims at the Pleadings Stage But Defers Ruling on the Motion to Dismiss Until Trial. In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, No. 17-9001L, 138 Fed. Cl. 658 (May 24, 2018). [Lettow, J.]

This action arose in the aftermath of Hurricane Harvey and flooding that impacted over 10,000 private properties west of Houston and upstream of the federally designated, built, and maintained Addicks and Barker Dams. These dams, built to limit flooding in Houston, collected water in their reservoirs during the storm, which inundated the Houston area with over 30 inches of rain. Initially, the United States Army Corps of Engineers ("Corps") closed the dams' gates to forestall downstream flooding. But the Corps opened the dams' gates when the reservoirs filled, causing flooding of over 3,081 acres of private property.

The owners of the upstream properties sued, alleging a Fifth Amendment taking. In response to the large number of similar complaints, the Court utilized a case management procedure akin to a multi-district litigation and directed co-lead counsel to file a master complaint. The government moved under RCFC 12(b)(1) and 12(b)(6) to dismiss the master complaint, raising five arguments: (1) the statute of limitations ran; (2) the plaintiffs' taking claim arises from government *inaction*, not any affirmative act; (3) the plaintiffs lack the necessary underlying property interest to bring viable takings claims; (4) the plaintiffs have no reasonable investment-backed expectations because they acquired their properties after construction of the dams; and (5) the plaintiffs' have only plausibly alleged a tort, not a taking. The Court rejected the government's first argument, observing that the plaintiffs' claims accrued no earlier than 2016 and more likely in 2017, well within the six-year limitations period set forth in 28 U.S.C. § 2501. It declined the government's implied invitation to treat § 2501 differently in the case, noting the Supreme Court's characterization of § 2501's text as "unexceptional" and emphasizing that § 2501 is not a statute of repose. As to the government's argument that the plaintiffs' claims rest on government inaction and not action, the court observed that the plaintiffs alleged specific government action in the form of the Corps' construction and modification of the dams. It concluded that the plaintiffs adequately alleged government action.

Turning to the government's third argument, the court explained that the government misstated Texas property law and cited inapposite Texas Water Code provisions. It found equally unpersuasive the government's invocation of the Flood Control Act of 1928 to foreclose the plaintiffs' takings claim. The court also rejected the government's argument that preexistence of the dams foreclosed the plaintiffs' claims and determined that the plaintiffs' property rights were not limited by the government's police power. Finally, the Court rejected the government's tort argument, which was premised upon a requirement that the flooding must be frequent to constitute a taking. Despite its analysis, the Court recognized the fact-intensive nature of takings cases and elected not to resolve the issues on a motion to dismiss. Instead, the Court, exercising its discretion under RCFC 12(i), deferred ruling on the motion to dismiss until trial.

Read decision here.

Court, Applying Washington State Law, Finds That Plaintiffs in Rails-To-Trails Action Lacked Cognizable Rights to the Land Underlying the Railroad Corridor At Issue. *Lucier v. United States*, Nos. 16-865L, 16-893L, 138 Fed. Cl. 793 (June 1, 2018), *on reconsideration*, 138 Fed. Cl. 793 (July 26, 2018). [Horn, J.]

In this Rails-to-Trails case, two landowners in Washington state alleged that the government engaged in a Fifth Amendment taking when, pursuant to the National Trails System Act, the Surface Transportation Board issued to BNSF Railway Company a Notice of Interim Use ("NITU") that permitted the railroad and Thurston County, Washington to negotiate a trail use agreement for the railroad corridor. The railroad and county reached an agreement under which the railroad conveyed to the county, via quitclaim deed, all of its rights in the railroad corridor. According to plaintiffs, the NITU foreclosed the reversion of their state law property rights. The parties disputed whether recreational trail use exceeded the scope of BNSF's easement in the railroad corridor and whether plaintiffs owned the land underlying the railroad corridor.

Adjudicating the parties' cross-motions for summary judgment, the Court ruled in favor of the government. Analyzing the right-of-way deeds at issue and applying Washington state law, the Court determined that BNSF Railway Company possessed easements for railroad purposes in the section of the railroad corridor adjacent to nine plaintiffs' properties. It therefore concluded that Thurston County's use of the railroad purposes easements that it acquired from BNSF Railway Company for a recreational trail exceeded the scope of the railroad purposes easement granted to the railroad's predecessor in interest. Nevertheless, the Court, after examining the chains of title offered by plaintiffs, determined that plaintiffs did not own the land underlying the railroad corridor, and the deeds and plat maps of all the properties showed, under Washington law, that plaintiffs and their predecessors in interest did not intend to pass to plaintiffs fee interest in the land underlying the railroad corridor. The Court denied plaintiffs' subsequent motion for reconsideration.

Read the decision here.

Court Dismisses Claim That An Agency's Failure To Pursue An Investigation Constituted A Regulatory Taking. *Zainulabeddin v. United States*, No. 17-1955C, 138 Fed. Cl. 492 (June 20, 2018). [Sweeney, C.J.].

A medical school student, who was informally diagnosed with Attention Deficit Hyperactivity Disorder, brought a *pro se* action against the United States, alleging various claims, including that dismissal of her discrimination claims by the Department of Education's Office of Civil Rights (OCR) constituted a

regulatory taking. The Court, assuming for the sake for argument that an individual's interest in a discrimination claim is a cognizable property interest for the purposes of the Fifth Amendment of the Constitution, ruled that a taking claim premised on OCR's alleged failure to investigate her discrimination claims is "so devoid of merit as to not involve a federal controversy" and, thus, fails to invoke the jurisdiction of the Court.

Read the decision here.

Court Grants in Part and Denies in Part the Parties' Cross-Motions for Summary Judgment in North Carolina Rails-To-Trails Case Involving Parcels Adjacent to a Railroad Right of Way or Adjoining Public Road Rights-of-Way. *Brooks v. United States*, No. 15-843L, 138 Fed. Cl. 371 (June 27, 2018). [Sweeney, C.J.]

In this Rails-to-Trails case, 102 North Carolina property owners alleged that the government violated the Just Compensation Clause of the Fifth Amendment when it authorized the conversion of a railroad right-of-way into a recreational trail under the National Trail Systems Act and acquired their property through inverse condemnation. On cross-motions for summary judgment, the Court concluded – and the government conceded – that plaintiffs were entitled to summary judgment on threshold title issues for sixty-four claims. The Court also determined that plaintiffs were entitled to summary judgment on threshold title issues for an additional claim, rejecting the government's argument that the associated parcels were separated from the railroad right-of-way by a public road and, instead, finding that one boundary of the parcel at issue was the railroad right-of-way. The Court also granted summary judgment on threshold title issues related to eight claims the government did not address and two additional claims, concluding that plaintiffs established that their parcels were adjacent to the railroad right-of-way.

Turning to fifty-eight claims in which the government contended that a public road separated the relevant parcels from the railroad right-of-way, the court analyzed North Carolina General Statute § 1-44.2 and decisional law addressing ownership of parcels adjoining public road rights-of-way. Ultimately, the court determined that, for many of the fifty-eight claims, the parties' evidence did not definitively establish that the public road was situated within the confines of the railroad right-of-way. Consequently, the court declined to enter summary judgment on thirty-three of those claims. It also denied summary judgment on seventeen claims where the intervening public road might be situated completely within the railroad right-of-way. But the court concluded that the government was entitled to summary judgment on six claims where the plaintiffs failed to establish that their parcels were adjacent to the railroad right-of-way.

Read the decision here.

Court Rules in Favor of Government in Rails-to-Trails Litigation Where, Under Florida Law, Plaintiffs Lacked A Cognizable Interest in the Railroad Corridor At Issue. Castillo *v. United States*, Nos. 16-1624L, 17-1931L, 138 Fed. Cl. 707 (June 29, 2018). [Horn, J.]

The twenty-two plaintiffs in this consolidated Rails-to-Trails case owned property in subdivisions adjacent to a portion of the South Little River Branch Railroad Line in Florida that was constructed by the Florida East Coast Railway. Plaintiffs contended that, as adjacent landowners to the railroad corridor, they owned the land that runs to the center line of the railroad corridor. They further alleged that the

government, acting under the National Trails System Act, destroyed their reversionary rights to exclusive use and possession of the land underlying the railroad corridor after the Surface Transportation Board ("STB") issued a Notice of Interim Trail Use ("NITU") authorizing the Florida East Coast Railway to negotiate a trail use agreement with Florida East Coast Industries. Plaintiffs sued to recover just compensation for the government's alleged taking of their property. The parties stipulated that (1) plaintiffs owned their parcels on the date the STB issued the NITU, (2) plaintiffs' parcels were adjacent to the railroad corridor, and (3) the rights-of-way obtained by the Florida East Coast Railway in the 1920s through four final judgments in condemnation proceedings were easements.

Adjudicating the parties' cross-motions for partial summary judgment, the Court granted the government's motion based on its analysis of Florida property law. Although plaintiffs argued that Florida law creates a presumption of ownership to the center line of a right-of-way, the Court noted that the presumption can be rebutted by evidence that the party asserting the presumption does not own any of the land at issue. The Court determined that the platted subdivisions at issue did not include the railroad corridor. As a result, plaintiffs did not own the land underlying the railroad corridor at issue, and the government was not liable for a Fifth Amendment taking.

Read the decision here.

TAX

Court Rules that Plaintiff Lacked Standing to Seek Recovery of a Listed Transaction Penalty. *Barzillai v. United States*, Fed. Cl. No. 17-354 T, 137 Fed. Cl. 788 (April 30, 2018). [Braden, C.J.]

In *Barzillai*, plaintiff sought the recovery of a $100,000 listed transaction penalty imposed under I.R.C. § 707A for the plaintiff's 2005 tax year. Section 6707A(d)(1) authorizes the IRS to rescind the $10,000 *reportable* transaction penalty, but not the $100,000 *listed* transaction penalty. Section 6707A(d)(2) prohibits judicial review of any IRS rescission determination. Plaintiff's complaint alleged that § 6707A(d)(2)'s prohibition of judicial review violates the Due Process Clause. The Government moved to dismiss on the grounds that plaintiff lacks standing to challenge § 6707A(d)(2) because § 6707A(d)(2) does not apply to the penalty for which plaintiff was assessed and because plaintiff never sought rescission. The Court agreed that plaintiff lacks standing to challenge § 6707A(d)(2)'s prohibition on judicial review. In this regard, the Court held that plaintiff's "injury" was not fairly traceable to § 6707A(d)(2) because that provision does not apply to the penalty for which plaintiff was assessed. The Court further noted that plaintiff had never requested rescission pursuant to the procedures set forth in Revenue Procedure 2007-21, which are the exclusive method for requesting rescission.

Read the decision here.

VACCINE

Court Affirms Special Master's Award of Interim Damages to Petitioner for Vaccine Injury Compensation. *Fairchild v. Sec'y of HHS*, No. 13-487V, 138 Fed.Cl. 29 (April 19, 2018, *reissued* May 4, 2018). [Smith, S.J.]

In *Fairchild*, petitioner filed a petition seeking compensation pursuant to the Vaccine Act alleging that he suffered from brachial neuritis as a result of the administration of a tetanus vaccine. The respondent conceded petitioner's entitlement to compensation. The parties ultimately agreed to all elements of damages except for future lost earnings. After the determination of petitioner's lost future earnings

became protracted, the petitioner moved for an interim award for all agreed upon damages. The special master granted petitioner's motion and Mr. Fairchild was awarded interim damages. Thereafter, respondent filed a Motion for Review.

The sole question to be decided on review was whether the Vaccine Act permits multiple compensation awards upon one petition. The Court found that it does. In so finding, the Court first held that the special masters' express grant of power to "issue a decision on a petition" does not necessarily mean a single decision but could reasonably encompass multiple decisions. Next, the Court found that the legislative history of the Vaccine Act does not evidence Congressional preference for a single compensation decision. Finally, the Court found that the Federal Circuit's decisions awarding interim attorneys' fees were instructive, specifically the declaration that, "a decision on attorneys' fees and costs is a decision on compensation."

The Court, however, acknowledged respondent's concern that multiple decisions could lead to multiple elections allowing claimants to seeks monetary recovery from both the Vaccine Program and a vaccine administrator or manufacturer, and therefore could allow a petitioner to "cherry-pick" compensation decisions. Citing the Federal Circuit's nonpredecential order in *Tembenis v. Sec'y of HHS*, No. 2013-5029, Order (Fed. Cir. May 16, 2013), the Court held that if petitioner filed an election to receive interim damages, a subsequent election to pursue a civil action would be barred. An appeal of this decision was docketed in the Federal Circuit on August 30, 2018.

Read the decision here.

Court Reverses Special Master's Grant Of Entitlement Based On Finding That Vaccines Caused Sudden Infant Death Syndrome. *Boatmon v. HHS*, No. 15-13-611V, 138 Fed. Cl. 566 (July 3, 2018, *reissued* July 18, 2108) [Wheeler, J.].

The Court granted the Government's motion for review, reversing the special master's grant of entitlement in this claim for compensation pursuant to the Vaccine Act, 42 U.S.C § 300aa-11, *et seq.*, alleging that vaccinations caused Sudden Infant Death Syndrome (SIDS).

Petitioners submitted an expert opinion by Dr. Douglas Miller, a board-certified neuropathologist, in which Dr. Miller argued that the vaccinations were an external stressor that can cause cytokine-induced abnormalities leading to respiratory arrest resulting in SIDS. An external stressor is one of three factors of the "Triple Risk Model," which place infants at risk of SIDS when they occur simultaneously. Dr. Christine McCusker evaluated the case for the Government, and opined that cytokines are released as part of the immune response to vaccination, but that they are transient and help maintain normal brain function, and do not lead to SIDS. Dr. McCusker also explained that the epidemiological evidence supports no causal relationship between vaccines and SIDS. Dr. Brent Harris, a pathologist, also reviewed the case for the Government and explained that although the Triple Risk Model was generally accepted, it does not support a link between vaccines and SIDS. Dr. Harris further averred that there were no pathological findings in this case to suggest vaccine-related SIDS.

The special master found that petitioners were entitled to compensation, stating that they had established a "reasonable and reliable theory" that cytokines produced by vaccination can act as an external stressor under the Triple Risk Model. The Government moved for review, arguing that the special master erred by finding that vaccines can cause SIDS. The Government cited to four decisions by three special masters in other cases rejecting a causal relationship.

The Court granted the Government's motion, concluding that while the special master was not bound by those other decisions, his failure to acknowledge or distinguish those cases resulted in error. The Court explained that the "departure from the conclusions of other Special Masters can only be explained by improper application of the standard of proof required in vaccine cases." The Court further noted that United States Court of Appeals for the Federal Circuit has favorably cited the standards in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), to assess the reliability of expert opinions in Vaccine Act cases. One of the considerations in *Daubert* "is whether the theory at issue has been subjected to peer review and publication." Here, Dr. Miller's theory was not, and the Court concluded that "[w]ith respect to Petitioners' burden of proof, the Special Master in this case has applied a standard so low as to constitute clear error." An appeal of this decision was docketed in the Federal Circuit on September 5, 2018.

Read the decision here.