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RECENT RIPARIAN TAKINGS CASES UNDERSCORE IMPORTANCE OF TIMELINESS

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Riparian water rights—the rights of a landowner whose property borders on a body of water or water course—have been the subject of two recent takings cases, one decided by the U.S. Court of Appeals for the Federal Circuit last fall, *CRV Enterprises, Inc. v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), and one decided by the U.S. Court of Federal Claims, which is still pending on appeal in the Federal Circuit, *Mildenberger (Rivers Coalition) v. United States*, 91 Fed. Cl. 217 (2010).

These two cases, raising similar claims but premised on entirely different facts, warrant examination not because of the nature of the property interest—riparian water rights—but because both cases turned on whether the claim was timely filed. In short, the usual questions in takings cases—whether the riparian water right is a constitutionally protected property right and whether that property right had been taken—are the less interesting issues in these two cases because the deciding factor in each concerned when the claims accrued.

But these cases do not just illustrate how paramount the timeliness issue has become in takings litigation. And, make no mistake, it has. They also demonstrate how everyone involved in the litigation can struggle with determining when a claim accrues. Notably, in *CRV Enterprises*, attorneys for the Department of Justice and for the plaintiff entered into a voluntary stipulation of dismissal without prejudice of the lawsuit because both agreed that the taking claim was not ripe for review. Yet when the lawsuit was later refiled, the trial court dismissed the lawsuit as being filed late—after the statute of limitations had run.

This article will discuss the nature of water rights takings litigation, address why timeliness has become the dominant factor in takings litigation in the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit, and offer lessons learned from these two cases.

Water Rights and Takings Litigation

Takings cases for just compensation are based on the government's acquisition of property by either (1) physically acquiring the property or by appropriating the beneficial and productive use of the property or (2) by physically invading or occupying the property interest. In the Federal Circuit, takings claims are analyzed in two steps: First, is there a protected property interest? And, second, has that property interest been taken? *E.g.*, *Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003). In general, property is defined by state law. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998). Where state law says that there is a property right, that right is protected by the Fifth Amendment's Just Compensation Clause. And if the government takes that right for a public use, the government has to pay just compensation for the value of the property taken.

Although water rights are different from land, fee title to land having the fullest panoply of rights associated with ownership, water rights are generally recognized as constitutionally protected property rights. Water rights are usufructuary. The

rights in the water owner's bundle are limited essentially to the right of use (and perhaps in some instances, the right to store the water). This means that when the government inversely condemns a water right, it essentially takes every stick in the bundle of rights associated with water right ownership because the deprivation of the use leaves no doubt that the government has appropriated the water right. Or in constitutional terms, when the right to use a water right is taken, that governmental action "chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982).

Riparian rights are a special kind of water right, accruing to owners whose land borders on a waterway, but courts analyze the taking of riparian water rights claims much like any other water right taking claim. For starters, a riparian right, like any other water right, is a usufruct. Riparian rights chiefly include the right to access the water, and to use the water in particular ways, such as the right to navigate or to recreate on the water, or to view the water. Robert E. Beck, *Waters & Water Rights* § 6.01(a) (3d ed. 2009). The exact contours vary from state to state, but the principles remain the same.

The United States Supreme Court has recognized that riparian rights are property, and that owners of riparian rights are entitled to just compensation when they are taken by governmental action. In fact, just last term the Supreme Court stated in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010), that

> [l]ittoral [riparian] owners have, in addition to the rights of the public, certain "special rights" with regard to the water and the foreshore, rights which Florida considers to be property, generally akin to easements . . . . These include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property.

Id. at 2598 (citations omitted).

And in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754 (1950), the United States Supreme Court held that riparian owners' water rights had been taken in association with the construction of the Friant Dam reclamation project in California. The Court determined that the public welfare—which required the riparian owners to sacrifice their riparian rights for the public good—did not require that their loss go uncompensated, stating that:

> The waters of which claimants are deprived are taken for resale largely to other private land owners not riparian to the river and to some located in a different water shed. Thereby private lands will be made more fruitful, more valuable, and their operation more profitable. . . . No reason appears why those who get the waters should be spared from making whole those from whom they are taken. Public interest requires appropriation; it does not require expropriation.

Id. at 752–53.

In both *CRV Enterprises* and *Mildenberger (Rivers Coalition)*, the plaintiffs had established that they possessed protected riparian water rights that had been taken. And in both cases, the plaintiff had established that a taking occurred. But both cases floundered on timeliness, a crucial issue now in the U.S. Court of Federal Claims (CFC) because the U.S. Supreme Court has held that the statute of limitations under the CFC's Tucker Act is a jurisdictional requirement.

CRV Enterprises

In *CRV Enterprises*, the federal Environmental Protection Agency (EPA) had built a log boom that operated as a fence, preventing the riparian owner access to part of a slough next to part of its shoreline. *CRV Enters.*, 626 F.3d at 1245. CRV owned nine acres of land on the northern shore of the Old Mormon Slough, a man-made waterway in Stockton, California. The slough is connected to the Stockton Deep Water Channel, which then flows into the San Joaquin River and ultimately to San Francisco Bay. *Id.*

From 1942 to 1990, a wood treatment plant on the southern shore of the slough, across from the plaintiffs' property, released hazardous waste into the soil, the slough, and the sediment at the bottom of the slough. As a result, EPA declared the soil area and the bottom of the slough a Superfund site in 1992. *Id.*

In March 1999, EPA announced plans to cover the slough's bed with a sand-cap, and issued a formal record of decision (ROD). Part of the plan included installing a log-boom across the slough to prevent navigation on part of the slough—including part adjacent to CRV's land. The log boom was installed in 2006. *Id.*

CRV had acquired the property in 2002, after issuance of the ROD and before the log boom was installed. In 2003, CRV filed a takings case, alleging that the EPA's plan was a taking of their riparian rights—their right to access the navigational channels in the Old Mormon Slough and the Stockton Channel. Both parties agreed that the claim was not yet ripe and stipulated to dismissal without prejudice. *Id.*

But when CRV filed again in September 2006, the trial court held that the takings claim had accrued when the ROD was issued, in 1999, and so the statute of limitations had run. The CFC thus dismissed the case. The Federal Circuit went one step further, holding that not only had the statute of limitations started running in 1999, but because CRV had not owned the land when the claim accrued—that is, when the ROD was issued, they did not have standing to bring suit in the first place. *Id.*

Mildenberger (Rivers Coalition)

In *Mildenberger (Rivers Coalition)*, the issue was whether the plaintiffs' riparian water right had been taken when the Army Corps of Engineers released billions of gallons of polluted water from Lake Okeechobee into the St. Lucie River. *Mildenberger*, 91 Fed. Cl. at 223. The plaintiffs own land along the St. Lucie River, the Indian River Lagoon, and the St. Lucie Canal. The plaintiffs alleged that by releasing record quantities of polluted water from Lake Okeechobee into the St. Lucie, the Government had permanently destroyed both the water quality of the St. Lucie River and the water rights of those living along the River. They argued that their claim accrued between 2003 and 2005, when the Government released billions of gallons of polluted water from Lake Okeechobee into the St. Lucie. The result was described as a "knock-out" blow to the River's ecosystem. An estimated 116 acres of oyster beds died. Sea grass near the mouth of the river that provided habitat for millions of fish disappeared. For the first time, the water was deemed unsafe for human contact. And also for the first time, the damage to the River was now largely irreversible. *Id.* at 236.

Therefore, the riparian owners along the St. Lucie River filed suit against the federal government in November 2006. *Id.* at 229. But as in *CRV Enterprises*, the CFC decided there was a problem with timing.

The trial court concluded that the riparian owners' takings claim accrued many decades prior to 2003, pointing out that the St. Lucie Canal had been built in the 1920s and has been operated by the federal government since the late 1930s. And starting in the 1950s, the Corps has been releasing water from Lake Okeechobee into the St. Lucie. The court thus concluded that the damage was foreseeable in the 1950s and thus the takings claim accrued at that time. Even if the plaintiffs had more recently relied on promises by the government that it would fix the damage, "those hopes arrived too late in face of a long-expired statute of limitations." *Id.* at 239. The filing of the claim in 2006 had thus come too late and the CFC dismissed the case.

The Statute of Limitations as a Jurisdictional Bar to a Taking Recovery

In 2008, the Supreme Court held for the first time that when a takings claim is against the federal government the six-year statute of limitation under the Tucker Act—the jurisdictional statute for the CFC—cannot be waived or tolled. 28 U.S.C. § 2501; *John R. Sand & Gravel v. United States*, 552 U.S. 130 (2008). As the Supreme Court explained:

> Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader

> system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency . . . . The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional."
>
> This Court has long interpreted the court of claims limitations statute as setting forth this second, more absolute, kind of limitations period.

John R. Sand, 552 U.S. at 133–34 (citations omitted). But when does a takings claim accrue or start the six-year statute of limitations running?

Prior to *John R. Sand*, this question was fairly straightforward: A claim for just compensation accrued when "all the events have occurred which fix the liability of the government" and when "the permanent nature of the government action is evident." *Goodrich v. United States*, 434 F.3d 1329, 1333, 1336 (Fed. Cir. 2006), *reh'g denied*, 2006 U.S. App. LEXIS 6927 (Fed. Cir. Mar. 6, 2006). But after the *John R. Sand* decision, the courts began to look at the claim accrual issue very closely, to make sure that the court was not exceeding its jurisdictional authority. Inevitably, closer scrutiny by many judges has led to conflicting decisions and confusion.

Does Anyone Know When a Takings Claim Accrues?

CRV Enterprises and *Mildenberger (Rivers Coalition)* illustrate how difficult it can be to determine when a takings claim accrues. In *CRV Enterprises*, the court held that the regulatory taking claim arose when EPA announced the record of decision (ROD), not when EPA implemented the actions called for in the ROD, including the building of a log boom, which operated as a fence blocking the riparian owner from accessing its shoreline. But in *John R. Sand*, the court held just the opposite, that the adoption of the ROD did not cause the takings claim to accrue, although that case too involved EPA's management of a Superfund site and the issuance of a ROD requiring construction of a fence in 1990. *Compare John R. Sand*, 457 F.3d at 1347–49 *with CRV Enterprises v. United States*, 86 Fed. Cl. 758, 767–68 (2009). And in *John R. Sand*, none of the parties claimed that the takings claim was untimely. Rather, the timeliness claim was raised by amicus curiae in the case while the case was on appeal. *John R. Sand*, 457 F.3d at 1353–54.

Indeed, in *John R. Sand,* the court held that the property owner was not on notice as to what property was going to be taken until the EPA completed the fence. But in *CRV Enterprises*, even though the log boom was not completed until 2006, the court held that the issuance of the 1999 ROD put the property owner on notice that the EPA had reached a final decision to prevent access to a certain part of the slough. Because the ROD made clear the scope of the taking and because it made clear that the taking was permanent, the claim accrued when EPA issued the ROD. And because CRV Enterprises did not own the land at that time, it did not have standing to sue for just compensation.

In a similar physical takings case involving riparian rights decided by the Supreme Court in the 1940s, *Dickinson v. United States*, 331 U.S. 745, 746 (1947), the Government built a dam to raise the level of a river. By doing so, the Government physically took the land adjacent to the river. But it did so gradually: The dam was authorized in 1935, built in 1937, and the river did not stop rising until 1938. Dickinson did not file the suit until 1943. The government argued that Dickinson could not file the suit because he had not acquired the land until 1937 and that the taking had occurred before then. The Court disagreed, holding that "the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.'" *Id.* at 749.

And although the court applied this same "stabilization" doctrine in *Mildenberger (Rivers Coalition)*, the court decided that the damage was "reasonably foreseeable" some five decades before

the 2003 to 2006 releases. *Mildenberger (Rivers Coalition)*, 91 Fed. Cl. at 236. According to the court, the plaintiffs (or their predecessors) had been on notice that the Government's release of fresh water into the St. Lucie would damage the ecosystem since "at least the 1950s . . . ." *Id.* at 239. According to the court, even though the full extent of the damage might not have been known (or knowable) at the time, because the eventual result of the government's actions was clear by the 1950s, the claim had accrued many years before the suit was filed. The statute of limitations had run and the court thus dismissed the claim that the government had taken the riparian owners' water rights by destroying the River's ecosystem. *Id.*

Lessons Learned

CRV Enterprises and *Mildenberger (Rivers Coalition)* teach us that the consequences of failing to address the timeliness in takings litigation can be fatal for a plaintiff. By the same token, these cases also make clear that determining when the claim arose can be challenging. In both of these cases, the plaintiffs relied to their ultimate detriment on representations of government officials with respect to certain aspects of their claims. The government at first agreed that CRV's rights had not been taken because the log boom had not been installed. And the U.S. Army Corps of Engineers had for years told the residents along the St. Lucie that it would remedy the damage to the River, assertions on which the riparian owners likewise relied. In the end, though, these assertions did not save either case. In both, the court concluded that affected property owners were on notice that their rights were being taken long before their takings lawsuit was filed. This resulted in the dismissal of their just compensation claims.

In short, a potential plaintiff would be wise not to take a "wait and see" attitude with a takings claim. Even if the full extent of the taking might only become apparent with the passing of decades, the claim can accrue—and the statute of limitations can run—well before that.

Conclusion

Although both *CRV Enterprises* and *Mildenberger (Rivers Coalition)* confirm that riparian water rights are constitutionally protected property rights, both serve as striking examples of how timeliness can defeat what might otherwise appear to be a legitimate takings claim. Or just like an otherwise funny joke, an otherwise successful riparian takings claim needs good timing—and without good timing, a takings claim, like a joke, can go stale.

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