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[Entered: July 17, 2017]

United States Court of Appeals
for the Federal Circuit

PETRO-HUNT, L.L.C.,

Plaintiff-Appellant

v.

UNITED STATES,

Defendant-Appellee

2016-1981, 2016-1983

Appeals from the United States Court of Federal Claims in Nos. 1:00-cv-00512-MBH, 1:11-cv-00775-MBH, Judge Marian Blank Horn.

Decided: July 17, 2017

JOSEPH RALPH WHITE, White Andrews, LLC, Oxford, MS, argued for plaintiff-appellant. Also represented by SHARON ANDREWS, BRUCE ALAN BAKER, JR., White, Andrews & Shackelford, LLC, New Orleans, LA; EDMUND MICHAEL AMOROSI, Smith, Pachter, McWhorter, PLC, Tysons Corner, VA; D. JOE SMITH, Jenner & Block LLP, Washington, DC.

KATHERINE J. BARTON, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Represented by JOHN CRUDEN, BRIAN C. TOTH.

Before PROST, *Chief Judge,* CLEVENGER, and REYNA, *Circuit Judges.*

CLEVENGER*, Circuit Judge.*

Petro-Hunt, L.L.C. appeals the decision of the United States Court of Federal Claims to dismiss its claims for permanent takings, temporary takings, judicial takings, and breach of contract by the United States ("United States" or "the Government"). The Court of Federal Claims dismissed Petro-Hunt's permanent takings claims, contract claims, and some temporary takings claims under the statute of limitations. *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51 (2009) ("*Petro-Hunt I*"). The Court of Federal Claims subsequently held that the remaining temporary takings claims were barred by 28 U.S.C. § 1500. *Petro-Hunt, L.L.C. v. United States*, 105 Fed. Cl. 37 (2012) ("*Petro-Hunt II*"). And, because Petro-Hunt's judicial takings claim would require the Court of Federal Claims to question the merits of the Fifth Circuit's decision regarding the same servitudes asserted in the instant case, the Court of Federal Claims held it also lacked jurisdiction over those claims. *Petro-Hunt, L.L.C. v. United States*, 126 Fed. Cl. 367 (2016) ("*Petro-Hunt III*"). Because we agree with the Court of Federal Claims' reasons for its dismissal of Petro-Hunt's claims, we affirm.

I

The facts of this case are generally undisputed and are set forth in the Court of Federal Claims' multiple decisions. *See Petro-Hunt I*, 90 Fed. Cl. at 53–57. We recite here the facts pertinent to the issues before us.

A

Petro-Hunt's claims relate to ninety-six mineral servitudes underlying roughly 180,000 acres of the Kisatchie National Forest in Louisiana ("Kisatchie"). Under Louisiana law, the right to enter land and extract minerals can be held separately from ownership of the land in the form of a mineral servitude. *Petro-Hunt I*, 90 Fed. Cl. at 53. Such servitudes generally prescribe (i.e., revert back to the landowner) if not used for a period of ten years. *Id*. This ten-year rule of prescription cannot be modified by contract. *Id*.

Between 1932 and 1934, the original owners of the relevant servitudes, Bodcaw Lumber Company and Grant Timber Company, transferred six mineral conveyances, resulting in ninety-six servitudes, to Good Pine Oil. Each of these six deeds conveying mineral rights to Good Pine Oil contained a clause contemplating that a ten-year prescriptive period would apply. From 1934 to 1937, Bodcaw and Grant conveyed, through eleven written instruments, 180,000 acres of land, burdened by ninety-six mineral servitudes in favor of Good Pine Oil, to the United States. All but one of the eleven transfer instruments explicitly stated that the conveyances

were subject to one or more of the mineral deeds granting rights to Good Pine Oil.

In 1940, the Louisiana legislature enacted Act 315 of 1940, 1940 La. Acts 1250 ("Act 315").[1] Act 315 created an exception to Louisiana's law of prescription and retroactively confirmed that all outstanding, but not yet prescribed mineral rights reserved in land sold to the United States, were now imprescriptible, so long as the United States remained the landowner.

In 1941, Good Pine Oil transferred its mineral rights to William C. Brown. One year later, Brown transferred his mineral rights to Nebo Oil Company. Based on Act 315, Nebo Oil believed it had acquired imprescriptible mineral servitudes.

In 1948, the United States filed a declaratory judgment against Nebo Oil, claiming that Nebo's mineral rights to an 800 acre tract of land had prescribed to the Government due to non-use. The district court ruled that Act 315 was retroactive and thus Nebo Oil owned the mineral property in perpetuity. *United States v. Nebo Oil Co.*, 90 F. Supp. 73, 89 (W.D. La. 1950). On appeal, the Fifth Circuit agreed, holding that Nebo Oil's mineral rights to that specific tract were imprescriptible.

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[1] Act 315 reads in full: "[W]hen land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America . . . , and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

United States v. Nebo Oil Co., 190 F.2d 1003, 1010 (5th Cir. 1951) ("*Nebo Oil*").

In 1973, the Supreme Court decided *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973). The Court held that Act 315 could not be applied retroactively to outstanding mineral interests in land acquired by the United States under the Migratory Bird Conservation Act, 45 Stat. 1222, 16 U.S.C. §§ 715–715s. *Id*. at 595. It reasoned that retroactive application of Act 315 would deprive the United States of "bargained-for contractual interests" by abrogating the terms of the acquisition instruments relating to prescription and thus was "plainly hostile to the interests of the United States." *Id*. at 597. Notably, the Court did not overrule *Nebo Oil* and distinguished its facts. *Id*. at 586.

In the 1980s, relying on the Court's decision in *Little Lake Misere*, the Government, through the Bureau of Land Management ("BLM"), began to issue mineral leases on Petro-Hunt's mineral property. While the parties disagree as to the exact timing of these leases (and even as to the number thereof), it appears that the majority of them were granted beginning in 1991, with more than forty-five leases made from that year up to the beginning of this lawsuit. Each lease was for a period of ten years.

In the 1990s, owners of the mineral servitudes disputed the Government's issuance of leases on their mineral property. In response, in 1991, the Forest Service informed BLM, in a letter on which Hunt Petroleum (a co-owner of the relevant servitudes) was copied, that all but two of the mineral servitudes had prescribed and were now

owned by the United States. The letter cited a 1986 U.S. Department of Agriculture legal opinion indicating that the United States had ownership of the servitudes on all parcels acquired before the enactment of Act 315 and on which no wells had been drilled. In 1993, BLM responded to another protest by Hunt Petroleum in a letter to Hunt and Placid Oil, its co-owner at the relevant time, by citing a title report indicating that the servitudes had prescribed to the United States. In 1998, Petro-Hunt acquired Placid Oil's 64.3% undivided interest in the servitudes and thus owns the mineral servitudes at issue in this case as a successor in interest.[2]

In 1996, Central Pines Land Company and other holders of mineral servitudes brought an action against the government and lessees under mineral leases granted by the government, seeking declaratory relief and to quiet title in the servitudes. *Central Pines Land Co. v. United States*, No. 2:96-cv-02000 (W.D. La. filed Aug. 22, 1996). Like those at issue in this case and in *Nebo Oil*, the mineral servitudes in *Central Pines* were on property acquired by the United States for Kisatchie prior to Act 315's enactment. On appeal, the Fifth Circuit held that Act 315 could not provide the federal rule of decision because, as in *Little Lake Misere*, it was hostile to the United States' interests in "obtaining the mineral rights via the default rule of prescription in place before Act 315." *Central Pines Land Co. v.*

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[2] The other co-owners of the mineral servitudes are Kingfisher Resources, Inc., which owns an 18.9% undivided interest, and Hunt Petroleum Corporation, which owns a 16.8% undivided interest.

United States, 274 F.3d 881, 891 (5th Cir. 2001). Instead, the court held that the ten-year prescriptive period of residual (pre-Act 315) Louisiana law should govern the case and thereby concluded that the servitudes on Kisatchie lands had prescribed for non-use. *Id*. at 892, 894. The Supreme Court denied Central Pines's petition for a writ of certiorari. *Central Pines Land Co. v. United States*, 537 U.S. 822 (2002). While summary judgment motions were pending in the district court, Central Pines had filed a complaint in the Court of Federal Claims, alleging a taking in violation of the Fifth Amendment based on the same facts alleged in its district court complaint. *Central Pines Land Co. v. United States*, 99 Fed. Cl. 394 (2011). This court affirmed the Court of Federal Claims' dismissal of Central Pines's taking claims for lack of jurisdiction pursuant to 28 U.S.C. § 1500. *Central Pines Land Co. v. United States*, 697 F.3d 1360, 1367 (Fed. Cir. 2012).

B

On February 18, 2000, Petro-Hunt and others not party to the current action filed suit against the Government in the United States District Court for the Western District of Louisiana. Complaint, *Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001) (No. 00-cv-0303), ECF No. 1 (the "Quiet Title Action"). Petro-Hunt alleged it was the owner of all aforementioned ninety-six mineral servitudes under the theory that Act 315 and the *Nebo Oil* decision had rendered them imprescriptible. It further alleged that starting in 1991, the United States, claiming ownership over the mineral rights, wrongfully granted a series of oil and gas leases covering the property in interest.

Based on these factual allegations, Petro-Hunt filed for a declaratory judgment under 28 U.S.C. § 2409a to quiet title to the property. In the alternative, it alleged an unconstitutional taking without just compensation in violation of the Fifth Amendment.

In 2001, the district court granted summary judgment in Petro-Hunt's favor and ruled that *Nebo Oil* precluded the United States from litigating title to the ninety-six mineral servitudes, which the court held Petro-Hunt owned in perpetuity. *Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001). However, in 2004, the Fifth Circuit reversed the district court, holding that res judicata applied only to the mineral rights in the 800-acre parcel described in *Nebo Oil*. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 396–97 (5th Cir. 2004). It found that Petro-Hunt's remaining mineral property was subject to the contractual provisions permitting prescription after ten years of non-use. *Id*. at 398–99. The Fifth Circuit remanded the case to the district court for it to determine whether any of the servitudes had prescribed. The Supreme Court denied Petro-Hunt's petition for writ of certiorari. *Petro-Hunt, L.L.C. v. United States*, 543 U.S. 1034 (2004).

In 2005, the parties stipulated that five servitudes, representing approximately 109,844 acres, still existed due to use, but that the remainder had prescribed. So the district court issued a judgment that Petro-Hunt was the owner of those five servitudes, now subject to the law of prescription, and 800 acres of the 1120 acre *Nebo Oil* servitude, which remained imprescriptible. Quiet Title Action, ECF No. 228. It additionally found that

ninety servitudes and the remaining 320 acres of the *Nebo Oil* servitude had prescribed to the United States. *Id.* at 2–3. In 2007, the Fifth Circuit affirmed the district court's order. *Petro-Hunt, L.L.C. v. United States*, No. 06-30095, 2007 WL 715270 (5th Cir. Mar. 6, 2007) (per curiam). Petro-Hunt's petition for writ of certiorari was denied. *Petro-Hunt, L.L.C. v. United States*, 552 U.S. 1242 (2008).

On August 24, 2000, while summary judgment motions were pending in district court, Petro-Hunt filed a complaint in the Court of Federal Claims, alleging a taking without just compensation in violation of the Fifth Amendment. Complaint, *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51 (2009) (No. 00-cv-512), ECF No. 1 (the "2000 Case"). Similar to its district court complaint, Petro-Hunt alleged that, pursuant to Act 315 and *Nebo Oil*, it owned in perpetuity the same ninety-six mineral servitudes at issue in the Quiet Title Action. Petro-Hunt noted its pending case in the district court and explained that it filed its taking claims in the Court of Federal Claims as a result of the Government's allegation in its answer that the district court lacked jurisdiction over Petro-Hunt's takings claims. In November 2000, the Court of Federal Claims granted the parties' joint motion to stay the case pending the resolution of the Quiet Title Action in the district court. 2000 Case, ECF No. 6.

On June 25, 2008, after the Quiet Title Action concluded and the stay was lifted, Petro-Hunt filed its first amended complaint in the Court of Federal Claims, adding alternative claims for breach of contract and reformation. 2000 Case, ECF No. 51. The amended complaint divided the takings claims

in the original complaint into permanent and temporary takings claims, and added four contract-based claims founded on the transfer instruments by which the Government obtained the lands subject to the servitudes from Bodcaw and Grant. In September 2008, the United States moved to dismiss all of Petro-Hunt's claims for lack of jurisdiction for failure to state a claim.

In November 2009, the Court of Federal Claims granted in part and denied in part the Government's motion. It held that Petro-Hunt's permanent takings claim and contract-based claims accrued, subject to the accrual suspension rule, no later than 1993, based on letters to the mineral servitude owners regarding the Government's claims of mineral ownership of specific parcels in the Kisatchie. *Petro-Hunt I*, 90 Fed. Cl. at 63–64, 67–68. The Court of Federal Claims therefore dismissed these claims as untimely under 28 U.S.C. § 2501. *Id.* The Court of Federal Claims further held that the temporary takings claims accrued when the United States entered into mineral leases on the servitudes with third parties, not when the leases terminated. *Id.* at 65–67. So the Court of Federal Claims dismissed as time-barred Petro-Hunt's temporary takings claims founded on the Government's mineral leases that were issued more than six years before Petro-Hunt filed suit on August 24, 2000. *Id.* Regarding the leases entered into less than six years prior to Petro-Hunt's filing suit, the Court of Federal Claims stated that discovery was needed to determine whether each relevant servitude prescribed by the time the leases were issued. *Id.* at 69. The Court of Federal Claims denied Petro-Hunt's motion for reconsideration.

In 2010, Petro-Hunt filed a restated second amended complaint, adding a judicial takings claim founded on the result of the Quiet Title Action in the Fifth Circuit. 2000 Case, ECF No. 95. Petro-Hunt said its new complaint was prompted by the Supreme Court's decision regarding judicial takings in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010). In May 2011, based on the Supreme Court's decision in *United States v. Tohono O'odham Nation*, 563 U.S. 307 (2011), the Government filed a motion to dismiss Petro-Hunt's remaining claims under 28 U.S.C. § 1500, arguing that those claims were pending at the district court when Petro-Hunt filed its complaint at the Court of Federal Claims and, therefore, the Court of Federal Claims lacked jurisdiction.

On November 11, 2011, Petro-Hunt filed a new suit in the Court of Federal Claims, reasserting the claims from the 2000 Case. Complaint, *Petro-Hunt, L.L.C. v. United States*, 105 Fed Cl. 37 (2012) (No. 11-cv-775), ECF No. 1 (the "2011 Case"). Soon thereafter, the Court of Federal Claims issued an order staying the 2011 Case. Later, in July 2015, the Court of Federal Claims consolidated Petro-Hunt's two actions. 2000 Case, ECF No. 210.

On May 2, 2012, the Court of Federal Claims granted the Government's motion to dismiss with regard to Petro-Hunt's remaining temporary takings claims under § 1500, finding that they were "essentially the same takings claims" that were pending in Petro-Hunt's district court action when it filed the Court of Federal Claims action. *Petro-Hunt II*, 105 Fed. Cl. at 43. The Court of Federal

Claims concluded that Petro-Hunt's alternative compensation request in its district court complaint was pending when Petro-Hunt filed its temporary takings claims in the Court of Federal Claims and that the two suits were based on the same operative facts. *Id*. at 44. The court denied the Government's motion to dismiss with respect to the judicial takings claim, reasoning that it rested on the independent operative facts of the Fifth Circuit's 2007 decision and the Supreme Court's denial of certiorari in 2008. *Id*. at 45. The Court of Federal Claims denied Petro-Hunt's motion for reconsideration.

In January 2015, after discovery was completed, the United States moved to dismiss Petro-Hunt's sole remaining claim: the judicial takings claim. 2000 Case, ECF No. 198.

On February 29, 2016, the Court of Federal Claims entered a final judgment, disposing of all of Petro-Hunt's claims. *Petro-Hunt III*, 126 Fed. Cl. at 385. It ruled that it could not determine whether the Fifth Circuit took Petro-Hunt's mineral property without "scrutinizing" the merits of the Fifth Circuit's decision, and thus it lacked jurisdiction to consider Petro-Hunt's judicial takings claim. *Id*. at 380 (citing *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1352 (Fed. Cir. 2015) ("Binding precedent establishes that the Court of Federal Claims has no jurisdiction to review the merits of a decision rendered by a federal district court.")). The court reasoned that determining whether or not Petro-Hunt had an established property right at the relevant time would require the Court of Federal Claims to decide whether the Fifth Circuit was correct in finding that *Little Lake Misere*

and *Central Pines* established that lands sold to the United States before the enactment of Act 315 were subject to Louisiana's ten-year prescription rule. *Id*. at 383–84. The court further noted that Petro-Hunt's own filings characterized the Fifth Circuit's decision as incorrect, further supporting its conclusion that adjudicating the judicial takings claim would require an improper exercise in collateral review. *Id*. at 384–85. The Court of Federal Claims also dismissed the 2011 Case because Petro-Hunt conceded that a ruling against it on the judicial takings claim, combined with the Court of Federal Claims' prior rulings, should result in dismissal of both actions. *Id*. at 385 n.14. The Court of Federal Claims thus entered final judgment in both actions for the United States

Petro-Hunt timely appealed and asks this court to reverse the Court of Federal Claims' dismissal of its permanent, temporary, and judicial takings claims, breach of contract claims, and claims for reformation, and remand for the Court of Federal Claims to adjudicate the merits of its claims. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II

We review de novo a decision of the Court of Federal Claims to dismiss for lack of subject matter jurisdiction. *Fidelity & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015).

A

We affirm the Court of Federal Claims' dismissal of Petro-Hunt's permanent takings claim

and contract-based claims as untimely. A six-year statute of limitations governs claims before the Court of Federal Claims. 28 U.S.C. § 2501 (2004). A claim under the Fifth Amendment accrues when the taking action occurs. *Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (citing *Steel Improvement & Forge Co. v. United States*, 355 F.2d 627, 631 (Ct. Cl. 1966)). Generally, such a taking occurs when the government deprives an owner of the use of his or her property. *See United States v. Causby*, 328 U.S. 256, 261–62 (1946). A permanent takings claim arises when (1) all the events which fix the government's liability have occurred; and (2) the plaintiff knew or should have known about the existence of these events. *See Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358–59 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). Because the statute of limitations is jurisdictional, the plaintiff bears the burden of proof. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998).

We agree with the Court of Federal Claims that Petro-Hunt's permanent takings claim accrued, at the latest, in 1993. The statute of limitations for Petro-Hunt's permanent takings claim began to run in the 1940s when the servitudes at issue prescribed and the property interests were acquired by the United States. However, Petro-Hunt may be entitled to the benefit of the accrual suspension rule. Under the accrual suspension rule, the accrual of a claim is suspended under 28 U.S.C. § 2501 "until the claimant knew or should have known that the claim existed." *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc). We agree with the

Court of Federal Claims that the accrual suspension rule applied to some extent due to the enactment of Act 315 and the *Nebo Oil* decision. But even application of the accrual suspension rule in this case does not save Petro-Hunt's permanent takings claim from being barred by the statute of limitations. The accrual suspension period ended no later than 1993 in this case, because that was when Petro-Hunt's predecessor in interest, Placid Oil, and its co-owner, Hunt Petroleum, explicitly learned that the United States was granting mineral leases on the servitudes and had deemed the servitudes to have prescribed to the Government. Because Petro-Hunt did not file its complaint until 2000, the six-year statute of limitations expired, and the Court of Federal Claims was correct to dismiss these claims as outside of its jurisdiction. Additionally, because Petro-Hunt's contract-based claims arose out of the same transactions as its permanent takings claim, the Court of Federal Claims properly applied the same reasoning to accrual of those claims and properly dismissed them.

We reject Petro-Hunt's argument that accrual of its permanent takings claim should have been suspended until resolution of the Quiet Title Action. Petro-Hunt relies on this court's decision in *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005), for the proposition that it had to complete its Quiet Title Action in the district court before it could pursue its permanent takings claim in the Court of Federal Claims. Petro-Hunt contends that the Fifth Circuit's determination of the ownership of the servitudes was an "essential element" of its case in the Court of Federal Claims and therefore that case was not ripe for adjudication until the Fifth

Circuit ruled that the relevant servitudes were subject to prescription. We disagree with Petro-Hunt that *Samish* compels us to decide that accrual of Petro-Hunt's claims was suspended until March 6, 2007, the date the Fifth Circuit affirmed the district court's judgment regarding ownership of the servitudes. In *Samish*, the plaintiffs' action in the Court of Federal Claims depended on their status as an Indian tribe. Only a district court, acting on a challenge under the APA, had authority to review the status of the Indian tribe. *Id.* at 1373. Because plaintiffs' claim for retroactive benefits at the Court of Federal Claims depended on recognition of the Samish tribe, the claim did not accrue until the decision of the district court. *Id.* at 1373–74.

Conversely, in the case of a takings claim, the Court of Federal Claims has jurisdiction to determine the existence of property rights as a threshold inquiry in any takings case. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 906 (2003) (stating that there is a two-step approach to takings claims, where the first step is for a court to determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a 'stick in the bundle of property rights'" (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000))); *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 478 (2009) ("Before assessing plaintiffs' categorical takings claim, this court must, as a threshold matter, determine whether plaintiffs possessed a property interest protected by the Fifth Amendment."). Therefore, the Court of Federal Claims could have and would have addressed the

threshold inquiry of whether Petro-Hunt had a property right in the servitudes. Accordingly, because Petro-Hunt's takings claims in the Court of Federal Claims did not depend on the result of the Quiet Title Action in the district court, the result of the Quiet Title Action was not an "essential element" of its case in the Court of Federal Claims. Petro-Hunt was not required to wait until the Quiet Title Action in the district court was decided to file its case in the Court of Federal Claims.

B

Because we hold that Petro-Hunt's temporary takings claims accrued at the time the leases were entered into, we affirm the Court of Federal Claims' dismissal of all temporary takings claims based on leases entered into six years prior to Petro-Hunt's filing in the Court of Federal Claims.[3]

That Petro-Hunt's temporary takings claims accrued at the start of the leases when the Government entered into possession of the land is consistent with the precedent of both the Supreme Court and this court. The Supreme Court in *United States v. Dow*, stated that, in general, a taking occurs when the United States enters into physical

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[3] Regarding the 2000 Case, our holding applies to all leases entered into six or more years prior to August 24, 2000. Thus, sixty-eight of the leases asserted in the 2000 Case are barred. As discussed in Part II.C, the remainder of the leases asserted in the 2000 complaint are barred by § 1500. Regarding the 2011 Case, this holding applies to all leases entered into six or more years prior to November 17, 2011. Because all asserted leases in the 2011 Case were entered into prior to that date, our holding regarding Petro-Hunt's temporary takings claims affects all leases asserted in the 2011 Case.

possession of the land at issue. 357 U.S. 17, 21–22 (1958). "It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues." *Id.* at 22. In *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), this court endorsed the rule that, no matter whether the physical taking is permanent or temporary, the "taking occurs when the owner is deprived of use of the property. . . . While the taking may be abandoned . . . the accrual date of a single taking remains fixed." *Id.* at 1235. Here, too, we adopt the rule that a taking, permanent or temporary, occurs when the owner is deprived of use of the property, in this case, by physical possession. The temporary takings accrued when Petro-Hunt was deprived of use of the property at the beginning of each lease. Therefore, we conclude that all temporary claims based on leases that were entered into more than six years before Petro-Hunt filed suit on August 24, 2000, are barred by the statute of limitations.

Petro-Hunt argues that its temporary takings claims did not accrue until the end of each lease because temporary physical takings are analogous to, and therefore should be treated the same as, regulatory takings. In other words, Petro-Hunt asserts that the accrual rule should be the same for temporary physical takings as it is for regulatory takings. Generally, a party who has suffered a regulatory taking is allowed to wait to file suit until the process that began the taking has ceased. Compensation for a regulatory taking often cannot be measured until the government's act has completed because the economic impact and extent of the harm cannot be measured until the process

that began it has ended. *See Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (stating that where there is a temporary regulatory taking, "property owners cannot sue for a temporary taking until the regulatory process that began it has ended . . . because they would not know the extent of their damages until the Government completes the 'temporary' taking"). Petro-Hunt alleges that the circumstances are the same for temporary physical takings; that is, the property owner will not know the extent of the damage until the temporary taking has ceased. For this reason, Petro-Hunt contends that it had the option to file its claim once the taking began or wait and determine the extent of the taking and the amount of just compensation owed before filing suit.

We disagree with Petro-Hunt that temporary physical takings are analogous to regulatory takings and therefore decline to adopt the rule Petro-Hunt proposes. Where regulatory takings rely heavily on the degree of diminution of the value of the property over time, the effect of a physical taking on a property owner can be measured as soon as the Government enters into possession of the physical property. *Dow*, 357 U.S. at 24. In explaining why a physical taking occurs at the time the Government enters into possession of the land, the Supreme Court stated that just compensation is a "reflection of the value of what the property owner gave up and the Government acquired" at the time the Government took possession, and that measurement at a later date may not accurately reflect the value of what was lost. *Id*. We think this reasoning is sound as applied to the leases here. While it is possible that the value of a servitude at the end of the ten-year

lease period would be greater than at the beginning, it is also possible that the servitude would be deemed worthless at the lease's end. Indeed, as the Supreme Court stated:

> [I]f the difference between the market value of the fee on the date of the taking and that on the date of return were taken to be the measure, there might frequently be situations in which the owner would receive no compensation . . . because the market value of the property had not decreased during the period of the taker's occupancy.

Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949); *see also Dow*, 357 U.S. at 24 ("[I]f the value of the property changed between the time the Government took possession and the time of filing, payment as of the latter date would not be an accurate reflection of the value of what the property owner gave up and the Government acquired.").

Because just compensation can be determined at the time the leases were entered into, we hold that a temporary physical taking accrues at the time the Government takes physical possession of the land. Thus, all leases entered into at least six years prior to the date the complaint was filed are barred by the statute of limitations.

C

We also affirm the Court of Federal Claim's finding that the remaining temporary takings claims

asserted in the 2000 Case not barred by the statute of limitations are barred by 28 U.S.C. § 1500. Jurisdiction under § 1500 is "dependent on the state of things when the action is brought, and cannot be rescued by subsequent action of either party or by resolution of the co-pending litigation." *Central Pines*, 697 F.3d at 1367. Section 1500 provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

In other words, § 1500 bars the Court of Federal Claims' jurisdiction over a suit if a plaintiff, upon filing in the Court of Federal Claims, has a suit pending in any other court "for or in respect to" the same claim. *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993). To determine whether § 1500 applies, a court must make two inquiries: "(1) whether there is an earlier-filed 'suit or process' pending in another court, and, if so, (2) whether the claims asserted in the earlier-filed case are 'for or in respect to' the same claim(s) asserted in the later-filed Court of Federal Claims action." *Resource Invs., Inc. v. United States*, 785 F.3d 660, 664 (Fed. Cir. 2015) (quoting *Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013)). "Two suits are for or in

respect to the same claim, precluding jurisdiction in the [Court of Federal Claims], if they are based on substantially the same operative facts, regardless of the relief sought in each suit," *Tohono*, 563 U.S. at 317, or the legal theories asserted, *Keene*, 508 U.S. at 212.

To determine whether the § 1500 bar attached when plaintiffs filed their action in the Court of Federal Claims, we compare the operative facts underlying the claims pending in the two courts. *See Central Pines*, 697 F.3d at 1364.[4] A review of the complaints filed by Petro-Hunt at the district court and at the Court of Federal Claims reveals that the factual allegations are nearly identical. *Compare* Quiet Title Action, ECF No. 1, *with* 2000 Case, ECF No. 1. Both complaints describe the same mineral servitudes, the same history of conveyances of the land to the Government in the 1930s, the same

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[4] This case presents similar facts to *Central Pines*, where this court affirmed the Court of Federal Claims' dismissal of plaintiffs' takings claims as barred by § 1500. 697 F.3d at 1367. In *Central Pines*, plaintiffs alleged that the government improperly asserted ownership over mineral rights in property in Kisatchie that Central Pines claimed to own. *Id.* at 1362. Plaintiffs first filed suit in the district court, requesting a declaratory judgment to quiet title to the property and alternatively alleging an unconstitutional taking without just compensation in violation of the Fifth Amendment. *Id.* While summary judgment motions were pending in the district court, plaintiffs filed suit in the Court of Federal Claims, alleging a taking in violation of the Fifth Amendment. *Id.* at 1362–63. This court found that the Court of Federal Claims properly dismissed plaintiffs' claims as barred under § 1500 because the two suits were based on substantially the same operative facts. *Id.* at 1364–65. Those facts include the mineral servitudes at issue, the history of conveyances, the description of the government's behavior, and the claims of ownership. *Id.*

history of conveyances of the mineral rights to Petro-Hunt and its predecessors from the 1940s to the 1990s, and the same allegedly wrongful use of the land by the Government. Both complaints allege that the Government had granted leases to the mineral servitudes as early as 1991, despite protests by Petro-Hunt's co-owners and predecessors. We disagree with Petro-Hunt that these are mere background facts and conclude that they are critical to its claims in both actions. In fact, both complaints allege these facts as support for a takings claim. Because we find that Petro-Hunt's district court complaint and Court of Federal Claims complaint allege nearly identical operative facts, we affirm the Court of Federal Claims' invocation of the § 1500 bar. *See, e.g.*, *Tohono*, 563 U.S. at 317–18 (finding two suits had substantial overlap of operative facts where plaintiff could have filed two nearly identical complaints without changing the claim in either suit in any significant way); *Central Pines*, 697 F.3d at 1365 ("Because plaintiffs filed two nearly identical complaints that, at best, repackaged the same conduct into two different theories, and at worst, alleged the same takings claim, we find that there is a substantial overlap of operative facts that implicates the § 1500 bar.").

Petro-Hunt makes several arguments on appeal as to why the § 1500 bar should not apply, and we reject each in turn.

Petro-Hunt disagrees that its temporary takings claims in the Court of Federal Claims were based on substantially the same operative facts as the claims in the Quiet Title Action and thus argues that § 1500's jurisdictional bar was not triggered.

According to Petro-Hunt, the only similarities between these two suits are the background facts that provide context for the claims presented. Petro-Hunt says that the Court of Federal Claims improperly conflated operative facts with background facts and contends that the facts relevant to the claims in its Quiet Title Action are unrelated to the conduct that gave rise to the takings. We reject this argument because the operative facts are nearly identical in each complaint, as discussed above.

Petro-Hunt states that its alternative request for just compensation in the Quiet Title Action was not a 'claim' for purposes of § 1500. Citing Rule 8(a) of the Federal Rules of Civil Procedure, Petro-Hunt argues that its alternative request was not a 'claim' because Petro-Hunt did not cite the district court's jurisdiction over that claim and did not assert that it was bringing a cause of action for a taking. As noted by the Government, this argument is waived because Petro-Hunt did not present this argument at the Court of Federal Claims. *See Mass. Mut. Life Ins. Co. v. United States*, 782 F.3d 1354, 1369 (Fed. Cir. 2015) ("As a general principle, appellate courts do not consider issues that were not clearly raised in the proceeding below."). In any case, Petro-Hunt's complaint at the district court did state a takings claim: "Plaintiffs allege that the actions of the United States in confiscating their mineral interests amounts to an unconstitutional taking in direct violation of the Fifth Amendment of the United States Constitution, for which Plaintiffs should be compensated." Quiet Title Action, ECF No. 1 at ¶ 19. It is irrelevant to the § 1500 analysis that Petro-Hunt failed to cite a jurisdictional basis for this claim or that this claim was set forth under the

"Relief Requested" heading rather than the "Cause of Action" heading. All that is required for two suits to be "for or in respect to the same claim" is that they be "based on substantially the same operative facts, regardless of the relief sought in each suit." *Tohono*, 563 U.S. at 317. As discussed above, we find that the 2000 Case and the Quiet Title Action are based on substantially the same—in fact, nearly identical—operative facts.

Petro-Hunt argues that its alternative request for compensation in the Quiet Title Action was not 'pending' as required by § 1500, reasoning that the request was never litigated, argued, decided, or appealed. Moreover, Petro-Hunt argues that § 1500 should not bar a claim where the potential for duplicative litigation is not possible. Petro-Hunt asserts that duplicative litigation would not have been possible because the Court of Federal Claims has exclusive jurisdiction over takings claims for more than $10,000, and thus, the district court would not have been able to assert jurisdiction over its takings claims. We disagree with Petro-Hunt's reasoning and agree with the Government that Petro-Hunt's claim was pending for purposes of § 1500. Even though the claim was not "litigated, argued, decided, or appealed," as Petro-Hunt argues was required, it was pending because it had not been dismissed and was in front of the district court when Petro-Hunt filed its Court of Federal Claims complaint. *See Central Pines*, 697 F.3d at 1364 (explaining that the § 1500 bar attaches at the time the complaint is filed in the Court of Federal Claims). Additionally, whether or not the district court would have been able to exercise its jurisdiction over Petro-Hunt's takings claims is

irrelevant. First, because district courts do have jurisdiction over takings claims for just compensation of $10,000 or less (under the Little Tucker Act) and because Petro-Hunt's complaint in its Quiet Title Action did not specify an amount, the district court did have jurisdiction over the takings claim on its face. *See, e.g., Smith v. Orr*, 855 F.2d 1544, 1552–53 (Fed. Cir. 1988) (stating that a Little Tucker Act case may proceed in district court if recovery is limited to $10,000, even when potential liability exceeds $10,000). Even so, whether or not the court where the claim is pending has jurisdiction is irrelevant. *See Keene*, 508 U.S. at 204 (applying § 1500 jurisdictional bar to a case filed in the Court of Federal Claims where substantially the same claims were pending at a district court when the Court of Federal Claims case was filed, even though the district court ultimately dismissed those claims for lack of jurisdiction); *see also UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) (en banc), *aff'd sub nom. Keene*, 508 U.S. 200 ("There is nothing in section 1500 to suggest a free floating jurisdictional bar that attaches only when the government files a motion to dismiss, or worse, when the court gets around to acting on it.").

Petro-Hunt also challenges the constitutionality of the § 1500 jurisdictional bar. Petro-Hunt contends that Congress is not allowed to dispense with the constitutional right to just compensation by withholding jurisdiction through statute. Since *Tohono* was decided, Petro-Hunt believes that § 1500 has been applied too broadly to cover not only rights granted by statute but also constitutionally created rights. In response, the Government finds Petro-Hunt's constitutional

arguments to be "waived, inapplicable, and incorrect." Even if Petro-Hunt had argued this constitutional issue at the Court of Federal Claims, the Government contends it is without merit because Petro-Hunt could have avoided the § 1500 bar by not filing its takings claims in the district court or by dismissing it and then refiling it with its Court of Federal Claims complaint.

We find Petro-Hunt's argument to be unpersuasive. Section 1500 does not act as a general bar to constitutional rights, but instead was applied in this case because Petro-Hunt filed essentially the same case twice, pleading an unconstitutional taking in both district court and the Court of Federal Claims. The Court of Claims in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), set forth the rule that § 1500 applies only when a suit is commenced in another court against the United States before the claim is filed in the Court of Claims. *Id.* at 949.[5] In *Resource Investments*, this court applied the rule of *Tecon* and avoided the possible constitutional questions underlying application of § 1500 by stating that had the plaintiff filed his claim in the Court of Federal Claims before filing in the district court, the Court of Federal Claims could have considered his claims. 785 F.3d at 669–70; *see also id.* ("In [*Tecon*], our predecessor court found that the § 1500 bar operates *only* when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims]. . . . We are bound by *Tecon*, which remains the law of this

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[5] *Tecon* was overruled on other grounds by *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992).

circuit." (citations and internal quotation marks omitted)). The same is true here. Petro-Hunt could have avoided the force of § 1500 by following *Tecon* and filing its case first in the Court of Federal Claims. *See Brandt v. United States*, 710 F.3d 1369, 1379 n.7 (Fed. Cir. 2013) (stating that *Tecon*'s order-of-filing rule "remains the law of this circuit"); *Hardwick Bros. Co. II v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995) (the rule of *Tecon* "remains good law and binding on this court"). Thus, we find that application of § 1500 did not affect Petro-Hunt's right to assert its constitutional claim.

D

Finally, we affirm the Court of Federal Claims' dismissal of Petro-Hunt's judicial takings claim because the Court of Federal Claims lacks jurisdiction to review the merits of a decision rendered by a federal district court. *See Shinnecock*, 782 F.3d at 1352 ("Binding precedent establishes that the Court of Federal Claims has no jurisdiction to review the merits of a decision rendered by a federal district court."); *see also Boise*, 296 F.3d at 1344 (stating that "Article III forbids the Court of Federal Claims, an Article I tribunal, from reviewing the actions of an Article III court," and that "the Court of Federal Claims cannot entertain a takings claim that requires the court to scrutinize the actions of another tribunal" (citations and internal quotation marks omitted)); *Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) ("[T]he Court of Federal Claims cannot entertain a taking claim that requires the court to 'scrutinize the actions of' another tribunal." (quoting *Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed. Cir. 2001))).

Petro-Hunt's judicial takings claim alleges that the Fifth Circuit's holding that Petro-Hunt's mineral servitudes are subject to prescription for nonuse was a taking of its right to perpetual ownership of the servitudes. Petro-Hunt's claim to prior perpetual ownership is based on the Fifth Circuit's decision in *Nebo Oil*, which Petro-Hunt argued to the Fifth Circuit and again to the Court of Federal Claims should have applied to all of its mineral servitudes in Kisatchie and not just the specific ones at issue in *Nebo Oil*. In the Quiet Title Action, the Fifth Circuit held that *Nebo Oil* did not have such preclusive effect, and thus Petro-Hunt did not have perpetual ownership of any servitude except the one at issue in *Nebo Oil*. *Petro-Hunt*, 365 F.3d at 397–99. Therefore, to resolve Petro-Hunt's judicial takings claim, the Court of Federal Claims would necessarily have to review the Fifth's Circuit decision to decide whether Petro-Hunt ever had a cognizable property interest in perpetual ownership of the servitudes. To determine whether Petro-Hunt held imprescriptible mineral servitudes prior to the Fifth Circuit's ruling, the Court of Federal Claims must determine the res judicata or collateral estoppel effect of *Nebo Oil*, which was decided against Petro-Hunt in the Fifth Circuit's decision in the Quiet Title Action and became a final, nonappealable judgment in 2008. Thus, the Court of Federal Claims correctly dismissed Petro-Hunt's judicial takings claim because it could not determine if Petro-Hunt's mineral servitudes were "previously imprescriptible" or "transformed" from private to public property without determining whether the Fifth Circuit's interpretation of precedent was correct. *Petro-Hunt III*, 126 Fed. Cl. at 385.

We disagree with Petro-Hunt that its case is comparable to *Boise*, where this court held that the Court of Federal Claims had jurisdiction to review the merits of plaintiff's Tucker Act claim after a district court had enjoined plaintiffs from logging on property. 296 F.3d at 1343–44. There, plaintiffs had accepted the validity of the district court's injunction and filed suit in the Court of Federal Claims to determine whether the injunction effected a taking of its property. *Id*. While Petro-Hunt contends that it has accepted the result of the Quiet Title Action and therefore the Court of Federal Claims need not review the merits of the Fifth Circuit's decision, its briefings at the Court of Federal Claims and to this court show that Petro-Hunt is actually challenging the result. In its briefs on appeal, it requests that this court remand to the Court of Federal Claims for it to "determin[e] whether Petro-Hunt held a compensable property interest that was taken and, if so, what compensation is due." Appellant's Br. 54. Petro-Hunt also stated in its opposition to the Government's motion to dismiss at the Court of Federal Claims that "[t]he ultimate result of the [Quiet Title Action] was inconsistent with the principles set forth in [*Nebo Oil*] and the other relevant principles applicable to Petro-Hunt's established property right and deprived Petro-Hunt of its ownership of the mineral servitudes in perpetuity." *Petro-Hunt III*, 126 Fed. Cl. at 384–85.

Therefore, Petro-Hunt's case is more analogous to *Vereda* and *Allustiarte*, where this court found the adjudication of a takings claim would require the Court of Federal Claims to review the propriety of a district court's actions. *See Vereda*,

271 F.3d at 1375 (holding that the Court of Federal Claims lacked jurisdiction over plaintiff's takings claim because review would require a determination of the correctness of an administrative forfeiture, which has the same force and effect as a district court judgment); *Allustiarte*, 256 F.3d at 1352 (Court of Federal Claims lacked jurisdiction over a takings claim requiring determination of whether a bankruptcy judgment was correctly decided). Because the Fifth Circuit held that Petro-Hunt had no property interest and therefore there could be no taking, the Court of Federal Claims would necessarily have to find that the Fifth Circuit erred for Petro-Hunt to prevail. Thus, resolution of Petro-Hunt's judicial takings claim depends on the Court of Federal Claims' finding that the Fifth Circuit's decision was in error—something it has no jurisdiction to do.

This court's recent response to a judicial takings claim in *Shinnecock* confirmed that the Court of Federal Claims "cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal." 782 F.3d at 1353 (citing *Innovair Aviation Ltd. v. United States*, 632 F.3d 1336, 1344 (Fed. Cir. 2011)). This court reasoned that "[p]ermitting parties aggrieved by the decisions of Article III tribunals to challenge the merits of those decisions in the Court of Federal Claims would circumvent the statutorily defined appellate process and severely undercut the orderly resolution of claims." *Id.* The court in *Shinnecock* did not address the general viability of a judicial takings claim, and this court need not do so here,

either.[6] It is only necessary for us to decide that because Petro-Hunt's judicial takings claim would require the Court of Federal Claims to overturn the Fifth Circuit's decision, the Court of Federal Claims lacks jurisdiction over that claim.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims to dismiss Petro-Hunt's permanent, temporary, and judicial takings claims for lack of jurisdiction.

AFFIRMED

COST

No costs.

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[6] In *Smith v. United States*, 709 F.3d 1114, 1116–17 (Fed. Cir. 2013), this court noted that "judicial action could constitute a taking of property," and that the Supreme Court applied the theory of a judicial taking in *Stop the Beach*. But the Court's decision in *Stop the Beach* that a cause of action for a judicial taking exists is a plurality decision, and therefore not a binding judgment. *Stop the Beach*, 560 U.S. at 715–19 (Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concluded that a court may effect a taking. There were two separate opinions concurring in the judgment but not in the plurality's views on judicial takings—one by Justice Kennedy, joined by Justice Sotomayor, the other by Justice Breyer, joined by Justice Ginsburg. Justice Stevens did not participate.)

[Entered: April 26, 2016]

In the United States Court of Federal Claims

Nos. 00-512L, 11-775L
Filed: February 29, 2016
Reissued for Publication: April 26, 2016[1]

* * * * * * * * * * * *	*	
PETRO-HUNT, L.L.C.,	*	
	*	
Plaintiff,	*	**Taking; Judicial**
v.	*	**Takings Claim; Motion**
	*	**to Dismiss; Subject-**
UNITED STATES,	*	**Matter Jurisdiction.**
	*	
Defendant.	*	
	*	
* * * * * * * * * * * *	*	

Joseph R. White, White Law Firm, New Orleans, LA, for plaintiff.

William J. Shapiro, Trial Attorney, Natural Resources Section, Environment and Natural Resources Division, United States Department of Justice, Sacramento, CA, for the defendant. With him was **Emily M. Meeker**, Trial Attorney, Natural Resources Section, and **John C. Cruden**, Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.

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[1] This opinion was issued under seal on February 29, 2016. The parties filed a joint status report indicating no redactions were required. After subsequent review of the opinion by the court, the court agrees no redactions are warranted, and, therefore, the opinion is hereby unsealed and reissued without redaction.

O P I N I O N

HORN, J.

The above captioned cases involve the government's alleged taking in violation of the Fifth Amendment to the United States Constitution of ninety mineral servitudes underlying roughly 58,000 acres of the Kisatchie National Forest in Louisiana. Plaintiff alleges that the United States Court of Appeals for the Fifth Circuit took its property by holding that the mineral servitudes were subject to the Louisiana law of prescription. See Petro-Hunt, L.L.C. v. United States, 365 F.3d 385 (5th Cir.), cert. denied, 543 U.S. 1034 (2004). These cases are currently before this court on defendant's motion to dismiss plaintiff's judicial takings claims and the parties' cross motions for summary judgment on the judicial takings claims.[2]

FINDINGS OF FACT

Between 1932 and 1934, two companies, Bodcaw Lumber Company of Louisiana (Bodcaw) and Grant Timber & Manufacturing Company of Louisiana, Inc. (Grant), conveyed 96 mineral servitudes underlying approximately 180,000 acres

[2] Judge Francis Allegra, the Judge previously assigned to these cases, issued seven earlier opinions in Case No. 00-512L. See Petro-Hunt, L.L.C. v. United States, 114 Fed. Cl. 143 (2013); Petro-Hunt, L.L.C. v. United States, 113 Fed. Cl. 80 (2013); Petro-Hunt, L.L.C. v. United States, 108 Fed. Cl. 398 (2013); Petro-Hunt, L.L.C. v. United States, 105 Fed. Cl. 132 (2012); Petro-Hunt, L.L.C. v. United States, 105 Fed. Cl. 37 (2012); Petro- Hunt, L.L.C. v. United States, 91 Fed. Cl. 447 (2010); Petro-Hunt, L.L.C. v. United States, 90 Fed. Cl. 51 (2009). The court includes only the findings of fact relevant to this opinion in order to address the pending motions.

of land to Good Pine Oil Company, Inc., a joint venture created by Bodcaw, Grant, and three other lumber companies.

In the early 1930s, the United States approached Bodcaw and Grant with an offer to purchase the surface land of the 180,000 acres. The United States intended to acquire this land pursuant to the Weeks Law, which authorized the government to purchase lands throughout the United States to establish national forests. See Weeks Law of 1911, ch. 186, 36 Stat. 961 (1911) (codified as amended at 16 U.S.C. §§ 515–519, 521, 552, 563 (2012)). Bodcaw and Grant expressed concern over the application of the Louisiana law of prescription, which states that mineral servitudes to the owner of the surface estate extinguish after ten years of nonuse. See La. Civil Code art. 789, 3546 (1870) (currently codified as amended at La. Rev. Stat. § 31:27 (2015)). On May 29, 1935, an Assistant Solicitor of the United States Department of Agriculture issued an opinion stating that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes. The Forest Service delivered the 1935 opinion to Bodcaw and Grant to ease their fears that the land would prescribe to the United States. Between 1934 and 1937, the two companies conveyed the surface land of the 180,000 non-contiguous acres to the United States through several conveyances for the creation of the Kisatchie National Forest.[3]

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[3] As Judge Allegra previously noted: "The eleven instruments of transfer all expressly excluded the mineral servitudes, which the grantors reserved for Good Pine Oil, a joint venture created by Bodcaw Lumber, Grant Timber, and three other lumber

In 1940, the Louisiana legislature enacted Act 315 of 1940 (Act 315), declaring that when the United States acquired land subject to the prior sale of the oil, gas or other mineral rights, the mineral rights were imprescriptible.[4] In 1948, the United States filed a quiet title action in the United States District Court for the Western District of Louisiana to determine the owner of a mineral servitude underlying approximately 800 acres of the 180,000 acres in dispute in these cases. The court held, relying on Act 315, that the Louisiana law of prescription did not apply and the servitude affecting the approximately 800 acres remained in the hands of Petro-Hunt's predecessor in interest, the Nebo Oil Company.[5] See United States v. Nebo Oil Co., 90 F. Supp. at 84. Although Act 315 was passed four years after the sale of the land above the servitude affecting the approximately 800 acres, the Western District of Louisiana found that the law still

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companies." Petro-Hunt, L.L.C. v. United States, 105 Fed. Cl. at 40.

[4] The relevant part of Act 315 provides: "Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas, and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible." United States v. Nebo Oil Co., 90 F. Supp. 73, 80 (W.D. La. 1950) (quoting Act 315 (codified as amended at La. Rev. Stat. Ann. § 31:149)), aff'd, 190 F.2d 1003 (5th Cir. 1951).

[5] In 1942, Nebo Oil Company acquired all of the mineral rights formerly held by Good Pine Oil Company, Inc.

applied because the conveyance occurred within ten years of Act 315. See id. at 81.

The holding of Nebo Oil came into question when the United States Supreme Court decided United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973). The Little Lake Misere case involved two parcels of land in Louisiana acquired by the United States in 1937 and 1939 in accordance with the Migratory Bird Conservation Act, with the express provision that the mineral rights associated with the land were reserved to Little Lake Misere for a period of 10 years, or longer if Little Lake Misere continued the production of minerals on the site. See id. at 582–83. The Supreme Court determined that because the land acquisition was "one arising from and bearing heavily upon a federal regulatory program" and involved the United States as a party, the case should be interpreted according to federal law. See id. at 593–94. The Supreme Court held that the retroactive application of Louisiana's Act 315 was "plainly hostile to the interests of the United States" and "[t]o permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs." Id. at 596–97. Accordingly, the Supreme Court held that the land in question had prescribed to the United States. See id. at 604.

In 1991, the United States began granting mineral leases on some of the conveyed land at issue in these cases. In 1998, through various conveyances, Petro-Hunt became the record holder of a 64.3% undivided interest in the mineral servitudes

once owned by Good Pine Oil Company, Inc. On February 18, 2000, Petro-Hunt, along with the co-owners of Petro-Hunt's mineral estate, filed a quiet title action in the United States District Court for the Western District of Louisiana, seeking a declaration that they were the owners in perpetuity of the mineral servitudes. See Petro-Hunt, L.L.C. v. United States, No. 00-303 (W.D. La. filed Feb. 18, 2000). Their complaint requested a declaratory judgment quieting their title to the property, but alternatively asserted "that the actions of the United States in confiscating their mineral interests amounts to an unconstitutional taking in direct violation of the Fifth Amendment of the United States Constitution, for which Plaintiffs should be compensated." In its June 5, 2000, response to this complaint, the United States asserted that the United States District Court for the Western District of Louisiana lacked jurisdiction to declare an unconstitutional takings and award compensation.

On August 24, 2000, Petro-Hunt filed a complaint in this court, Case No. 00-512L, alleging that the United States had breached its contract and the Fifth Amendment Takings Clause by exercising ownership over the mineral servitudes. On November 2, 2000, the case in this court was stayed pending the resolution of the quiet title action in the United States District Court for the Western District of Louisiana. On December 18, 2001, the Western District of Louisiana held that the law of prescriptions did not apply and that Petro-Hunt retained title to the mineral servitudes. Petro-Hunt, L.L.C. v. United States, 179 F. Supp. 2d 669 (W.D. La. 2001). The United States Court of Appeals for the Fifth Circuit reversed, holding that the law of

prescriptions did apply to Petro-Hunt's mineral servitudes. See Petro-Hunt, L.L.C. v. United States, 365 F.3d at 399. In its ruling, the Fifth Circuit expressly relied upon the Little Lake Misere decision and a 2001 Fifth Circuit decision, Central Pines Land Co. v. United States, 274 F.3d 881 (5th Cir. 2001), cert. denied, 537 U.S. 822 (2002). See Petro-Hunt, L.L.C. v. United States, 365 F.3d at 392–93 (discussing the two cases). Central Pines held that "Act 315 cannot be borrowed as the rule of decision for application to pre-1940 transactions, because it is hostile to the interests of the United States." Cent. Pines Land Co. v. United States, 274 F.3d at 886.[6] Relying on Central Pines, the Fifth Circuit held that it was "prohibited from borrowing Act 315 as the federal rule of decision" and remanded the case United States District Court for the Western District of Louisiana to determine which of Petro-Hunt's

[6] The Central Pines case addressed the seemingly contrary precedent of Nebo Oil, and determined that Nebo Oil's limited holding only addressed the constitutionality of Act 315 under the Contract Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment. See Cent. Pines Land Co. v. United States, 274 F.3d at 889 ("Nebo Oil holds only that the 'mere hope' or 'expectancy' in the prescription of mineral rights is not protected by the Contract Clause of the U.S. Constitution, and that the retroactive application of Act 315 does not violate the Due Process Clause of the Fourteenth Amendment or dispose of United States property in violation of Article IV, Section 3, clause 2." (footnote omitted)). Therefore, Little Lake Misere's holding that Act 315 could not be applied as a matter of federal common law did not necessarily overrule the constitutional analysis of Nebo Oil, although it did "reject[] the presumption in Nebo Oil that Louisiana law governed the terms of the transactions at issue." Petro-Hunt, L.L.C. v. United States, 365 F.3d at 393 (citing Cent. Pines Land Co. v. United States, 274 F.3d at 889–90) (footnote omitted).

mineral servitudes had prescribed to the United States through nonuse. Petro Hunt, L.L.C. v. United States, 365 F.3d at 399.

In accordance with the Fifth Circuit decision, the quiet title action was remanded to the United States District Court for the Western District of Louisiana. Petro-Hunt filed a motion for trial on the issue of whether Act 315 applied to its mineral servitudes. See Petro-Hunt, L.L.C. v. United States, No. 00-0303 (W.D. La. Mar. 14, 2005). The court denied the motion, finding that the only issue to be determined was "which of the 95 servitudes not at issue in Nebo Oil ha[d] in fact prescribed for nonuse." Order, Petro-Hunt, L.L.C. v. United States, No. 00-0303 (W.D. La. Nov. 21, 2005) (internal quotation marks omitted). On December 7, 2005, the United States District Court for the Western District of Louisiana held that Petro-Hunt remained the owner of six servitudes,[7] underlying roughly 122,000 acres, with the remaining 90 having prescribed to the United States through nonuse. Petro-Hunt, L.L.C. v. United States, No. 00-0303 (W.D. La. Dec. 7, 2005).

Petro-Hunt appealed, arguing that the United States District Court for the Western District of Louisiana erred in denying its motion for trial, or in

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[7] This decision specifically addressed five servitudes, which had not prescribed because they had been maintained by drilling or production activities. The sixth servitude is the Nebo Oil servitude, which had not prescribed to the United States because of the res judicata effect of the Nebo Oil decision. See Petro-Hunt, L.L.C. v. United States, 365 F.3d at 397 (holding that the res judicata effect of Nebo Oil only extends to the particular servitudes at issue in that case).

the alternative, that the Fifth Circuit's 2004 mandate was clearly erroneous and should be withdrawn. See Petro-Hunt, L.L.C. v. United States, No. 06-30095, 2007 WL 715270, at *1 (5th Cir. Mar. 6, 2007), cert. denied, 552 U.S. 1242 (2008). On March 6, 2007, the Fifth Circuit affirmed the denial of the motion for trial and denied plaintiff's request that the previous mandate be withdrawn. Id. at *3. On March 3, 2008, the Supreme Court denied plaintiff's petition for a writ of certiorari, rendering the Fifth Circuit's decision final. See Petro-Hunt, L.L.C. v. United States, 552 U.S. 1242 (2008).

On May 27, 2008, the stay in Case No. 00-512L in this court was lifted. On September 2, 2008, defendant filed a motion to dismiss, or, alternatively, for summary judgment. On November 6, 2009, Judge Allegra granted, in part, and denied, in part, defendant's motion to dismiss. Petro-Hunt, L.L.C. v. United States, 90 Fed. Cl. 51. Judge Allegra dismissed plaintiff's contract claims, permanent takings claims, and certain of its temporary taking claims that were untimely, see id. at 64, 67, 68, but found that other temporary takings claims were timely. See id. at 71.

On September 16, 2010, plaintiff filed its second amended complaint, adding a claim that the Fifth Circuit's decision in the quiet title action constituted a judicial taking of plaintiff's mineral servitudes. On May 31, 2011, defendant filed a motion to dismiss asserting that plaintiff's prior filing of the district court action deprived the court of jurisdiction under 28 U.S.C. § 1500 (2006). On May 2, 2012, Judge Allegra dismissed plaintiff's temporary takings claims as barred by 28 U.S.C.

§ 1500, but denied the motion to dismiss as to the new judicial takings claim. See Petro-Hunt, L.L.C. v. United States, 105 Fed. Cl. 37.[8] The judicial takings claim is all that remains in the above captioned cases.

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[8] Judge Allegra's earlier decision did not address whether the court had jurisdiction to consider the plaintiff's judicial takings claims, only that the judicial takings claims were not barred by 28 U.S.C. § 1500. In his decision, Judge Allegra noted that:

> The Fifth Circuit's second decision was issued on March 6, 2007, and the Supreme Court's denial of certiorari was on March 3, 2008. Because these events occurred after the filing of plaintiff's original complaint, to the extent plaintiff's most recent complaint raises a judicial takings issue, it must be viewed not as an amended complaint under RCFC 15(c), but rather as a supplemental complaint under RCFC 15(d).

Petro-Hunt, L.L.C. v. United States, 105 Fed. Cl. at 44. Judge Allegra also concluded that:

> [I]t makes little sense to hold, as defendant essentially suggests, that plaintiff's judicial takings claim is barred by section 1500 because that new count was added to a suit filed when the district court action was pending, but would not be barred if plaintiff chose to file a new suit featuring that count and then moved to consolidate that suit with this case. Critically, plaintiff's judicial takings claim rests upon "independent operative facts" that are not only unlike those in the first two complaints it filed in this case, but also unlike those that were operative in the claims that it originally pursued in the district court.

Petro-Hunt, L.L.C. v. United States, 105 Fed. Cl. at 45.

After discovery was completed in 2015, defendant filed a motion to dismiss pursuant to Rules 12(b)(1), 12(c), and 12(h)(3) (2015) of the Rules of the United States Court of Federal Claims (RCFC), and a motion for summary judgment pursuant to RCFC 56 (2015). Defendant raises four main arguments in support of its motions. First, defendant argues that the United States Court of Federal Claims lacks jurisdiction over the judicial takings claim because it requires the court to scrutinize the decision of another federal court. Second, defendant argues that the appropriate remedy for a judicial takings claim is the invalidation of the offending court decision, and the Court of Federal Claims lacks jurisdiction to grant this remedy. Third, defendant asserts that plaintiff's claim is barred by res judicata, because plaintiff already litigated its claims in the Fifth Circuit. Finally, defendant asserts that it should succeed on the merits because the Fifth Circuit did not take an established property right from the plaintiff.

In response, plaintiff filed a cross-motion for summary judgment in addition to responding to the motion to dismiss, alleging that it did have an established property right that was taken by the Fifth Circuit's 2007 decision. Regarding its judicial takings claims, plaintiff argues that "Petro-Hunt's valid judicial takings claim is subject to this Court's jurisdiction," and citing to Smith v. United States, 709 F.3d 1114 (Fed. Cir.), cert. denied, 134 S. Ct. 259 (2013) argues that "[t]he Federal Circuit has recognized that judicial action can give rise to claims for the taking of private property."

DISCUSSION

Prior to addressing the cross-motions for summary judgment, the court first considers defendant's motion to dismiss for lack of jurisdiction. It is well established that "'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'" Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011); see also Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."); Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." (citing Arbaugh v. Y & H Corp., 546 U.S. at 514)); Special Devices, Inc. v. OEA, Inc., 269 F.3d 1340, 1342 (Fed. Cir. 2001) ("[A] court has a duty to inquire into its jurisdiction to hear and decide a case." (citing Johannsen v. Pay Less Drug Stores N.W., Inc., 918 F.2d 160, 161 (Fed. Cir. 1990)); View Eng'g, Inc. v. Robotic Vision Sys., Inc., 115 F.3d 962, 963 (Fed. Cir. 1997) ("[C]ourts must always look to their jurisdiction, whether the parties raise the issue or not."). "Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-

matter jurisdiction over the controversy." Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013); see also Arbaugh v. Y & H Corp., 546 U.S. at 506 ("The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."); Cent. Pines Land Co., L.L.C. v. United States, 697 F.3d 1360, 1364 n.1 (Fed. Cir. 2012) ("An objection to a court's subject matter jurisdiction can be raised by any party or the court at any stage of litigation, including after trial and the entry of judgment." (citing Arbaugh v. Y & H Corp., 546 U.S. at 506–07)); Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1346 (Fed. Cir. 2008) ("[A]ny party may challenge, or the court may raise sua sponte, subject matter jurisdiction at any time." (citing Arbaugh v. Y & H Corp., 546 U.S. at 506; Folden v. United States, 379 F.3d 1344, 1354 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005); and Fanning, Phillips & Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998))); Pikulin v. United States, 97 Fed. Cl. 71, 76, appeal dismissed, 425 F. App'x 902 (Fed. Cir. 2011). In fact, "[s]ubject matter jurisdiction is an inquiry that this court must raise *sua sponte*, even where . . . neither party has raised this issue." Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings, 370 F.3d 1354, 1369 (Fed. Cir.) (citing Textile Prods., Inc. v. Mead Corp., 134 F.3d 1481, 1485 (Fed. Cir.), reh'g denied and en banc suggestion declined (Fed. Cir.), cert. denied, 525 U.S. 826 (1998)), reh'g and reh'g en banc denied (Fed. Cir. 2004), cert. granted in part sub. nom Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc., 546 U.S. 975 (2005), cert.

dismissed as improvidently granted, 548 U.S. 124 (2006); see also Avid Identification Sys., Inc. v. Crystal Import Corp., 603 F.3d 967, 971 (Fed. Cir.) ("This court must always determine for itself whether it has jurisdiction to hear the case before it, even when the parties do not raise or contest the issue."), reh'g and reh'g en banc denied, 614 F.3d 1330 (Fed. Cir. 2010), cert. denied, 5 U.S. 1169 (2011).

Pursuant to the RCFC and the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint "a short and plain statement of the grounds for the court's jurisdiction," and "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(1), (2) (2015); Fed. R. Civ. P. 8(a)(1), (2) (2016); see also Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–57, 570 (2007)). "Determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir.) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)), reh'g denied (Fed. Cir. 1997); see also Klamath Tribe Claims Comm. v. United States, 97 Fed. Cl. 203, 208 (2011); Gonzalez-McCaulley Inv. Grp., Inc. v. United States, 93 Fed. Cl. 710, 713 (2010). "Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim." Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998); see also McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1363 n.9 (Fed. Cir. 2007) (Dyk, J., concurring in part, dissenting in part) (quoting C. Wright and A. Miller,

Federal Practice and Procedure § 1286 (3d ed. 2004)). "A plaintiff's factual allegations must 'raise a right to relief above the speculative level' and cross 'the line from conceivable to plausible.'" Three S Consulting v. United States, 104 Fed. Cl. 510, 523 (2012) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 555), aff'd, 562 F. App'x 964 (Fed. Cir.), reh'g denied (Fed. Cir. 2014). As stated in Ashcroft v. Iqbal, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' 550 U.S. at 555. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 555).

When deciding a case based on a lack of subject matter jurisdiction or for failure to state a claim, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 555-56 (citing Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002)))); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800

(1982), recognized by Davis v. Scherer, 468 U.S. 183, 190 (1984); United Pac. Ins. Co. v. United States, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006); Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1343 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2002), cert. denied, 538 U.S. 906 (2003).

The Tucker Act grants jurisdiction to this court as follows:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2012). As interpreted by the United States Supreme Court, the Tucker Act waives sovereign immunity to allow jurisdiction over claims against the United States (1) founded on an express or implied contract with the United States, (2) seeking a refund from a prior payment made to the government, or (3) based on federal constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained. See United States v. Navajo Nation, 556 U.S. 287, 289–90 (2009); United States v. Mitchell, 463 U.S. 206, 216 (1983); see also Greenlee Cnty., Ariz. v. United States, 487 F.3d 871, 875 (Fed. Cir.), reh'g and reh'g en banc denied (Fed.

Cir. 2007), cert. denied, 552 U.S. 1142 (2008); Palmer v. United States, 168 F.3d 1310, 1314 (Fed. Cir. 1999).

"Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States . . . ." United States v. Mitchell, 463 U.S. at 216; see also United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003); Smith v. United States, 709 F.3d at 1116; RadioShack Corp. v. United States, 566 F.3d 1358, 1360 (Fed. Cir. 2009); Rick's Mushroom Serv., Inc. v. United States, 521 F.3d at 1343 ("[P]laintiff must . . . identify a substantive source of law that creates the right to recovery of money damages against the United States."); Golden v. United States, 118 Fed. Cl. 764, 768 (2014). In Ontario Power Generation, Inc. v. United States, the United States Court of Appeals for the Federal Circuit identified three types of monetary claims for which jurisdiction is lodged in the United States Court of Federal Claims. The court wrote:

> The underlying monetary claims are of three types. . . . First, claims alleging the existence of a contract between the plaintiff and the government fall within the Tucker Act's waiver. . . . Second, the Tucker Act's waiver encompasses claims where "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum." Eastport S.S. [Corp. v. United States, 178 Ct. Cl. 599, 605–06,] 372 F.2d [1002,] 1007-08 [(1967)]

(describing illegal exaction claims as claims "in which 'the Government has the citizen's money in its pocket'" (quoting Clapp v. United States, 127 Ct. Cl. 505, 117 F. Supp. 576, 580 (1954)) . . . . Third, the Court of Federal Claims has jurisdiction over those claims where "money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." Eastport S.S., 372 F.2d at 1007. Claims in this third category, where no payment has been made to the government, either directly or in effect, require that the "particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." Id.; see also [United States v.]Testan, 424 U.S. [392,] 401-02 [1976] ("Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim-whether it be the Constitution, a statute, or a regulation-does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" (quoting Eastport S.S., 372 F.2d at 1009)). This category is commonly referred to as claims brought under a "money-mandating" statute.

Ontario Power Generation, Inc. v. United States, 369 F.3d 1298, 1301 (Fed. Cir. 2004); see also Twp. of Saddle Brook v. United States, 104 Fed. Cl. 101, 106 (2012).

To prove that a statute or regulation is money-mandating, a plaintiff must demonstrate that an independent source of substantive law relied upon "'can fairly be interpreted as mandating compensation by the Federal Government.'" United States v. Navajo Nation, 556 U.S. at 290 (quoting United States v. Testan, 424 U.S. 392, 400 (1976)); see also United States v. White Mountain Apache Tribe, 537 U.S. at 472; United States v. Mitchell, 463 U.S. at 217; Blueport Co., LLC v. United States, 533 F.3d 1374, 1383 (Fed. Cir. 2008), cert. denied, 555 U.S. 1153 (2009). The source of law granting monetary relief must be distinct from the Tucker Act itself. See United States v. Navajo Nation, 556 U.S. at 290 (The Tucker Act does not create "substantive rights; [it is simply a] jurisdictional provision[] that operate[s] to waive sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts)."). "'If the statute is not money-mandating, the Court of Federal Claims lacks jurisdiction, and the dismissal should be for lack of subject matter jurisdiction.'" Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1308 (Fed. Cir. 2008) (quoting Greenlee Cnty., Ariz. v. United States, 487 F.3d at 876); Fisher v. United States, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (The absence of a money-mandating source is "fatal to the court's jurisdiction under the Tucker Act."); Peoples v. United States, 87 Fed. Cl. 553, 565–66 (2009).

The Takings Clause of the Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. The purpose of this Fifth Amendment provision is to prevent the government from "'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)), abrogated on other grounds by Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), recognized by Hageland Aviation Servs., Inc. v. Harms, 210 P.3d 444 (Alaska 2009); see also Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24, reh'g denied, 439 U.S. 883 (1978); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005); E. Enters. v. Apfel, 524 U.S. 498, 522 (1998); Rose Acre Farm, Inc. v. United States, 559 F.3d 1260, 1266 (Fed. Cir.), reh'g en banc denied (Fed. Cir. 2009), cert. denied, 130 S. Ct. 1501 (2010); Janowsky v. United States, 133 F.3d 888, 892 (Fed. Cir. 1998); Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 469-70 (2009); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 179 (1871) (citing to principles which establish that "private property may be taken for public uses when public necessity or utility requires" and that there is a "clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified").

Therefore, "a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of

jurisdiction in the relevant statute." E. Enters. v. Apfel, 524 U.S. at 520 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-19 (1984)); see also Acceptance Ins. Cos. v. United States, 503 F.3d 1328, 1336 (Fed. Cir. 2007); Morris v. United States, 392 F.3d 1372, 1375 (Fed. Cir. 2004) ("Absent an express statutory grant of jurisdiction to the contrary, the Tucker Act provides the Court of Federal Claims exclusive jurisdiction over takings claims for amounts greater than $10,000."). The United States Supreme Court has declared: "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [United States Court of Federal Claims] to hear and determine." Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990) (quoting United States v. Causby, 328 U.S. 256, 267 (1946)); see also Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1368 (Fed. Cir. 2005); Narramore v. United States, 960 F.2d 1048, 1052 (Fed. Cir. 1992); Perry v. United States, 28 Fed. Cl. 82, 84 (1993).

To succeed under the Fifth Amendment Takings Clause, a plaintiff must show that the government took a private property interest for public use without just compensation. See Adams v. United States, 391 F.3d 1212, 1218 (Fed. Cir. 2004), cert. denied, 546 U.S. 811 (2005); Arbelaez v. United States, 94 Fed. Cl. 753, 762 (2010); Gahagan v. United States, 72 Fed. Cl. 157, 162 (2006). "The issue of whether a taking has occurred is a question of law based on factual underpinnings." Huntleigh USA Corp. v. United States, 525 F.3d 1370, 1377-78 (Fed. Cir.), cert. denied, 555 U.S. 1045 (2008). The government must be operating in its sovereign rather than in its proprietary capacity when it

initiates a taking. See St. Christopher Assocs., L.P. v. United States, 511 F.3d 1376, 1385 (Fed. Cir. 2008).

The United States Court of Appeals for the Federal Circuit has established a two- part test to determine whether government actions amount to a taking of private property under the Fifth Amendment. See Klamath Irr. Dist. v. United States, 635 F.3d 505, 511 (Fed. Cir. 2011); Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir.) (citing M & J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed. Cir.), cert. denied, 516 U.S. 808 (1995)), reh'g denied (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005). A court first determines whether a plaintiff possesses a cognizable property interest in the subject of the alleged takings. Then, the court must determine whether the government action is a "'compensable taking of that property interest.'" Huntleigh USA Corp v. United States, 525 F.3d at 1377 (quoting Am. Pelagic Fishing Co., L.P. v. United States, 379 F.3d at 1372).

To establish a taking, a plaintiff must have a legally cognizable property interest, such as the right of possession, use, or disposal of the property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (citing United States v. Gen. Motors Corp., 323 U.S. 373 (1945)); CRV Enters., Inc. v. United States, 626 F.3d 1241, 1249 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 2459 (2011); Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374-75 (Fed. Cir.), reh'g denied and en banc suggestion denied (Fed. Cir. 2000), cert. denied, 532 U.S. 941 (2001). "'It is axiomatic that only persons with a

valid property interest at the time of the taking are entitled to compensation.'" Am. Pelagic Fishing Co. v. United States, 379 F.3d at 1372 (quoting Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001), cert. denied, 353 U.S. 1077 (2002) and citing Cavin v. United States, 956 F.2d 1131, 1134 (Fed. Cir. 1992)). Therefore, "[i]f the claimant fails to demonstrate the existence of a legally cognizable property interest, the courts [sic] task is at an end." Am. Pelagic Fishing Co. v. United States, 379 F.3d at 1372 (citing Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003) and M & J Coal Co. v. United States, 47 F.3d at 1154). The court does not address the second step "without first identifying a cognizable property interest." Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1213 (Fed. Cir.) (citing Am. Pelagic Fishing Co. v. United States, 379 F.3d at 1381 and Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir.), reh'g en banc denied (Fed. Cir. 2002), cert. denied, 537 U.S. 1112 (2003)), reh'g denied and reh'g en banc denied (Fed. Cir. 2005). Only if there is to be a next step, "'after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest.'" Huntleigh USA Corp. v. United States, 525 F.3d at 1378 (quoting Am. Pelagic Fishing Co. v. United States, 379 F.3d at 1372).

Judicial Takings

The contours—and even the existence—of a judicial takings doctrine has been debated in federal courts and in legal scholarship. See generally Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010); Frederic Bloom &

Christopher Serkin, "Suing Courts," 79 U. Chi. L. Rev. 553, 555 (2012); Stacey L. Dogan & Ernest A. Young, "Judicial Takings and Collateral Attack on State Court Property Decisions," 6 Duke J. Const. L. & Pub. Pol'y 107, 112–13 (2011); John D. Echeverria, "Stop the Beach Renourishment: Why the Judiciary is Different," 35 Vt. L. Rev. 475 (2010); Daniel L. Siegel, "Why We Will Probably Never See a Judicial Takings Doctrine," 35 Vt. L. Rev. 459 (2010); Barton H. Thompson, Jr., "Judicial Takings," 76 Va. L. Rev. 1449 (1990).

The door to judicial takings claims was cracked ajar by the Supreme Court's decision in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. See generally Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702. In Stop the Beach, a group of beachfront landowners from the city of Destin and Walton County, Florida, alleged that the Supreme Court of Florida took their property when it held that the Beach and Shore Preservation Act of 1961 did not unconstitutionally deprive landowners of their littoral rights without just compensation. See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. at 709–12. The eight justices who took part in the case[9] held that the Florida Supreme Court's decision did not constitute a violation of the Fifth Amendment Takings Clause "[b]ecause the Florida Supreme Court's decision did not contravene the established property rights of petitioner's Members." Id. at 733 (majority opinion). Specifically, the majority opinion found that "[t]here is no taking

[9] Justice John Paul Stevens recused himself from the case.

unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." Id. at 730.

The justices, however, did not agree on the definition of a judicial taking, or even whether judicial takings claims are cognizable in federal court. The plurality opinion by Justice Scalia, which was joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, asserted that courts can violate the Fifth Amendment through their actions, since "[t]he [Takings] Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor." Id. at 713–14 (plurality opinion). The plurality determined that a successful judicial takings plaintiff "must prove the elimination of an established property right" by the judicial decision. See id. at 726.

Justice Kennedy, joined by Justice Sotomayor, would have decided the case under the Due Process Clause of the Fourteenth Amendment, rather than the Takings Clause, and stated that it was unnecessary "to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause of the Fifth Amendment of the United States Constitution." Id. at 733–37 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy acknowledged that "[t]o announce that courts too can effect a taking when they decide cases involving property rights, would raise certain difficult questions." Id. at 737. Justice Kennedy feared that a

judicial takings doctrine would give judges more power by allowing them to decide what property should or should not be taken and paid for by the government, a responsibility that the judiciary historically has not possessed. See id. at 738–39. Additionally, "it may be unclear in certain situations how a party should properly raise a judicial takings claim" and what remedy courts are able to grant. See id. at 740–41.

Justice Breyer's concurrence, joined by Justice Ginsburg, found no unconstitutional taking had occurred and indicated it was unnecessary to decide whether courts could effect a taking or what would constitute a judicial taking. See id. at 742–44 (Breyer, J., concurring in part and concurring in the judgment). Justice Breyer shared some of the concerns expressed by Justice Kennedy about establishing a judicial takings doctrine, since it "would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law." Id. at 743. In the end, a majority of the Supreme Court justices were only able to agree that if there could be such a thing as a judicial taking, the Florida Supreme Court decision under review was not one. See id. at 733 (majority opinion).

Since the Stop the Beach decision, courts have varied in their treatment of judicial takings claims. Some courts, including the United States Court of Appeals for the Federal Circuit, have determined that judicial takings can exist, although without concluding that a judicial taking actually occurred.

See Smith v. United States, 709 F.3d at 1116 ("In that case [Stop the Beach], the Court recognized that a takings claim can be based on the action of a court."); Vandevere v. Lloyd, 644 F.3d 957, 964 n.4 (9th Cir.) ("[A]ny branch of state government could, in theory, effect a taking." (citing Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. at 713–15 (plurality opinion))), cert. denied, 132 S. Ct. 850 (2011). A number of courts faced with judicial takings claims have declined to address the question of whether a court can effect a taking, and have dismissed the claims on other grounds. See, e.g., Bettendorf v. St. Croix Cnty., 631 F.3d 421, 435 n.5 (7th Cir. 2011) (declining to decide "whether a court decision can effect a compensable taking of property"); Allustiarte v. United States, 256 F.3d 1349, 1352 (Fed. Cir.) (finding that the court lacked jurisdiction over a judicial takings claim), cert. denied, 534 U.S. 1042 (2001); Weigel v. Maryland, 950 F. Supp. 2d 811, 837–38 (D. Md. 2013) ("The Court need not determine whether a judicial takings claim is constitutionally cognizable here, because the Plaintiffs have failed to show a clear likelihood of success on their claim that a 'taking' has occurred in the first place."), appeal dismissed, (4th Cir. 2014).

Two United States Court of Appeals for the Federal Circuit decisions indicate that a court could effect a taking in violation of the Fifth Amendment, at least in theory. First, Boise Cascade Corporation v. United States held that the Court of Federal Claims had jurisdiction to consider a claim that a district court injunction took plaintiff's property rights, although the court went on to dismiss the claim as unripe. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1344, 1357 (Fed. Cir.), reh'g

and reh'g en banc denied (Fed. Cir. 2002), cert. denied, 538 U.S. 906 (2003). More recently, the Federal Circuit in Smith v. United States stated that in Stop the Beach, "the Court recognized that a takings claim can be based on the action of a court" and that "it was recognized prior to Stop the Beach that judicial action could constitute a taking of property." Smith v. United States, 709 F.3d at 1116–17. The Federal Circuit went on to dismiss the judicial takings claim for violating the statute of limitations. See id. at 1117. This court finds that it is not necessary to determine if plaintiff's judicial takings claim is cognizable in federal court because, even if it is, the United States Court of Federal Claims lacks jurisdiction to determine if a judicial taking occurred in these cases.

The Federal Circuit has repeatedly held that the Court of Federal Claims lacks jurisdiction over judicial takings claims that require the court to scrutinize the decisions of other tribunals for the same plaintiff given the same set of facts.[10] See Shinnecock Indian Nation v. United States, 782 F.3d 1345, 1352 (Fed. Cir. 2015) ("Binding precedent establishes that the Court of Federal Claims has no jurisdiction to review the merits of a decision rendered by a federal district court."); Innovair Aviation Ltd. v. United States, 632 F.3d 1336, 1344

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[10] In a non-presidential opinion, the Federal Circuit also has indicated that "[t]he appellant [Barth] asked the Court of Federal Claims to scrutinize the actions of coordinate federal courts to determine whether their actions effected a taking of his property. That was beyond the Court of Federal Claims' jurisdiction." Barth v. United States, 76 F. App'x 944, 945–46 (Fed. Cir.), cert. denied, 540 U.S. 1049 (2003) (footnote omitted).

(Fed. Cir.) ("[T]he Court of Federal Claims does not have jurisdiction to review the decision of district courts and cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal." (internal quotation marks omitted; brackets in original)), reh'g en banc denied, (Fed. Cir. 2011), cert. denied, 132 S. Ct. 999 (2012); Vereda Ltda. v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001) ("[T]he Court of Federal Claims cannot entertain a taking claim that requires the court to scrutinize the actions of another tribunal." (internal quotation marks omitted)); Allustiarte v. United States, 256 F.3d at 1352 ("'[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts.'" (quoting Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994))); see also Potter v. United States, 121 Fed. Cl. 168, 169 (2015); Martl v. United States,[11] No. 09-299,

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[11] The Martl case is related to a recent decision of the undersigned, Milgroom et al. v. United States, 122 Fed. Cl. 779 (2015), involving the same underlying facts as the Martl case. In the Milgroom case, this court determined:

> This court is without jurisdiction to review the alleged taking by the District Court, a judicial taking, see Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection et al., 560 U.S. 702 (2010), because review in this case of such a taking "would require the Court of Federal Claims to scrutinize the merits of the district court's judgment, a task it is without authority to undertake." Shinnecock Indian Nation v. United States, 782 F.3d 1345, 1352 (Fed. Cir. 2015); see also Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994) ("[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts or the clerks of district courts relating to

2010 WL 369212, at *2 (Fed. Cl. Jan. 29, 2010) (unpublished) ("[T]his court has no jurisdiction over takings claims that are founded on a challenge to the judgment of another federal court.").

The most recent, precedential decision regarding judicial takings is Shinnecock Indian Nation v. United States decided by the United States Court of Appeals for the Federal Circuit in 2015. In Shinnecock, the Federal Circuit explained:

> Permitting parties aggrieved by the decisions of Article III tribunals to challenge the merits of those decisions in the Court of Federal Claims would circumvent the statutorily defined appellate process and severely undercut

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> proceedings before those courts."). Just as the Court of Federal Claims does not have jurisdiction to review the decisions of the United States District Courts, the Court of Federal Claims also does not have jurisdiction to review decisions of the United States Bankruptcy Courts. See Allustiarte v. United States, 256 F.3d 1349, 1351 (Fed. Cir. 2001) (holding that the Court of Federal Claims does not have jurisdiction to entertain judicial takings claims against federal bankruptcy courts because "[s]uch a determination would require the court to scrutinize the actions of the bankruptcy trustees and courts"), cert. denied, 534 U.S. 1042 (2001); Mora v. United States, 118 Fed. Cl. 713, 716 (2014) ("[T]his court does not have jurisdiction to review the decisions of state courts, federal bankruptcy courts, federal district courts, or federal circuit courts of appeals.").

Milgroom et al. v. United States, 122 Fed. Cl. at 801-802.

> the orderly resolution of claims. See 28 U.S.C. § 1291 ("The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (explaining that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy").

Shinnecock Indian Nation v. United States, 782 F.3d at 1353 (emphasis in original); see also Brace v. United States, 72 Fed. Cl. 337, 359 (2006) (finding that it would be "untenable" for the Court of Federal Claims to hear judicial takings claims because "it would constantly be called upon by disappointed litigants to act as a super appellate tribunal reviewing the decisions of other courts to determine whether they represented substantial departures from prior decisional law"), aff'd, 250 F. App'x 359 (Fed. Cir. 2007), cert. denied, 552 U.S. 1258 (2008).[12]

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[12] In an non-precedential decision, the United States Court of Appeals for the Federal Circuit also indicated:

> The Court of Federal Claims is a court of limited jurisdiction. It is vested with jurisdiction under the Tucker Act to adjudicate monetary claims against the United States founded upon the Takings Clause of the United States Constitution, Acts of Congress, regulations, or contracts, and requires a money mandating act to confirm jurisdiction. 28 U.S.C. § 1491(a)(1); United States v. Mitchell, 463 U.S.

Often, a judicial takings claim is brought as a "collateral attack" on the judgment of another tribunal. See Shinnecock Indian Nation v. United States, 782 F.3d at 1353 (characterizing plaintiff's judicial takings claim as "an attempt to mount an improper collateral attack on the judgment of the district court"); Innovair Aviation Ltd. v. United States, 632 F.3d at 1344 ("[T]he trial court's finding that the bond amount was not just compensation is a collateral attack on the Arizona Court's approval of the bond amount."); Allustiarte v. United States, 256 F.3d at 1352 ("To permit collateral attacks on bankruptcy court judgments would 'seriously undercut[ ] the orderly process of the law.'" (quoting Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995))).[13]

> 206, 215–218 (1983). The Court of Federal Claims "has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code." Joshua v. United States, 17 F.3d 378, 379 (Fed. Cir. 1994). It does not have jurisdiction to review the judgments of the United States district courts or circuit courts. Shinnecock Indian Nation v. United States, 782 F.3d 1345, 1353 (Fed. Cir. 2015). We thus find no error in the Court of Federal Claims' conclusions that it lacks jurisdiction to review the judgments of the Eighth Circuit, and that Garcia has failed to allege a cause of action over which the court has subject matter jurisdiction.

Garcia v. United States, No. 2015-5099, 2015 WL 5845350, at *1 (Fed. Cir. Oct. 8, 2015).

[13] The Federal Circuit in Shinnecock noted that

> [t]he situation presented here parallels that presented in Allustiarte, 256 F.3d at 1351–53.

Based on these principles, the Court of Federal Claims and the Federal Circuit have rejected a variety of claims that required the court to review the decisions of another federal tribunal in a takings context. See, e.g., Shinnecock Indian Nation v. United States, 782 F.3d at 1348, 1352–53 (affirming a Court of Federal Claims decision, which barred plaintiff from amending its complaint to add a judicial takings claim because such a claim would be "futile"); Innovair Aviation Ltd. v. United States,

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> There the plaintiffs brought suit in the Court of Federal Claims alleging that bankruptcy courts in the Ninth Circuit took their property without just compensation when they allowed the plaintiffs' assets to be sold at less than fair value. Id. at 1350–51. The Court of Federal Claims dismissed the plaintiffs' suit for lack of jurisdiction and this court affirmed. We explained that the Court of Federal Claims was without authority to scrutinize the decisions of the bankruptcy courts (which are subordinate to Article III courts) and "to determine whether [the plaintiffs] suffered a categorical taking of their property at the hands of the . . . courts."

Shinnecock Indian Nation v. United States, 782 F.3d at 1352-53 (quoting Allustiarte v. United States, 256 F.3d at 1352). The Federal Circuit in Shinnecock noted that "[a] similar analysis applies here. The Nation alleges that in applying the doctrine of laches to bar its land claim, the district court improperly "took away the Nation's legal right to sue for compensation for its stolen land." The Court of Federal Claims, however, is without authority to adjudicate the Nation's claim that it suffered a compensable taking at the hands of the district court." Id. at 1353. The Federal Circuit concluded that "the Court [of Federal Claims] has no jurisdiction to review the decisions 'of district courts and cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal.'" Id. (quoting Innovair Aviation Ltd. v. United States, 632 F.3d at 1344).

632 F.3d at 1344 (holding that the court lacked jurisdiction over plaintiff's "collateral attack" on an Arizona court's approval of a res bond); Barth v. United States, 76 F. App'x at 945–46 (ruling that the Court of Federal Claims lacked jurisdiction to determine whether a federal court's decision not to abate a nuisance constituted a taking); Vereda, Ltda. v. United States, 271 F.3d at 1375 (holding that the Court of Federal Claims lacked jurisdiction to review an in rem administrative forfeiture of property); Allustiarte v. United States, 256 F.3d at 1352 (holding that the Court of Federal Claims lacked jurisdiction to determine if a bankruptcy court effected a taking of the plaintiff's property by approving the bankruptcy trustee's alleged mishandling of assets); Joshua v. United States, 17 F.3d at 380 (affirming the dismissal of the plaintiff's claim that the dismissal of his earlier federal district court claim violated the Takings Clause); Martl v. United States, 2010 WL 369212, at *2 (dismissing for lack of jurisdiction where plaintiff claimed that a federal district court committed a taking when it issued a default judgment against her that required the sale of her property).

The case of Boise Cascade Corp. v. United States stands alone as the one case in which the Federal Circuit has found that the United States Court of Federal Claims did in fact have jurisdiction over a judicial takings claim. See Boise Cascade Corp. v. United States, 296 F.3d at 1344. The plaintiff in Boise Cascade Corp. alleged that a federal district court took its property when the court issued an injunction preventing Boise from logging on its land unless it obtained an Incidental Take Permit pursuant to the Endangered Species

Act. See id. at 1341–42. The Federal Circuit ultimately dismissed the claim as unripe, but first it determined that the Court of Federal Claims could exercise jurisdiction. The Federal Circuit in Boise acknowledged that "Article III forbids the Court of Federal Claims, an Article I tribunal, from reviewing the actions of an Article III court." Id. at 1344 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. at 218–19). The Federal Circuit found, however, that:

> [R]esolution of this case did not require the Court of Federal Claims to review the merits of the district court's order enjoining Boise from logging without a permit. Boise has accepted the validity of the injunction, and only filed suit in the Court of Federal Claims to determine whether the Service's assertion of jurisdiction over it by seeking and obtaining the injunction worked a taking of its property that requires compensation under the Takings Clause. Whether or not the government action took Boise's property was not before the district court, nor could it have been. Because Boise seeks over $10,000 in compensation for this alleged taking, the Court of Federal Claims is the sole forum available to hear Boise's claim. See 28 U.S.C. § 1346(a)(2) (2000). Because the takings claim does not require the trial court to review the district court's actions, there is no constitutional defect in the Court of Federal Claims' assertion of jurisdiction over this case.

Id. In addition to emphasizing that the Court of Federal Claims was not required to review the merits of the decision of the District Court, the Boise court sought to distinguish Boise's claim from other cases in which the Federal Circuit found that the Court of Federal Claims lacked jurisdiction to scrutinize the decisions of other tribunals, with particular focus on Allustiarte v. United States, 256 F.3d 1349 and Vereda, Ltda. v. United States, 271 F.3d 1367. See Boise Cascade Corp. v. United States, 296 F.3d at 1344–45.

As noted above, in Allustiarte, several plaintiffs alleged that they suffered a taking at the hands of the bankruptcy courts in the Ninth Circuit. See Allustiarte v. United States, 256 F.3d at 1350–51. Specifically, they alleged that the court-appointed bankruptcy trustee had mishandled their assets, and the bankruptcy court wrongfully approved the trustee's actions. See id. The Federal Circuit held that the Court of Federal Claims lacked jurisdiction over the plaintiffs' claims because determining whether a judicial taking occurred "would require the court to scrutinize the actions of the bankruptcy trustees and courts," which the Court of Federal Claims lacks jurisdiction to do. Id. at 1352 (citing Joshua v. United States, 17 F.3d at 380). In Vereda, the Federal Circuit similarly held that a mortgagee may not assert a Fifth Amendment taking claim in the Court of Federal Claims following the government's in rem administrative forfeiture of the property securing its mortgage. See Vereda, Ltda. v. United States 271 F.3d at 1396, 1375.

The Boise court held that "unlike in Vereda and Allustiarte, Boise's takings claim is not based on the propriety of the district court's decision, and the trial court therefore would not be called upon to review the merits of the district court's decision in order to decide the merits of Boise's claim." Boise Cascade Corp. v. United States, 296 F.3d at 1345. Boise's challenge was not to the validity of the district court's injunction, but to the government's use of the courts to enforce the provisions of the Endangered Species Act and restrict the use of its land. As the court noted, the fact that the government "chose to effectuate its mandate to enforce the ESA [Endangered Species Act] through a court action rather than through an agency cease and desist order, for instance, cannot insulate the United States from its duty to pay compensation that may be required by the Fifth Amendment." Id.

In the above captioned cases, the court must determine if Petro-Hunt's judicial takings claim requires the court to scrutinize the United States Court of Appeals for the Fifth Circuit's decision, or, like Boise, can be decided without the need to scrutinize the ruling of another tribunal. This court finds that plaintiff's claim is not like Boise, and would require the court to scrutinize the decision of the Fifth Circuit. Plaintiff's claim does not attack the discretionary action of a government agency, which chose to exercise its authority through the courts. Instead, these cases are more like those that ask this court to review the decision of an "impartial judicial arbiter whose actions have been improperly appealed to the Court of Federal Claims." Boise Cascade Corp. v. United States, 296 F.3d at 1345. Indeed, deciding Petro-Hunt's current claim on the merits would require this court to determine if

Petro-Hunt had an established property right that was taken by the Fifth Circuit. See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. at 715 (plurality opinion). The only way to determine if Petro-Hunt had an established property right in the mineral servitudes is to decide whether the mineral servitudes had prescribed, as a matter of federal common law, to the United States prior to the Fifth Circuit's 2007 decision. In other words, this court would have to determine if the Fifth Circuit was correct in its finding that Little Lake Misere and Central Pines established that lands sold to the United States before the enactment of Act 315, like the surface lands in question here, were subject to Louisiana's ten-year prescription rule. See Petro-Hunt, L.L.C. v. United States, 365 F.3d at 392–93. If the Fifth Circuit was correct in this finding, then Petro-Hunt lost possession of its land long before the 2007 Fifth Circuit decision and it had no established property right that could have been taken by the court's decision. If the Fifth Circuit was incorrect in its application of precedent, and actually created a new rule depriving Petro-Hunt of its previously established property, then the Fifth Circuit may have effected a compensable taking of Petro-Hunt's mineral servitudes. This court lacks jurisdiction to determine whether or not the Fifth Circuit correctly interpreted its own precedent, and, therefore, lacks jurisdiction over plaintiff's judicial takings claim. See Shinnecock Indian Nation v. United States, 782 F.3d at 1348, 1352–53; Allustiarte v. United States, 256 F.3d at 1352.

In Stop the Beach, the majority of the Supreme Court made clear that "[t]here is no taking unless petitioner can show that, before the Florida

Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. at 730. In deciding whether the petitioner had an established property right, the Court analyzed the challenged decision and determined that the Florida Supreme Court had reached the correct conclusion. Id. at 730–33 (majority opinion) (holding that the Florida Supreme Court decision was consistent with the state's property law in finding that petitioner did not have the littoral rights). Similarly, this court would have to analyze the correctness of the Fifth Circuit decision to rule on plaintiff's claim. In Stop the Beach, the Supreme Court had the authority to scrutinize the decision of the Florida Supreme Court, as the case had properly been appealed to the Supreme Court for review. See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 557 U.S. 903 (2009) (granting certiorari). The Court of Federal Claims, however, has no appellate authority over decisions of the Fifth Circuit and cannot undertake the type of review that the Supreme Court exercised in Stop the Beach.

Petro-Hunt, like the plaintiffs in Allustiarte and Martl, insists that the court does not have to scrutinize the decision of another tribunal, because plaintiff does not challenge whether or not the Fifth Circuit was correct. Before this court, plaintiff claims that "the Court does not have to examine the propriety of a court's decision to resolve Petro-Hunt's takings claim." This language is similar to the Allustiarte plaintiffs' argument before the Court of Federal Claims, in which the Allustiarte plaintiffs

claimed that they were "not seeking to avoid, defeat, or evade any judgment of a bankruptcy court," but only to obtain just compensation for the taking. Allustiarte v. United States, 46 Fed. Cl. 713 (2000), aff'd, 256 F.3d 1349 (Fed. Cir.), cert. denied, 534 U.S. 1042 (2001). Likewise in Martl v. United States, the Martl plaintiff claimed that the case before the Court of Federal Claims was not a collateral attack against the district court judgment. The Martl court, however, found that "there is no other interpretation of her suit. Her complaint is replete with allegations of wrongdoing and errors of law committed by the district court to the exclusion of any other averred basis for relief." Martl v. United States, 2010 WL 369212, at *2.

Petro-Hunt's own submissions undercut the argument that it is not challenging the propriety of the Fifth Circuit's decision. For example, plaintiff's response to the motion to dismiss frames this court's role as determining if the Fifth Circuit decisions "effectively transformed Petro-Hunt's private property into public property," and argues that the mineral servitudes were "imprescriptible" prior to the Fifth Circuit decision in 2007. Additionally, plaintiff argues that Nebo Oil should have controlled the outcome of the case, and argues that the Fifth Circuit's decision was incorrect, and claims that "[t]he ultimate result of the QTA [quiet title action] was inconsistent with the principles set forth in Nebo [Oil] and the other relevant principles applicable to Petro-Hunt's established property right and deprived Petro-Hunt of its ownership of the mineral servitudes in perpetuity." This court, however, cannot determine if plaintiff's mineral servitudes were "previously imprescriptible," or

"transformed" from private to public property, without determining whether the Fifth Circuit's interpretation of precedent was correct. Because the court cannot determine whether the Fifth Circuit took plaintiff's property without scrutinizing the Fifth Circuit's decision, the court lacks jurisdiction over plaintiff's claim. The court does not need to address the remaining arguments in defendant's motion to dismiss or the parties' cross motions for summary judgment.[14]

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is hereby **GRANTED**. Plaintiff's complaint is **DISMISSED**. The Clerk of the Court shall enter **JUDGMENT** consistent with this opinion in Case No. 00-512L and Case No. 11-775L.

IT IS SO ORDERED.

s/Marian Blank Horn
MARIAN BLANK HORN
Judge

[14] As conceded by plaintiff's counsel at oral argument, if the court grants defendant's motion for a lack of jurisdiction as a result of the judicial taking, both of plaintiff's cases should be dismissed. Plaintiff's counsel stated, first "[i]f you rule against us on jurisdiction and the cause of action, then I would think you would dismiss both cases," and in response to a question from the bench reiterated, "if you dismiss for either lack of jurisdiction or if you hold there's no cause of action for a judicial taking, yes, you would dismiss both." Plaintiff retains all appeal rights regarding Judge Allegra's earlier decisions, as well as the ability to appeal this decision.

[Entered: October 3, 2017]

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

PETRO-HUNT, L.L.C.,

Plaintiff-Appellant

v.

UNITED STATES,

Defendant-Appellee

2016-1981, 2016-1983

Appeals from the United States Court of Federal Claims in Nos. 1:00-cv-00512-MBH, 1:11-cv-00775-MBH, Judge Marian Blank Horn.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER[1], DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, *Circuit Judges**.

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* Circuit Judge Hughes did not participate.

[1] Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing

PER CURIAM.

O R D E R

Appellant Petro-Hunt, L.L.C. filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on October 10, 2017.

FOR THE COURT

October 3, 2017 — Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court