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Takings/Water Contamination: Federal Appellate Court Addresses Jurisdictional Issue Involving Water District Damage Claim

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The United States Court of Appeals, Federal Circuit, ("Court") addressed in a July 19th opinion whether the Court of Federal Claims ("Lower Court") has subject matter jurisdiction to address a takings claim involving water contamination. See *Rio Linda Elverta Community Water District, et al. v. United States*, 2019 WL 3244985.

The Court considered whether allegations by two California water districts ("Districts") that a United States Air Force Base ("McClelland") contaminated their source water constituted a regulatory or physical taking.

Rio Linda Elverta Community Water District and Sacramento Suburban Water District filed Complaints in the Lower Court alleging contamination of water within their aquifers (along with drinking wells and transmission infrastructure) by McClelland. The contamination allegedly involved hexavalent chromium. The Districts' service areas abut McClelland.

McClelland no longer operates. It operated from 1936 through 2001.

The Air Force base is stated to have utilized and disposed of chromate products containing hexavalent chromium. This metallic element is stated to be linked to health risks. Some wells near McClelland are stated to have shown elevated levels of hexavalent chromium between 2001 and 2008. The Districts argued that the alleged contamination associated with McClelland constituted a taking of their usufructuary interest in the water.

The Lower Court dismissed the Complaints for lack of subject matter jurisdiction. The basis for the dismissal was the conclusion that the Districts' Complaints only asserted a regulatory takings claim. If so, the Lower Court determined that there was a failure to allege the facts necessary to satisfy Article III's case or controversy requirement.

The Lower Court's conclusion that the Districts' Complaints did not satisfy the case for controversy requirement was based on a California Court's overturning the California hexavalent chromium Safe Drinking Water Act Maximum Contaminant Level ("MCL"). The California Water Board was reexamining the MCL and it was no longer enforceable. As a result, the Lower Court concluded a regulatory takings action could not be based on a speculative regulation as there was no legally cognizable injury.

The Districts argued that the contamination physically invaded their water supply. Therefore, this was alleged to constitute a physical as opposed to regulatory taking. Consequently, they argued there was subject matter jurisdiction.

The United States argued that, even under a physical taking theory, the taking must be predicated on actions undertaken by the United States. In this instance, it was asserted that the State of California, as opposed to the United States, promulgated the MCL.

The Court rejected this argument, noting there was an allegation of physical invasion of the Districts' property rights. It further stated that the MCL is not the injury but instead why the contamination was discovered.

The United States also argued that even if a physical takings claim was asserted, the statute of limitations precluded relief. The Tucker Act limits the Court of Federal Claims jurisdiction applicable to takings claims to six years. It asserted that the base's closure in 2001 means the claims were untimely.

The Court rejected this argument stating that a cause of action does not accrue until all events needed to affix the liability have occurred and the claimant is legally entitled to assert its claims. The accrual was deemed suspended if a plaintiff shows that the defendant has concealed its acts with the result that the plaintiff is unaware of their existence or - - - that its injury was inherently unknowable at the accrual date. Whether the Districts' claims accrued was deemed to be a fact intensive inquiry for which the Lower Court is more suited to conduct.

The Court vacates and remands the case to the Lower Court for further proceedings.

A copy of the opinion can be found [here](#).