# In the United States Court of Federal Claims

No. 266-82 L
Filed: 3/28/00

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| **FLORIDA ROCK INDUSTRIES, INC.,** | * | |
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| *Plaintiff,* | * | Partial Regulatory Takings; |
| | * | Florida Limestone Mining; |
| v. | * | Clean Water Act; law of the |
| | * | case; res judicata, RCFC 54(b); |
| **UNITED STATES,** | * | 42 U.S.C. § 4654(c). |
| | * | |
| *Defendant.* | * | |

*John A. Devault, III*, with *C. Warren Tripp, Jr.*, both of Jacksonville Florida, for plaintiff.

*Fred R. Disheroon*, Special Litigation Counsel, with *Lois J. Schiffer*, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., for defendant.

## ORDER AND OPINION

**SMITH**, Chief Judge

The court believes that this case presents a problem somewhat unique in regulatory taking jurisprudence. Assuming that this court is correct in finding a partial regulatory taking of plaintiff's initial 98 acres, *see Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 (1999), plaintiff now faces a real potential for injustice. The 98 acres is part of an undifferentiated 1560 acres purchased by plaintiff in the 1970's for rock mining. The case was brought in the early 1980's after the Army Corps of Engineers (Corps) denied plaintiff's application for a dredge and fill permit. The Corps would only consider a three-year permit which, for Florida Rock, represented 98 acres, the first increment of its proposed mining plan. While plaintiff has lost the ability to mine the 98 acres, it has also lost, for the past 17 years, the ability to apply for permits for other three-year periods. Since state and local rules have now changed, this may have effectively denied plaintiff the ability ever to seek permits or just compensation for the additional 1462 acres--land that is now used for the benefit of the public but at plaintiff's expense.

Plaintiff is, thus, faced with a choice between permanently abandoning its claim or (assuming an appellate victory by the plaintiff in the interim) returning to court to begin the long litigation process again, including facing potential statutes of limitation problems and significant new costs. This choice does not seem to comport with the Fifth Amendment's guarantee of just compensation.

One alternative available to the court is to enter final judgment on the 98 acres so that the parties may appeal in this area of changing and complex conceptual constructs. The court could also then certify the remainder of the case to the court of appeals to decide whether the law of the case mandates that only 98 acres are at issue in this suit. If the court of appeals finds that the property as a whole is still at stake the court would only then hold proceedings to determine if any remaining acreage was taken and, if so, its value.

This would avoid the significant costs that might be imposed upon the parties in any immediate proceeding in this court, prior to appellate review of the court's decision that there was a partial taking of 98 acres. The only other possible course, short of putting the parties through complex and expensive immediate litigation, would be to rule against plaintiff on this issue and allow the case to proceed with plaintiff's appeal of this question. It seems, however, that, in adopting this alternative, the court would shirk its duty both to the parties and to the appellate court. Moreover, if the court is correct that a partial taking of plaintiff's 98 acres has occurred, denying plaintiff the right to pursue a taking of the remaining 1462 acres carries the potential for manifest injustice.

Since the law of the case doctrine raises real and serious legal and practical issues in this case, and since appellate review of this question would materially contribute to the fair and efficient administration of justice, the court chooses to enter final judgement on the 98 acres and to certify for immediate appeal the question of whether the plaintiff may pursue its claim that additional land has also been taken.

FINAL JUDGMENT ON 98 ACRES, ATTORNEYS FEES AND COSTS

Pursuant to the court’s opinion in the above-captioned case, filed August 31, 1999, and in accordance with RCFC 54(b), there being no just reason for delay, the Clerk of the Court is hereby directed to enter judgment for plaintiff, in the amount of $752,444 plus compound interest from October 2, 1980, as compensation for the partial regulatory taking of 98 acres of plaintiff’s limestone mining property in Dade County, Florida. In addition, pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c), and having considered the parties’ briefs and oral argument on this issue, the court hereby directs the Clerk of the Court to include in the above judgment an award of $1,320,377.01 as reimbursement for plaintiff’s reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred by prosecuting its taking claim.

In an order dated July 31, 1991, the court awarded plaintiff $808,784.90 for attorney fees and

costs incurred through July 31, 1990. That figure provides the starting point for the current award. In addition, the current award includes $511,592.11 to reimburse plaintiff for attorney fees and costs incurred through March 15, 2000.

As explained in the court's July 31, 1991 order, compound interest is consistent with the constitutional standard of just compensation. Plaintiff must be compensated, not only for the loss of its property, but for any delay in the use of those compensatory funds, if it is to be left "in as good a position pecuniarily as [it] would have occupied if [its] property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943).

Defendant argues that, during most of fifteen years of litigation, plaintiff's claim was based on a total taking of its entire fee. Defendant reasons that plaintiff is not entitled to any interest, simple or compound, for the period during which it asserted its total taking theory. The court must reject the government's argument, however, because compound interest is meant to provide neither a windfall to plaintiff nor a penalty to the government. The award of compound interest simply corresponds to the time value of money. The government has had the use of this money since October 2, 1980. Plaintiff has not.

Defendant reasons, furthermore, that, because plaintiff ultimately prevailed on a partial taking theory, it is not entitled to be reimbursed for the expense of pursuing its unsuccessful total taking claim. Accordingly, defendant suggests that plaintiff should be denied all attorney fees and litigation expenses associated with the first two Claims Court trials and the two appeals to the Federal Circuit. As the court recognized in its July 31, 1991 order, "[t]he Supreme Court has held that a party may not recover fees and expenses for work on a distinctly different and unsuccessful claim because such work is not performed in pursuit of the ultimate result achieved." July 31, 1991 order at 3 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)). Plaintiff's partial taking theory is not distinctly different from its total taking theory, however, nor was its total taking theory entirely unsuccessful.

This court has distinguished plaintiff's claim for a taking of 1,560 acres from its claim for a taking of 98 acres and therefore, following the second trial, in accordance with the allocation previously established by Chief Judge Kozinski, reduced plaintiff's award for attorney fees and expenses to reflect the cost of only the 98 acre claim. The court will not, however, attempt to parse from plaintiff's total litigation effort that portion which was devoted exclusively to its claim for a total taking as contrasted to a partial regulatory taking. Plaintiff claimed a total taking but ultimately came away with something less. Its entire litigation effort, however, contributed to the success it finally achieved. Specifically, the court continued to rely, in preparing its decision of August 31, 1999, upon the entire record of the proceedings related to the 98 acre claim, all the way back to 1982.

The parties, this court, and the court of appeals have struggled with this evolving area of the law. Both parties' contributions, with respect to both a total and partial taking theory, were valuable elements of the entire process and provided useful guidance to the court in reaching its ultimate

conclusion. Plaintiff sought all relief available to it under the takings clause of the Fifth Amendment. Plaintiff should not be penalized for its failure to anticipate whether the court would ultimately characterize the government's action as a total or partial regulatory taking.

Defendant also argues that plaintiff's litigation costs for the third trial, in the Court of Federal Claims, should be reduced by the cost of valuing its mineral interest using a discounted cash flow analysis since the court ultimately relied on a comparable sales approach to valuation. We disagree. Hindsight is 20/20, but it was not clear until the court had considered all the evidence presented at trial that it would ultimately rely on a comparable sales approach to valuation. As the court has previously observed, "the risk of abuse is minimal because plaintiff has no assurance of recovering and must assume it will bear the full cost of litigation." July 31, 1991 order at 4 (quoting *Florida Rock I* at 288-89 (1985)).[*]

## RIPENESS, 1462 REMAINING ACRES

The government relies on "law of the case" doctrine, citing this court and the Federal Circuit to conclude that the disposition of the remaining 1,462 acres is not properly before the court and that the court lacks jurisdiction to decide the issue. Plaintiff argues that "law of the case" doctrine does not apply because, during the 17 years that have passed while the courts resolved the legal issues in *Florida Rock*, there has been an intervening change in controlling authority relating to the futility of reapplying to the Army Corps of Engineers (Corps) for a Clean Water Act permit to develop wetlands.

Plaintiff cites *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 1582 (Fed. Cir. 1994) to support its assertion that law of the case is a "discretionary judicial doctrine regulating judicial affairs before final judgment and resting on the need for judicial economy." The Court of Appeals in *Mendenhall* wrote that "[t]he law of the case doctrine is a policy, not a command, even respecting a prior appellate decision in the case," and that "all federal courts retain the power to reconsider if they wish." *Id.* at 1582. Plaintiff argues that this case involves "exceptional circumstances" under which the court may "revisit or overrule the law of the case." The Federal Circuit in *Central Soya, Inc. v. George A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983), explained that such "exceptional circumstances" exist when "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such

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[*] The prior history of these proceedings includes *Florida Rock I* through *V* as follows: *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160 (1985)(*Florida Rock I*), *rev'd and remanded*, *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987)(*Florida Rock II*), *on remand*, *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990)(*Florida Rock III*), *rev'd and remanded*, *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995)(*Florida Rock IV*), *on remand*, *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 (1999) (*Florida Rock V*).

issues, or the decision was clearly erroneous and would work a manifest injustice."

Plaintiff reasons that the Federal Circuit's earlier determination that any subsequent applications would "inevitably" have been denied invokes the intervening "futility exception," that is, that plaintiff need not file a futile application with the Corps just so as to trigger a taking. The law of the case doctrine, however, "obligates a lower court on remand to follow the decision of the reviewing court, provided such decision does not conflict with subsequently controlling authority." *Lake Pleasant Group v. United States*, 40 Fed. Cl. 647, 653 (1998). This court and the Federal Circuit have held that only 98 acres are at issue in *Florida Rock*. Clearly those decisions are in conflict with the intervening futility exception.

The Supreme Court has stated that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a] determination." *MacDonald, Sommers & Frates v. Yolo County*, 477 U.S. 340, 350 n. 7 (1986); *see also Bayou Des Familles Development Corp. v. United States*, 130 F.3d 1034, 1038 (Fed. Cir. 1997).

Dealing with a taking claim for another Florida limestone mining property adjoining Florida Rock's, now Judge Miller cited *MacDonald* as she concluded that

> In the case at bar, it is evident that the Corps will not approve any permit that does not retain the property in its original wetland state. Based on the terms of the Corps' permit denial letter, no possibility remains that other types of development would be allowed. Seeking any further permits or applying for other types of development would be futile. Plaintiff is not required to pursue futile means to obtain a final determination.

*City National Bank of Miami v. United States*, 30 Fed. Cl. 715, 720 (1994). The futility exception serves "to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) *quoted in Heck and Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) *and in Christina Investment Corp. v. United States*, 40 Fed. Cl. 571, 579-80 (1998).

The court has likened Florida Rock's predicament to one in which permission is denied to construct the first floor of a ten story building. *Florida Rock V* at 44. In *Formanek v. United States*, 18 Cl. Ct. 785, 794 (1989), the court addressed a similar scenario. There the Corps denied a permit to develop 11 acres of wetlands which provided access to the rest of a 112 acre tract. The court described the development of the 11 acres as "the initial stage of a comprehensive project." Both Florida Rock and Formanek were thwarted at an initial stage in a way that destroyed the viability of their entire projects. "[I]n allowing the Corps to reduce its exposure by confining its determination to a 'test case' of limited acreage, the court would be encouraging precisely the piecemeal litigation against which the *MacDonald* Court spoke." *Id.* at 796.

Defendant argues that plaintiff has failed to show a change in the controlling law with respect to futility. It states that only the Federal Circuit can revisit its prior ruling that only 98 acres is at issue. Furthermore, defendant argues, even if the Court of Federal Claims had jurisdiction, plaintiff's claim with respect to the remaining 1462 acres is not ripe for review because it lacks the necessary state and local permits to mine. Chief Judge Kozinski ruled, however, and the court later reaffirmed, that plaintiff did have all state and local permits required to mine at the time it applied for a permit to the Corps of Engineers. 45 Fed. Cl. 21, 27-28 (1999).

Florida Rock secured a lake excavation permit, approved by the Dade County Board of County Commissioners, on March 24, 1974. A mining plan, which was the basis for that permit, contemplated the excavation and mining of plaintiff's entire 1,560 acres. Plaintiff's intent to mine the property is evident in the fact that it conditioned its purchase of the 1,560 acres upon securing all necessary state and local approvals for mining. Plaintiff's application to the Corps for a permit to mine 98 acres included the statement that it ultimately intended to mine the entire 1560 acres according to the mining plan that was submitted with its Dade County lake excavation permit application. Plaintiff described only 98 acres in its October 1, 1979 application to the Corps because the Corps had issued a directive that it would only consider applications for three years worth of production.

Plaintiff's application to the Corps to mine its property west of the Dade/Broward Levee was denied. Plaintiff continued to renew its Dade County lake excavation permit each year, however. Meanwhile, the Corps granted permits to mine limestone east of the Dade/Broward Levee. This court has found that "the Corps denied plaintiff's permit pursuant to . . . a deliberate, but unannounced, policy of 'zoning' the area west of the Dade/Broward Levee, north of the Tamiami Trail and east and south of Krome Avenue as undisturbed wetlands where no significant development would be permitted." *Florida Rock I* at 178-79 n. 23.

As this court observed in its August 31, 1999 decision, the denial of Florida Rock's application to the Corps for its first three years' worth of mining was never reconsidered. Although Florida Rock could have applied for at least five more three-year permits since 1980, under these circumstances there was no reason for them to do so. As reflected in this court's earlier findings in *Florida Rock* and *City National Bank of Miami* it would have been futile for plaintiff to apply for one permit after another as the years went by. Clearly, those applications would have been denied.

Florida Rock elected not to challenge the Corps' refusal to consider a 1,560 acre permit application in district court under the APA. Such a challenge would have little chance of success, however, and, in any case, it is not a prerequisite to a takings claim. The Federal Circuit found it "very questionable whether a refusal to consider applications relating to remote periods would be deemed an abuse of discretion." *Florida Rock II* at 905. Chief Judge Kozinski stated that the Corps could not reasonably be expected to allow a permit for 35 years of excavation. He noted that local, state and federal requirements tend to change. (Tr. I 6/12/84 at 38, 39.)

For the sake of appeal, Judge Kozinski made an alternative finding on pre-denial valuation of the entire 1,560 acres ($6,782 per acre), although he adhered to his ruling that the relevant parcel, the only acreage before the court, was 98 acres. (Tr. I 6/12/84 at 38, 39.) Florida Rock, in its cross-appeal of *Florida Rock I*, sought an award under the trial court's alternative finding since, as a practical or legal matter, it could not mine any of its 1,560 acres. On appeal, in *Florida Rock II* at 905, the Federal Circuit stated that the government's interest in controlling the extent of exposure to a 98 acre test case is entitled to some judicial respect. The court of appeals added that if, after the remand, the instant case "still results in a substantial award against the government, the Army engineers probably would want to consider whether the continued protection of the 1,560 acres of wetlands was worth the damage to the public fisc. This right should be preserved to them."

The Corps has, so far, over the past 20 years, not elected to abandon its protection of plaintiff's wetlands. In the meantime, the state and local posture has become progressively more protective since 1980. Although the state once waived jurisdiction over Florida Rock's property, we do not know the duration of that state waiver. It may have remained in effect for the life of the mine. During oral arguments on March 15, 2000, the court was advised that the state is now purchasing wetlands outright for preservation. Perhaps plaintiff will ultimately lose its 1560 acres entirely to a local exercise of eminent domain. Because of the current Corps denial, however, it may decide that there is no need to purchase the land to keep it in its present condition.

Plaintiff once had, but has lost, its traditional common law right to its subsurface estate, as well as the right to make economically viable use of the surface of its property. Its loss can be attributed to the Army Corps of Engineers. If the Corps had not effected a taking of plaintiff's property in 1980, perhaps state and local authorities would have done so at some later date. The fact remains, however, that when the Corps denied plaintiff's dredge and fill permit application, plaintiff had all other necessary permits in place. If the state had later decided to curtail plaintiff's mining operations, plaintiff may have brought a taking claim against the state, but that is not what happened. "[T]he Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking." *Ciampetti v. United States*, 18 Cl. Ct. 548, 556 (1989). Florida Rock has slipped into a quagmire of overlapping jurisdictions where it sinks ever deeper with the passage of time. Justice requires that the courts provide some means of escape.

Plaintiff has not questioned the Corps' authority to restrict the use of these south Florida wetlands or even the Corps' discretion to refuse to consider applications for more than three years worth of mining. This is not a case of waiting to see whether mining a different parcel within the 1560 acres will be approved or whether mining will be permitted at a later time. The Federal Circuit has recognized the improbability of the Corps approving any application to mine any of plaintiff's 1560 acres. It likened it to the probability of a pot of water freezing on a hot stove. *Florida Rock IV* at 904; *see also City National Bank of Miami v. United States*, 33 Fed. Cl. 224, 228 (1995) (court may determine what constitutes a final agency action). Plaintiff need not "engage in a futile, pro forma exercise of agency review when no possibility exists that a permit will be granted." *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 235-36 (1996), *vacated on*

*different grounds*, 121 F.3d 727 (Fed. Cir. 1997) (1997 WL 428516).

Plaintiff's enterprise was based on mining its entire 1560 acre property over many years. Almost two thirds of those years have now passed. Mining less acreage in less time was not a viable alternative. Plaintiff deserves a determination as to whether permit denial amounted to a partial regulatory taking of the remaining 1462 acres.

The court finds that exceptional circumstances justify review and reversal of its earlier holding that plaintiff's taking claim with respect to the remaining 1462 acres was not ripe. This is an exceptional case. This judgment and order involve a controlling question of law with respect to which there is substantial ground for difference of opinion. An immediate appeal may materially advance the ultimate termination of this litigation.

Further proceedings to determine whether there was a taking of the remaining 1,462 acres, and, if so, the date of the taking and the amount of compensation due, shall be suspended to give the parties an opportunity to appeal this judgment and order.

**IT IS SO ORDERED**

**Loren A. Smith**
**Chief Judge**