

## Stephanie Tatham

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**Subject:** RE: 57th Plenary Session - Update on New Comments

**From:** Dan Syrdal [mailto:dsyrdal@comcast.net]  
**Sent:** Tuesday, December 04, 2012 12:43 AM  
**To:** Stephanie Tatham; Gretchen Jacobs  
**Cc:** Emily Bremer; Jonathan Siegel; Mark Parris; DKeenan  
**Subject:** RE: 57th Plenary Session - Update on New Comments

Dear Stephanie, Gretchen, Emily and Jonathan

Once again it seems the DOJ waits until the last minute and then seeks more delay by requesting another year to see how bad the damage is after Tohono runs its course for another year. They do so without even mentioning the effect on the large number of U.S. Court of Claims cases (far more than the small numbers they argue from recent pre-Tohono yearly statistics when the law protected cases seeking different relief from the application of 1500) in which they moved for dismissal after the Tohono decision. While I don't know if it is allowed to submit comments regarding the DOJ's recent submittal at this late date, or whether there is any mechanism for ACUS to consider such comments prior to or at the upcoming plenary session, just in case such is allowable, and due to the shortness of time, I would like to make these few comments regarding the recent DOJ arguments, especially with respect to how they apply to pending cases like ours involving APA review of agency decisions in District Court followed by constitutional temporary takings claims in the Court of Claims when such agency action appeals are successful.

In its most recent "Statement", the DOJ argues that nothing should be done to rectify the unfairness of section 1500 until we see what the courts do in implementing the Tohono decision, "whose impact is not yet certain, but is likely to eliminate the basis for many if not all of the prior complaints [about unfairness]." We believe it is simply disingenuous for the DOJ to make such an argument for delay unless it is suggesting that it is going to lose the large number of motions to dismiss it brought in the Court of Claims based on the Tohono decision. As we have set forth in our prior comments, the Department of Justice has sought to dismiss many cases pending in that court, including ours, on the basis that the Tohono decision requires dismissal even though the prior state of the law which was applicable in the Federal Circuit at the time of their filing did not require dismissal as long as the two cases were seeking different relief. In other words, the many cases the DOJ seeks to dismiss pursuant to Tohono were admittedly brought in full compliance with the law of the Federal Circuit at the time since section 1500 did not apply to cases that were seeking different types of relief.

This raises many issues of fairness that cannot be somehow rectified by another year of forced litigation over the DOJ motions to dismiss. How can it be fair to dismiss a case that was brought entirely in accordance with the law at the time just because the Tohono decision changed that law? How could it be anything other than unfair to dismiss our case seeking relief for an unconstitutional takings in the Federal Court of Claims which is based on a successful APA challenge to an administrative agency permitting action, which agency action was ultimately overturned by the 9<sup>th</sup> Circuit Court of Appeals, just because we brought the takings action before the appeal period had run on the 9<sup>th</sup> Circuit's decision on the permit action? How can the DOJ justify taking the

position that a case challenging the government's permitting action, which under the APA had to be brought first in Federal District Court and was based on the record and no discovery was allowed, had substantially the same "operative facts" under Tohono as our federal takings claim under the 5<sup>th</sup> Amendment, a case with extensive discovery involving entirely different issues and seeking entirely different relief, i.e. damages. How can the DOJ argue with a straight face that "APA review followed by takings" cases like ours, which involve absolutely no duplicative litigation given the totally different issues and requested relief involved, and which are required by law to be pursued in different federal courts, constitute the "duplicative" or "redundant" litigation that section 1500 is so needed to protect against?

If the DOJ is so worried about "duplicative litigation" burdens and fairness, why are they seeking to dismiss many "APA review followed by takings" cases under the guise of section 1500 and Tohono's requirement for substantially the same operative facts? The delays and litigation in these many cases spawned by DOJ's warped view of Tohono is causing a great deal of the "unnecessary expense" that DOJ claims to want to avoid. If DOJ truly was concerned about avoiding the unnecessary expense, it would not have brought these dismissal motions in the first place. At page three of its "Statement", DOJ itself points out how its position of delay will add to the expense of these cases and thus to the unfairness of the results: "Just a year after Tohono, lower courts are only beginning to really focus on what qualifies as "substantially the same operative facts," and further litigation will be necessary to clarify how narrowly (or broadly) the statute actually sweeps." If these expensive cases sweep broadly, as argued for by DOJ, so that cases like ours where everything was done correctly under the existing law and yet the constitutional takings claim is dismissed, justice will not have been done and our clients will have been treated most unfairly. If the courts rule narrowly, then much time and money would have been wasted, but the DOJ would ultimately lose its dismissal motion. In either case, this obvious unfairness and expense would not have been rectified by waiting another year to see if we or they win their motion to dismiss our claim and the many other similar claims they seek to dismiss. Instead, this delay will just add more to the client's costs, the court's costs and the government's costs, and increase the delay the DOJ has already gained in our Court of Claims case beyond the current 14 years. This is simply not a valid argument against moving forward with the ACUS proposal to amend section 1500, thereby avoiding, to the extent possible, the added expense of all that litigation and the unfairness that would result should the DOJ prevail in its attempt to obtain these most unfair dismissals.

DOJ's attempt to argue against the ACUS proposal to amend Section 1500 by pointing out the relatively small number of cases that have been dismissed under Section 1500 is also misleading and inappropriate. First, because of the Federal Circuit case law prior to Tohono which precluded dismissal under Section 1500 when the actions in the different courts were seeking different relief, there were not many dismissals prior to Tohono other than those where plaintiffs really were trying to try the same action in different courts, i.e. were truly bringing duplicative litigation. That, however, is not the case after Tohono. DOJ is now, because this previous bar to dismissal under Section 1500 is no longer available, seeking to dismiss a much larger number of cases from the Federal Court of Claims, such as ours. Therefore, for DOJ to argue that another year's delay is not important because so few cases are dismissed under Section 1500 anyway is extremely disingenuous in light of the change in the law caused by Tohono and DOJ's attempt to utilize that change to unfairly dismiss a much larger than historical number of cases.

DOJ then goes on to rather sanctimoniously argue that, rather than the proposed statutory amendment, the problem can be addressed by "any number of meritorious efforts, short of a dramatic statutory overhaul, that might be undertaken to improve awareness of section 1500 within the bar and among plaintiffs, and to educate

counsel on the proper means to pursue multiple claims against the government in the current statutory framework.” While this might sound nice, it obviously does absolutely nothing to undo the unfairness that would be caused to my clients, and those many others like them, who are facing motions to dismiss their constitutional takings claims in the Court of Claims despite the fact they and their counsel did everything correctly except anticipate that the Supreme Court was going to change the law long after their claims were filed so that section 1500 could potentially bar their properly filed actions. The only way “such measures may in fact prove to be sufficient by themselves to address any concerns with section 1500” as argued by DOJ would be if DOJ’s arguments under Tohono seeking to unfairly dismiss claims like those of my clients were rejected by the courts. Furthermore, the DOJ elsewhere argues for the extra year’s delay so that the courts can determine the proper scope of the Tohono decision, an argument which therefore demonstrates that their “education” alternative is not even capable of full implementation until this scoping is concluded, or until the section 1500 is modified as proposed by ACUS.

I hope these comments prove useful and would request that you let me know if there is anything else that could be helpful as ACUS continues to reach resolution on its approach to rectifying the unfairness caused by section 1500.

Sincerely,

Daniel Syrdal

Attorney for Resource Investments, Inc. and Land Recovery, Inc.