IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RESOURCE INVESTMENTS, INC., and LAND RECOVERY, INC., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	No. 98-419L Hon. Lawrence J. Block Filed Electronically June 27, 2011

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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I. INTRODUCTION

Defendant's motion to dismiss this case for lack of jurisdiction and deprive Plaintiffs of their day in court should be denied.[1] Plaintiffs' jurisdictional, statutory, and administrative claims pending in the Ninth Circuit at the time this case was filed were fundamentally different than the claims in this Court for damages for Defendant's unconstitutional taking of Plaintiffs' property. Likewise, the operative facts necessary to prove these different claims were also fundamentally different. As such, these two cases are in no way redundant or duplicative and therefore 28 U.S.C. § 1500 does not bar jurisdiction.

Defendant's motion was filed in the wake of the Supreme Court's April 2011 decision in *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011). *Tohono* reversed one aspect of existing law under § 1500—that merely requesting different relief in the Court of Federal Claims ("CFC") was sufficient to avoid the jurisdictional bar of § 1500, even if the claims were otherwise identical and duplicative. But *Tohono* did not in any way alter the other aspect of § 1500 recognized in this Circuit's pre-existing law, which bars jurisdiction *only if* the claims in the two cases are based on substantially the same operative facts. To the contrary, the *Tohono* Court observed that the claims and complaints in the two lawsuits before the Supreme Court were virtually identical but for the relief requested, demonstrating the close similarity and substantial overlap of "operative facts" required to preclude jurisdiction under § 1500.

Defendant's attempt to create the appearance of substantial overlap here flouts both the letter and spirit of § 1500. Wholly consistent with the Supreme Court's recent decision in *Tohono*, this Court's precedent instructs that a careful comparison of the operative facts for the claims is required when ruling on a motion to dismiss under § 1500. But Defendant makes only a superficial comparison of *background* facts and circumstances that are largely undisputed, and

[1] As used herein, "Plaintiffs" refers to Resource Investments, Inc. and Land Recovery, Inc. "Defendant" refers to the United States of America, acting through the Army Corps of Engineers. The District Court action, *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, No. C96-5920 (W.D. Wash.) filed October 30, 1996, is referred to as "*Resource I*," and this action is referred to as "*Resource II*."

are not material to adjudicating the claims in the two lawsuits. This is most clearly demonstrated in Defendant's Appendix A (comparing *Resource I* facts with facts drawn *exclusively* from the "factual background" section of the Complaint in this case), which fails to acknowledge or address any of the truly *operative* facts alleged in Plaintiffs' complaints in this action. Defendant also directly contradicts its own arguments in prior motions that the issues in the two lawsuits do *not* overlap.

Operative facts are those facts that are material to determining the claims at issue. They are "operative" because they influence or effect the outcome of the issues in dispute. Identifying the operative facts starts with analyzing the claims to which the facts apply. In *Resource I*, Plaintiffs pled statutory and administrative claims about solid waste permitting based on environmental statutes and regulations such as the Clean Water Act, the Resource Conservation and Recovery Act, the National Environmental Protection Act, and other statutes and regulations governing the Corps of Engineers. *Resource I* primarily required a determination of the Corps' jurisdiction, and whether Plaintiffs met the statutory and regulatory requirements for issuance of a permit. The *correctness* of the Corps' permit denial—and nothing more—was finally resolved by the Ninth Circuit.

The contrast with this action is stark. In this taking case, there are *no* claims based on environmental statutes or regulations, and Plaintiffs plead *no* claims to obtain issuance of any environmental or solid waste permit. Plaintiffs allege a constitutional taking claim based on three theories, and at the heart of each of the three theories are core issues and operative facts that were not even remotely at issue in *Resource I*. For example, this Court must adjudicate several purely economic issues, including the economically beneficial uses of Plaintiffs' property, whether Plaintiffs had reasonable investment-backed expectations, and just compensation for the taking. No similar issues were adjudicated in *Resource I*. The Court must also adjudicate the impact of the Corps' action on Plaintiffs' expectations and whether its delay and bad faith constituted a taking. While there may be some overlap of background facts concerning the Corps' assertion of jurisdiction and denial of a permit, it is far too thin to meet the

substantial level of identity required by § 1500 jurisprudence. Even on Plaintiffs' temporary taking theory based on extraordinary delay—a claim that until after the Ninth Circuit's decision was final did not come into existence—there is no substantial overlap because this case delves into the Corps' internal processes and alleged bad faith, not whether its assertion of jurisdiction and denial of a permit were improper on the merits. The Ninth Circuit has already ruled that the Corps' assertion of jurisdiction was improper, and those facts and legal issues will not be revisited, except incidentally.

The significant discovery that has occurred in this case also underscores the differences between the claims in the two lawsuits. *Resource I* was litigated entirely on the administrative record, whereas this case has involved 55 depositions, production of large numbers of documents, and testimony of multiple experts who played no role in *Resource I*. When virtually all of the key facts developed to prove Plaintiffs' claims in this action were completely outside the record of facts involved in *Resource I*, there cannot be any substantial overlap of operative facts between the two cases.

Holding that § 1500 prevents this Court from exercising jurisdiction over Plaintiffs' constitutional taking claims would not serve the purposes of that statute and would raise grave constitutional concerns. Section 1500 is an ancient Reconstruction-era statute intended to prevent duplicative litigation from vexing the government. The reason that Federal Circuit jurisprudence directs the CFC to compare *operative* facts is that operative facts serve as a "gauge" of the extent of duplication between artfully pled claims. In other words, comparison of operative facts is a "means" to serve Congressional "ends"—avoiding duplicative "claims." Here, where the environmental and constitutional claims are so distinct, the evidence so clearly dissimilar, and the theories of liability and recovery so different, no painstaking examination is required to see that which is obvious—the substantial differences in "claims" in the two lawsuits render § 1500 inapplicable.

Section 1500 must be construed strictly to avoid the serious constitutional problem that would be created by a judicial deprivation of Plaintiffs' taking claim. Obviously, Congress could

not pass a bill today that eliminates jurisdiction in the federal courts over Plaintiffs' taking claim, but granting Defendant's motion could have precisely the same effect. Unlike the plaintiffs' claims at issue in *Tohono*, which were "available by grace and not by right," Plaintiffs here assert constitutional rights that may only be adjudicated in the CFC. As a result, to avoid constitutional infirmity this Court must insist on a construction of § 1500 that does not preclude jurisdiction unless the substantial overlap is so complete as to render the litigation in this Court entirely duplicative, if not "identical."

In its motion, Defendant makes no pretense that the result it seeks would comport with fundamental notions of fairness or justice, and tacitly concedes that dismissal at this stage would be unjust. Defendant sheepishly acknowledges that Plaintiffs have been trying to have their day in court for 13 years, but Defendant argues that the long and tortured history of this case must be ignored. Defendant is wrong. Any arguable jurisdictional defect was cured no later than March 16, 1999, when the District Court entered its final judgment terminating proceedings against the Corps. Subsequently, after several years spent in an unsuccessful mediation, Plaintiffs filed their First Amended Complaint (Dkt. 125, "FAC") alleging the termination of the other proceedings, and adding a claim for a temporary taking. CFC precedent requires this Court to apply § 1500 based on the facts alleged in the operative complaint, and as alleged in the FAC, there was no suit or proceeding "pending" that would implicate § 1500. To promote the efficient administration of justice, it is permissible to allow jurisdictional defects to be cured after the commencement of the action. If a jurisdictional defect is found, this case warrants such treatment, especially because there are core constitutional rights at stake. The precedents in this Circuit do not require this Court to be callously indifferent to the palpable injustice that would flow from granting Defendant's motion, or powerless to preserve a constitutional claim when, as here, any arguable jurisdictional defect was cured more than a decade earlier.

II. DISCUSSION

Congress enacted § 1500 to eliminate duplicative or redundant claims against the government. To identify duplicative claims, the courts in this Circuit have analyzed the degree to which the "operative facts" in the two lawsuits overlap. The Supreme Court's recent decision in *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), which Defendant cites as justification for bringing its motion 13 years into the case, did not change this aspect of the § 1500 standard in any way. As explained below, *Tohono* applied the test to affirm dismissal of a CFC case where the claims were "virtually identical" to those in another pending case.

A. Section 1500 Was Intended to Eliminate Duplicative Litigation over "Virtually Identical" Claims.

Section 1500 is a relic of the Reconstruction era, first passed in 1868. *Tohono*, 131 S. Ct. at 1727. Its purpose was to "curb duplicate lawsuits brought by residents of the Confederacy following the Civil War." *Id*. at 1728; *see also id*. at 1730 (referring to "the need to save the Government from burdens of redundant litigation"). These "cotton claimants" were suing in the CFC while pursuing duplicative actions in other courts against federal officials, "seeking relief under tort law for the same alleged actions." *Id*. at 1728. Defendant acknowledges that the "clear" purpose of the statute was to "save the Government from burdens of redundant litigation." Mot. at 5 (internal quotation marks omitted). To achieve this, § 1500 states that the CFC "shall not have jurisdiction of *any claim* for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. As the language of the statute makes clear, the analysis focuses on the claims asserted by the plaintiff, and whether those claims are redundant or duplicative. It follows, then, that where a claim is not "redundant"—as is the case with Plaintiffs' taking claim—barring jurisdiction does not comport with Congressional intent and should not occur.

The question of whether a suit in the CFC is "for or in respect to" the same "claim" pending in another proceeding has been extensively litigated in the CFC and the Federal Circuit. To make the determination, and to ensure that artful pleading does not circumvent

§ 1500's bar, the courts have resorted to a comparison of "operative facts" in the two lawsuits. For over 50 years, the government could not invoke the jurisdictional bar unless it could meet a two-prong test: the claim pending in another court (1) arose from "the same operative facts" *and* (2) sought "the same relief." *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (*en banc*) (emphasis omitted); *see also Casman v. United States*, 135 Ct. Cl. 647 (1956); *British Am. Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939).[2] Two months ago, in *Tohono*, the Supreme Court reversed longstanding law and held that only the "operative facts" prong of the two-prong test need be satisfied—that is, that § 1500 applies when two actions raise claims "based on substantially the same *operative* facts," even if they do not seek the "same relief." *Tohono* did not disturb in any way the existing Federal Circuit and CFC precedent determining when two cases present the same "operative facts," however. *Tohono*, 131 S. Ct. at 1730. While noting that the "relief requested matters less," the Court confirmed that it remains relevant "insofar as it affects what facts parties must prove." *Id*.[3]

Defendants have not correctly identified the "operative facts" in the two actions. Plaintiffs explain in great detail in the following section how Defendant misclassifies immaterial, largely undisputed, *background* facts as "operative facts" in order to invoke § 1500. Black's Law Dictionary defines "operative" as "[b]eing in or having force or effect; … Having principal relevance; essential to the meaning of the whole." *Black's Law Dictionary,* 1201 (9th ed. 2009); *see also Webster's II New College Dictionary*, 767 (2001) (defining "operative" as "[e]xerting

[2] There was a brief deviation in this rule after the Federal Circuit's *en banc* opinion in *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992). On certiorari under the caption *Keene Corp. v. United States*, 508 U.S. 200 (1993), the Supreme Court "took exception" to the breadth of the opinion in *UNR*, which went beyond the facts of the case to overrule a variety of long-standing precedents, *see Loveladies Harbor*, 27 F.3d at 1548-49, and shortly after the *Keene* decision the *en banc* Federal Circuit again made clear that § 1500 required both the same facts *and* the same relief. *See id*. at 1551.

[3] Indeed, the *Tohono* plaintiffs sought overlapping relief in both actions, as all eight justices agreed (Justice Kagan took no part in the case). *See id*. at 1727; *id*. at 1733 (Sotomayor, J., concurring in the judgment) ("[J]ust like the District Court complaint, the CFC complaint requests money to remedy the Government's alleged failure to keep accurate accounts."); *id*. at 1739 (Ginsburg, J., dissenting) (arguing that the proper rule should be to "trim" any duplicative requests for relief from the CFC complaint and allow any remaining requests for relief to proceed). To Plaintiffs' knowledge, no court applying § 1500—certainly no case cited by Defendant in its motion—has ever found that it lacked jurisdiction over an action like this one that involves entirely separate requests for relief.

influence or force" and "[b]eing in effect or in operation"). For a fact to have "force or effect," it must be material to the resolution of an issue in dispute. Under § 1500, then, the "force or effect" must be exerted with respect to proof of the "claims" to be compared in the two lawsuits. The fatal mistake that Defendants commit in their motion is to confuse the factual *circumstances* from which a claim *arises*, with those material facts that "operate" to decide the claim.

Defendant's focus is entirely on the circumstances giving rise to claims, when the law in this Circuit requires that it be on those facts that exert influence or force on the decision of the claim, i.e., the material facts necessary to prove the claim. When the "facts parties must prove" in order to prevail on their claims and obtain the relief they seek are different in the two relevant actions, then the actions are not "based on substantially the same operative facts." *Tohono*, 131 S. Ct. at 1730. This is because the "operative" facts, in turn, "are only those which support the claims or legal theories raised." *McDermott, Inc. v. United States*, 30 Fed. Cl. 332, 338 (1994). Thus, claims "involving the same general factual circumstances, but distinct *material* facts can fail to trigger section 1500" because there is no substantial overlap in their operative facts. *Branch v. United States*, 29 Fed. Cl. 606, 609 (1993) (emphasis added); *see also d'Abrera v. United States*, 78 Fed. Cl. 51, 58 (2007) ("In short, if a material factual difference exists between two claims, they are not the same for purposes of Section 1500.").

Tohono itself did not articulate a precise metric to calibrate the degree of similarity in "operative facts" required for § 1500 to bar a claim in the CFC, but the opinion (together with existing precedent in this Circuit addressed in Section II.C below), provides important guidance that extremely close similarity, if not complete identity, is required. In *Tohono*, the Court addressed whether "the Nation's two suits have sufficient factual overlap to trigger the jurisdictional bar." *Id*. at 1731. The Supreme Court agreed with the CFC that "the Nation's two suits were, for all practical purposes, identical." *Id*. (internal quotation marks omitted). Both actions alleged that the United States held "the same assets in trust for the Nation's benefit" and they described "almost identical breaches of fiduciary duty." *Id*. The Court noted that the plaintiff "could have filed two identical complaints, save the caption and prayer for relief,

without changing either suit in any significant respect." *Id*. The detailed comparison of operative facts presented in the following sections shows how woefully short of this benchmark Defendant's motion falls. On proper consideration of those facts that truly are "operative," there is no doubt that these cases do not involve "identical" claims or a substantial overlap of operative facts.

B. The Claims in *Resource I* and the Claims in This Action Are Totally Different and Do Not Involve the Same Operative Facts.

1. Plaintiffs Brought *Resource I* Solely to Determine Whether the Corps' Denial of Plaintiffs' Permit Was Improper.

On October 30, 1996, Plaintiffs filed a Complaint for Judicial Review of Administrative Action in the U.S. District Court for the Western District of Washington to overturn the Corps' permit denial decision dated September 30, 1996. *Resource I*, Dkt. 234 Ex. 1 ¶¶ 2, 19-28 ("*Resource I* Compl."). The claims in *Resource I* focused on legal questions of jurisdiction and regulatory decision making.

The *Resource I* complaint was 104 pages long and contained over 360 paragraphs of factual allegations charging that the Army Corps of Engineers (the "Corps") lacked jurisdiction to adjudicate Plaintiffs' permit application, or in the alternative, that the Corps' denial of the permit violated various federal environmental laws and administrative requirements. Many of these were preliminary overview facts that served to put Plaintiffs' claims in context, but did not comprise the operative facts of the environmental claims under which Plaintiffs' sought relief. The *Resource I* portion of Appendix A to Defendant's motion, which contains the factual allegations that Defendant claims overlap, is comprised largely of these background facts from the *Resource I* complaint.[4] These background facts include the identity of the parties (*Resource I* Compl. ¶¶ 33-35; *see* App. A Fact Nos. 1-5), the background of Plaintiffs' involvement with the

[4] Indeed, the facts identified in Appendix A come almost exclusively from the "Project Summary," "Jurisdiction and Venue," "The Parties," and "Factual and Procedural Background" sections of Plaintiffs' *Resource I* complaint, not from the sections setting forth the claims and the operative facts associated therewith.

proposed landfill (*Resource I* Compl. ¶¶ 3-4, 8, 13, 50; *see* App. A Fact Nos. 6, 8-9, 13, 16), the characteristics of the property to be used as the landfill (*Resource I* Compl. ¶¶ 1-6, 75; *see* App. A Fact Nos. 10-12, 14-15), and the steps taken by state and local authorities to advance the landfill project (*Resource I* Compl. ¶¶ 46-54, 104-109, 120; *see* App. A Fact Nos. 7, 16-23, 25). For the most part, they were undisputed. And without more—specifically, without the *operative* facts alleged below—these facts by themselves would not have been sufficient to prove Plaintiffs' environmental statutory claims.

After reciting the background facts, the *Resource I* complaint asserted four claims, each of which was accompanied by allegations of the operative facts necessary to prove the claim. Set out below are each of those four claims, along with the operative facts pled in support of each.

a. First Claim: Subtitle D of the Resource Conservation and Recovery Act Preempted Section 404 of the Clean Water Act and Deprived the Corps of Jurisdiction

The first claim was that the Corps lacked jurisdiction because Section 404 of the Clean Water Act ("CWA") had been preempted by Subtitle D of the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations. In order to plead this claim, Plaintiffs alleged the following mixed questions of fact and law and operative facts:

- The terms of the Memorandum of Agreement ("MOA") between the Corps and the Environmental Protection Agency ("EPA") concerning the regulation of solid waste, including the agreement that Subtitle D would provide the governing regulatory authority. *Resource I* Compl. ¶¶ 136-137.

- The Corps' communications, both internally and to Congress and EPA officials, established the implementation of the MOA and conceded the applicability of Subtitle D. *Id.* ¶¶ 139-140.

- The EPA completed the necessary rulemaking procedures to implement regulations for solid waste landfills under Subtitle D. *Id.* ¶¶ 141-145.

- The State of Washington subsequently completed the necessary state-level rulemaking for solid waste landfills under the authority delegated to it by the EPA under Subtitle D. *Id.* ¶¶ 146-149.

Relying on these operative facts, Plaintiffs alleged that the Corps lacked jurisdiction over Plaintiffs' permit application and that the decision denying the permit should be vacated for lack of jurisdiction. *Id.* ¶ 151. None of these operative facts have any overlap with those in the current action.

b. Second Claim: Lack of Jurisdiction Under Section 404 of the CWA and the Corps' Regulations

The second claim also asserted that the Corps lacked jurisdiction, for the separate reason that the terms of the statute and regulations under which the Corps purported to act did not permit the Corps to regulate Plaintiffs' landfill. In order to plead this claim, Plaintiffs alleged the following mixed questions of fact and law and operative facts:

- Section 404 of the CWA authorizes the Corps to administer a permit program regulating "discharge" of "dredged" material and "fill" material, terms which are not defined in the CWA. *Id.* ¶¶ 153-154.
- The Corps' regulations define "fill material" and "discharge of fill material" in a manner that expressly excludes material deposited in sanitary landfills and discharges primarily to dispose of waste. *Id.* ¶¶ 155-161.
- The Corps' regulations similarly define "dredged material" and "discharge of dredged material" in a manner that is inconsistent with the construction and operation of a sanitary landfill. *Id.* ¶¶ 162-166.
- Congress did not intend for the term "dredged material" to be construed so broadly as to encompass the construction and operation of a sanitary landfill. *Id.* ¶¶ 167-169.

Relying on these operative facts, Plaintiffs alleged that the Corps lacked jurisdiction over Plaintiffs' permit application because neither the construction nor the operation of the landfill constituted or in any way involved a "discharge of dredged or fill material" under Section 404. Again, none of the operative facts regarding this claim have any overlap with those in the current action.

c. Third Claim: Violations of the National Environmental Policy Act

The third claim challenged the substantive basis for the Corps' denial of the permit, asserting that the Corps' assessment that environmental factors required denial of the permit was

inconsistent with the National Environmental Policy Act ("NEPA"). In order to plead this claim, Plaintiffs alleged the following mixed questions of fact and law and operative facts:

- NEPA requires that every federal agency accurately consider the environmental impacts of any proposed action and that an environmental impact statement ("EIS") be prepared whenever an agency concludes that a proposed action contains potentially significant environmental impacts. *Id.* ¶¶ 172-180.

- The Corps initially called for the preparation of a draft EIS, but halted the process and ultimately denied the permit without completing a final EIS. *Id.* ¶¶ 181-186.

- The Corps' denial of the permit was unlawful in the absence of a final EIS, and was contrary to both NEPA and the Corps' own regulations. *Id.* ¶¶ 187-195.

- The Corps improperly used an environmental assessment ("EA") as a de facto EIS without affording Plaintiffs an opportunity to respond to that documentation. *Id.* ¶¶ 196-203.

- The Corps improperly considered long haul waste disposal as an "action" alternative—rather than a "no action" alternative—and failed to consider that long haul disposal was not a suitable alternative for Plaintiffs. *Id.* ¶¶ 204-206.

- The Corps failed to adequately consider the relevant environmental factors, including, among other things, the unique hydrologic conditions of the project site that made it particularly suited for use as a landfill. *Id.* ¶¶ 207-212.

Relying on these operative facts, Plaintiffs alleged that the Corps' denial of the permit application violated NEPA. Again, these operative facts did not overlap with those originally alleged in the current action during the time the Ninth Circuit appeal was still active.[5]

d. Fourth Claim: Violation of the CWA, the Corps' Regulations, the Section 404(b)(1) Guidelines, and the Administrative Procedure Act

The final claim also challenged the substantive grounds for the Corps' denial of the permit, for the separate reason that the Corps' action violated various requirements under the

[5] To the extent that some of these facts may cumulatively imply some bad faith on the part of the Corps, there may be some minimal overlap of these operative facts with those pled in support of the extraordinary delay claim in the FAC in this action. However, no such overlap existed when this case was filed. Plaintiffs' original Complaint does not assert any extraordinary delay claim because no such claim existed until *after* the reversal of the District Court by the Ninth Circuit. Thus, any minimal overlap in these facts is irrelevant because the overlap did not exist until after there was no longer another "pending" action.

statutory and regulatory framework governing the Corps' conduct. In order to plead this claim, Plaintiffs alleged the following operative facts:

- The Corps improperly considered long haul waste disposal as a practicable alternative because (a) it was contrary to the project's purpose (*id.* ¶¶ 219-224); (b) it was neither available to nor capable of being done by Plaintiffs (*id.* ¶¶ 225-230); (c) it was in disregard of state and local determinations that an in-county landfill was sound policy (*id.* ¶¶ 231-246); (d) it was treated as a non-wetlands alternative despite its wetlands impact (*id.* ¶¶ 247-250); (e) several state and local authorities had already concluded that long haul disposal had exorbitantly high cost and would lead to adverse impacts (*id.* ¶¶ 251-257); (f) independent studies confirmed the damage to the employment and tax base of Pierce County that would result from long haul disposal (*id.* ¶¶ 258-261); (g) no weight was given to proposed wetlands mitigation (*id.* ¶¶ 262-266); and (h) other significant adverse economic and environmental consequences would result from the use of long haul disposal (*id.* ¶¶ 267-277).

- The Corps improperly considered Horn Creek as a practicable alternative because (a) it was not available to Plaintiffs (*id.* ¶¶ 278-282); (b) it was treated as a non-wetlands alternative despite its wetlands impact (*id.* ¶¶ 283-285); (c) development of a landfill at the Horn Creek site would have more adverse environmental impact than the proposed development (*id.* ¶¶ 286-288); (d) use of Horn Creek as a landfill would contravene state and local permit requirements regarding groundwater protection (*id.* ¶¶ 289-292); and (e) other significant adverse economic and environmental consequences would result from the use of Horn Creek (*id.* ¶¶ 293-296).

- The Corps improperly disregarded the certification by the Washington State Department of Ecology under Section 401 of the CWA (*id.* ¶¶ 298-300), detailed and exhaustive findings by the Pierce County Hearing Examiner (*id.* ¶¶ 301-304), and the conclusions of the Tacoma-Pierce County Health Department (*id.* ¶ 310), all of which established the project's compliance with all applicable groundwater requirements.

- The Corps failed to follow its own regulations when it refused to elevate the decision on the permit application to a higher level within the Corps. *Id.* ¶¶ 311-317.

Relying on these operative facts, Plaintiffs alleged that the Corps violated Section 404 and the Corps' own internal regulations when it denied Plaintiffs' permit application. As noted in footnote 5 and below, the facts alleged regarding this claim have some minimal overlap with the facts relevant to the extraordinary delay aspect of Plaintiffs' current taking claim, but the operative facts necessary to each claim are far from identical and the original Complaint did not include an extraordinary delay claim. Significantly, the operative facts alleged in support of this claim are not sufficient, without more, to prove Plaintiffs' extraordinary delay claim.

2. The Administrative Record Was the Sole Source of Operative Facts in *Resource I*.

The legal nature of Plaintiffs' claims in *Resource I*—a challenge to the Corps' denial of a permit—eliminated the possibility for factual development and limited the scope of operative facts. While *Resource I* was before the District Court, and before Plaintiffs filed their claim in this Court, the Corps argued that its decision to deny the permit "must stand or fall based upon the Administrative Record" alone. Declaration of Daniel D. Syrdal ("Syrdal Decl.") Ex. A at 12. It thus sought to bar Plaintiffs from seeking discovery and developing any facts beyond the administrative record. *See id*. at 6 (arguing that "judicial review of the Corps' permit decisions is restricted to the administrative record"). The District Court granted the Corps' motion. Syrdal Decl. Ex. B. Consequently, factual inquiries were limited solely to the administrative record concerning the permitting process, and no depositions were taken. No fact beyond the administrative record was among the operative facts weighed by the District Court or the Ninth Circuit in evaluating whether or not the Corps had jurisdiction over Plaintiffs' permit application or erred in denying Plaintiffs' permit.

3. The Ninth Circuit Ruled That the Corps Lacked Jurisdiction over Plaintiffs' Permit.

Plaintiffs appealed the District Court's decision. The case was argued and submitted to the Ninth Circuit Court of Appeals on May 4, 1998, the same day the original complaint in this action was filed. The Ninth Circuit subsequently reversed the District Court, focusing solely on Plaintiffs' jurisdictional claims and holding that the Corps lacked jurisdiction to require a Section 404 permit for Plaintiffs' project. *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1163-64 (1998). The court concluded that, "as a matter of law," the Corps lacked jurisdiction over Plaintiffs' project because the municipal solid waste in question was neither "dredged" nor "fill" material. The court further found the Corps' assertion of jurisdiction to be "unreasonable" because it created a situation in which the Corps and RCRA-approved state regulatory programs could apply the same criteria to the same wetlands permit applications with potentially inconsistent results. *Id.* at 1168-69. The Ninth Circuit's ruling became final on

February 10, 1999. The Court of Appeals did not reach any of the other issues in Plaintiffs' District Court action—as Defendant has conceded, "the Ninth Circuit declined to review the merits of the Corps' decision." Dkt. 131 ¶ 201.[6]

4. Plaintiffs Brought the Taking Case Solely to Determine Whether the Permit Denial Took Private Property for Public Use Without Just Compensation in Violation of the Fifth Amendment.

On May 4, 1998, the day the appeal in *Resource I* was argued before the Ninth Circuit, Plaintiffs filed this action in the CFC. Dkt. 1 ("Compl."). In stark contrast to the legal issues regarding the Corps' jurisdiction and regulatory actions presented in *Resource I*, Plaintiffs' Fifth Amendment taking claim presents a series of fact-intensive issues concerning whether the Corps' permit denial deprived Plaintiffs of their property without just compensation.

a. Plaintiffs' Taking Claim Depends on Operative Facts Not at Issue in *Resource I* and Extending Far Beyond the Administrative Record.

As in the District Court, Plaintiffs began by reciting a series of background facts (the "Factual Background") to help put their claims in context. Again, these facts included the identity of the parties (Compl. ¶¶ 9-11; FAC ¶¶ 17-20), the characteristics of the site and the proposed project (Compl. ¶¶ 12-24; FAC ¶¶ 21-31), and the steps taken by state and local authorities to advance the landfill project (Compl. ¶¶ 25-34; FAC ¶¶ 32-41). Here, the fact that the Corps denied the permit (and, in the FAC, that the Ninth Circuit ultimately reversed that denial) is also presented as a background fact. *See* Compl. ¶¶ 35-46; FAC ¶¶ 42-53. All of the facts from *Resource II* contained in Appendix A to Defendant's motion are drawn from this "Factual Background" section of Plaintiffs' pleading.

Having established these background facts, Plaintiffs proceeded to plead the operative facts in support of their single claim for relief, an unconstitutional taking of property under the

[6] Once *Resource I* became final, Plaintiffs' action became one for a temporary taking rather than a permanent taking. After a lengthy hiatus during the ADR process undertaken pursuant to this Court's rules, Plaintiffs filed the FAC to reflect this change.

Fifth Amendment. There are several theories by which a taking may be shown, each of which involves a distinct (although sometimes overlapping) set of operative facts. As shown below, Plaintiffs pled operative facts to support three such avenues of relief: a categorical temporary taking (or *Lucas*[7] claim), a temporary taking through extraordinary delay (in the FAC only), and a regulatory taking (or *Penn Central*[8] claim).[9]

Categorical temporary taking. The lynchpin of Plaintiffs' *Lucas* claim is the destruction of all economically beneficial use of the property when its use as a landfill was prohibited. As operative facts, Plaintiffs' FAC contains a series of allegations to establish that denial of the permit deprived Plaintiffs of all economically beneficial use of their property, that the property possessed tremendous value when operated as a landfill, and that it lacked any economically viable alternate uses. FAC ¶¶ 55-60; Compl. ¶¶ 54-56. None of these allegations of economic value and harm were contained in the *Resource I* complaint.

Temporary taking through extraordinary delay. Plaintiffs' extraordinary delay claim depends on a series of alleged delays by the Corps in the permitting process, all of which combined to extend by many years the time in which Plaintiffs' permitting application was considered. FAC ¶¶ 72-74. There are some common operative facts between the extraordinary delay claim and the third and fourth claims asserted in *Resource I*. However, that overlap is not relevant because Plaintiffs' extraordinary delay claim was not pled in the original Complaint in this action, arose *after* the Ninth Circuit's decision in *Resource I*, and was added in the FAC several years later. Defendants contend that jurisdiction must be established based on the state of

[7] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

[8] *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978).

[9] The operative facts pled in support of Plaintiffs' taking claim are less detailed than the operative facts pled in support of plaintiffs' four District Court claims, despite the fact that this action encompasses a far broader range of factual issues and accompanying operative facts than did *Resource I*. This difference in pleading is reflective of the procedural postures of the two cases. As discussed above, in *Resource I* the court's review was confined to the administrative record. Thus, at the time that case was filed, the facts necessary to resolve Plaintiffs' claims were already fully developed. In this case, as discussed in more detail below, the facts necessary to Plaintiffs' claims were developed through an extensive discovery process that is still ongoing 13 years after the case was filed.

things at the time the suit was filed (Mot. at 3 n.1), while Plaintiffs contend that the comparison should be made with the operative complaint—here, the FAC—as of the time that pleading was filed. *See* Section II.E, *infra*. Under Plaintiffs' approach, any overlap is irrelevant because the prior action had concluded by the time the operative complaint was filed, and there was thus no pending action to bar jurisdiction. Under Defendants' approach, any overlap is irrelevant because it did not exist at the time the action was filed, and was only created by subsequent events.

In any event, the overlap is far from substantial. It is certainly not complete, because several fact-intensive issues beyond the scope of *Resource I* are necessary to determine whether Plaintiffs suffered a taking by virtue of extraordinary delay. For example, the reasonableness of the Corps' actions and the impact those actions had on both the permitting process and the value and use of the property are central factual issues in an extraordinary delay claim. Determining the party or parties who bear responsibility for any delay is also directly relevant to Plaintiffs' claims. As can be readily seen by examination of the summary judgment briefing, these issues depend upon operative facts, developed during discovery in this case, from far beyond the administrative record that was before the court in *Resource I*.

Temporary regulatory taking under *Penn Central*. *Penn Central* regulatory takings involve three specific factors, each of which depends on different operative facts not present in *Resource I*. First is the economic impact of the Corps' denial on Plaintiffs' property, which dovetails with the "no economically viable use" element of the *Lucas* claim. *See* Compl ¶¶ 54-56; FAC ¶¶ 57-60. Second is the question of whether Plaintiffs had reasonable investment-backed expectations. *See* Compl. ¶¶ 57-60; FAC ¶¶ 61-64. And third is the character of the Corps' actions, which bears some similarity to the operative facts underlying whether the Corps acted with extraordinary delay. *See* Compl. ¶¶ 61-64; FAC ¶¶ 65-74. All of these factors raise substantial operative facts that are unrelated to the question of whether the Corps was right or wrong when it denied the permit. These operative facts, focused on the economic uses and the impact of the Corps' internal permitting process on those economic uses, were developed

through extensive discovery of facts outside the administrative record. Again, there is no overlap with operative facts in *Resource I*.

b. The Factual Development in *Resource II* Extended Far Beyond the Administrative Record.

Unlike the claims in *Resource I*, there is no requirement that Plaintiffs' taking claim be decided solely on the administrative record before the Corps. At the time this action was filed, it was apparent that additional discovery would be conducted and that Plaintiffs' claims would depend on a variety of facts that were not considered by the Corps in connection with Plaintiffs' permit application and were not contained in the administrative record. Undoubtedly recognizing that much different claims required the proof of much different operative facts, Defendant did not even attempt to confine the scope of this Court's review to the administrative record. The substantial difference in the scope and availability of discovery demonstrates the absence of redundancy and duplication between this action and *Resource I*. In *Tohono*, the Court observed that an overlap of operative facts is the best measure for weighing redundancy because "[d]eveloping a factual record is responsible for much of the cost of litigation." 131 S. Ct. at 1730. Where the factual records developed in two cases are almost entirely different, none of the "burdens of redundant litigation" are present. *Id.*

True to form, discovery in this action has been lengthy and broad. Fifty-five depositions were taken, encompassing sixty-seven days of testimony (no depositions were taken in *Resource I*). Volumes of additional documents from outside the administrative record—over 125,000 pages, nearly 10 times greater than the size of the administrative record itself—have been produced (none of these documents was produced in *Resource I*). Thirteen experts have prepared reports concerning the many fact-intensive questions relevant to the operative facts of this case, including, but not limited to, the reasonableness of Plaintiffs' investment-backed expectations, lost revenues during the delay, other practicable alternatives to the project, and the existence of any economically beneficial uses of the property during the time the permit had been denied. No experts testified in *Resource I*, and none of these facts and expert testimonies

were relevant to the *Resource I* question of whether the permit denial was improper. The parties have identified at least 50 witnesses who are likely to or may provide testimony at trial. Syrdal Decl. Exs. C & D. Furthermore, Defendant has continued to seek more discovery, recently requesting additional witnesses to provide additional facts it contends are relevant to Plaintiffs' claims. *See* Dkt. 215. Importantly, none of the witnesses proffered and requested by Defendant is offered to provide testimony in any way relevant to the issues in *Resource I*. As was expected from the inception of this case, Plaintiffs and Defendant have engaged in extensive factual development, and this, together with the very different operative facts and claims, means that the vast majority of the evidence relevant to this action was not relevant to or before the District Court in *Resource I*.

5. Defendant Argued Against Res Judicata on Summary Judgment, and The Court Accepted Defendant's Representations and Argument.

The comparisons that Defendant makes now could not contrast more sharply with the distinctions Defendant drew to defeat application of res judicata on summary judgment. Here, Defendant represents that the two suits are "'based on substantially the same operative facts.'" Mot. at 8 (quoting *Tohono*, 131 S. Ct. at 1731). But the impression Defendant sought to convey on summary judgment was very different.

Then, Defendant distinguished the two cases by arguing that "[t]he focus of the Ninth Circuit was *not on the factual nature of the Corps' actions*, but on the legal question of statutory interpretation—an analysis of whether the agency's construction of a statute was a reasonable interpretation and within the agency's statutory authority." Dkt. 180 at 30. (emphasis added). Defendant represented that the Ninth Circuit made no evaluation "in any fashion relevant to the court's inquiry" here. *Id.* These representations—not at all addressed in Defendant's Motion—logically compel a conclusion that the *operative* facts in the two cases also cannot be the same.

Now, Defendant asserts that both cases involve "the same permitting decision on the same Clean Water Act section 404 permit application for the same proposed landfill," "the same permit processing and denial," "the same conduct," and "the same facts related to the Corps'

processing of that permit application." Mot. at 1, 2, 4. Then, Defendant argued that "the Ninth Circuit made no examination, much less any findings with respect to the length of the permit process, the complexity of the permit process, or the purposes being served by the regulatory action." Dkt. 180 at 30. Defendant further argued that, "contrary to Plaintiffs' arguments, the Ninth Circuit did not evaluate in any fashion relevant to the court's inquiry here reasonableness of the Corps' actions." *Id.*[10]

On summary judgment, this Court accepted Defendant's arguments recited above that the Ninth Circuit decision had no claim preclusion or res judicata effect. Opinion and Order, Dkt. 191 at 18, 49-52, 74-75. In its order, the Court specifically refused to find that *Resource I* had preclusive effect over any of the overarching factual issues presented by Plaintiffs' claim. The Court held that the operative facts necessary to Plaintiffs' claim were not at issue in *Resource I* and were not resolved by the court. Specifically, the Court held that the issue in *Resource I*, "whether the Corps was right or wrong," was "not the same issue as extraordinary delay," which required a "fact-intensive examination of each specifically-identified delay," facts that went far beyond the scope of *Resource I*. *Id.* at 51. In so doing, the Court agreed with Defendant's arguments that *Resource I* did not focus "on the factual nature of the Corps' actions, but on the legal question of statutory interpretation." Dkt. 180 at 30. In so ruling, this Court rejected Plaintiffs' argument that an immeasurable assertion of jurisdiction by the Corps amounted to extraordinary delay as a matter of law. Plaintiffs, of course, do not waive this argument.

The Court's ruling on summary judgment has direct implications for the decision on the present motion, because the *Tohono* Court reasoned that "[c]oncentrating on operative facts is also consistent with the doctrine of claim preclusion," and "[r]eading § 1500 to depend on the underlying facts . . . gives effect to the principles of preclusion law *embodied in the statute*."

[10] Even if Defendant's summary judgment arguments are not *directly* contradicted by its representations in this motion, Defendant's previous contentions on summary judgment cannot be squared with any reasonable argument now that the claims in the two suits are the same, or that Plaintiffs are involved in the "duplicative" litigation that Defendant itself acknowledges § 1500 was intended to prevent.

Tohono, 131 S. Ct. at 1730 (emphasis added). In other words, the "substantial overlap of operative facts" required to invoke a § 1500 bar after *Tohono* must be equivalent and comparable to that needed for claim preclusion (e.g., res judicata). But here, Defendant should not be heard to argue that this case meets this test, based on the prior representations and arguments at summary judgment, and the fact that the Court accepted and relied upon those representations in ruling in Defendants' favor.

6. The Court's Ruling on Summary Judgment Also Identified Other Issues and Operative Facts That Were Not Before the Ninth Circuit.

In its summary judgment ruling, the Court identified overarching factual issues or mixed questions of law and fact raised by Plaintiffs' claim (each of which was itself dependent on a series of underlying operative facts) that were not operative in *Resource I*, including:

- whether Plaintiffs possessed a Fifth Amendment-protected property interest;
- whether the Corps' denial of the permit deprived Plaintiffs of all economically viable use of their property;
- whether there was an extraordinary delay and who was responsible;
- the economic impact of the Corps' denial on Plaintiffs;
- whether Plaintiffs had reasonable investment-backed expectations;
- the character of the Corps' action; and
- causation.

Dkt. 191 at 18-19. Not before the Court was the separate factual issue of the amount of just compensation necessary to make Plaintiffs whole. The differences between the operative facts necessary to resolve these issues and the operative facts relevant to *Resource I* are discussed in detail in Section II.C.3, below.

Based largely on factual evidence outside the record in *Resource I*, the Court found in favor of Plaintiffs on certain of these issues, holding, among other things, that Plaintiffs possessed valid property rights, that the permit denial destroyed all economically beneficial use

of the property (albeit temporarily), and that the economic impact prong of *Penn Central* was met. *Id*. at 83-84. It reserved for trial the questions of whether there was an extraordinary delay, who was responsible, whether Plaintiffs had reasonable investment-backed expectations, the character of the Corps' actions, and causation. *Id*.

C. Section 1500 Does Not Deprive This Court of Jurisdiction Where the Operative Facts Underlying the District Court Claim Are Insufficient, Without More, to Prove Plaintiffs' Taking Claim.

The CFC has repeatedly denied motions to dismiss under § 1500 when presented with factually related claims where the operative facts of the district court claim are insufficient to prove the separate claim brought in the CFC. As discussed in more detail below, the court has found no jurisdictional bar with respect to claims arising out of: (1) the misappropriation and reproduction of copyrighted images in a single handbook, *d'Abrera*, *supra*; (2) a single series of construction contracts for naval vessels, *McDermott, Inc. v. United States*, 30 Fed. Cl. 332 (1994); (3) the design of a single war memorial, *Lucas v. United States*, 25 Cl. Ct. 298 (1992); and (4) the loss of mining rights over a single tract of land resulting from the passage of a federal statute, *Whitney Benefits, Inc. v. United States*, 31 Fed. Cl. 116 (1994) ("*Whitney II*"). These cases illustrate that the mere fact that the two *Resource* actions arise out of Plaintiffs' efforts to construct a landfill is not enough to show substantial overlap of the operative facts. In contrast, in both *Tohono* and the cases cited by Defendant, there was complete overlap of the operative facts, such that proving the claim in one court would have been sufficient to prove the claim in the other court.

1. There Is No Jurisdictional Bar When Transactionally Related Claims Depend upon Different Operative Facts.

The decision in *d'Abrera* perfectly illustrates how claims with distinct operative facts can arise out of a nearly identical factual background. Mr. d'Abrera and his publishing company owned the copyright to thousands of photographs of butterflies, including many from Burma and other parts of Southeast Asia, which Mr. d'Abrera himself had taken over a span of many decades. A volunteer working for the Smithsonian was compiling an illustrated checklist of

Burma's butterflies. Because the Smithsonian did not itself have photographs of all the butterflies, and because it would be impracticable for the volunteer to travel to Burma and take new photographs himself, he used over 1,000 of Mr. d'Abrera's photographs in the checklist. Two distinct claims arose out of these same background facts: a Lanham Act false designation of origin claim in the Southern District of New York and a Copyright Act infringement claim in the CFC.

When the government moved to dismiss the Copyright Act claim under § 1500, the court denied the motion because the operative facts underlying the two claims were not the same. The false designation of origin claim depended on whether the Smithsonian "knowingly and intentionally authorized and participated in the passing off and utilization of the false designations of origin, i.e., deceiving individuals into believing that the book and the photograph were the unique work of the Smithsonian." 78 Fed. Cl. at 58 (internal quotation marks omitted). Those facts were not material to the Copyright Act claim, which depended only on whether the Smithsonian "reproduced and distributed over 1,375 of Mr. d'Abrera's photographs without permission, license, or consent." *Id*. (internal quotation marks omitted). The facts necessary to prove the Lanham Act claim would not have been sufficient to prove the Copyright Act claim and vice versa. The Smithsonian could have deceived individuals into believing that the photographs were its unique work regardless of Mr. d'Abrera's copyright over those pictures, and Mr. d'Abrera could prove a violation of his copyright without the additional facts necessary to show false designation. Thus, the court found no jurisdictional obstacle to the Copyright Act claim before it because there was no overlap in *operative* facts, despite the similar underlying background for the two claims.

Similarly, in *McDermott*, the plaintiff was a party to a series of shipbuilding contracts with the Navy. The action pending in the CFC charged the Navy with breaching those contracts in a variety of ways, such as providing a defective design, interfering with subcontractors, and changing the contract specifications. 30 Fed. Cl. at 334-35. When that case was filed, McDermott had pending in the District Court for the District of Columbia an action challenging

the constitutionality and applicability of 10 U.S.C. § 2405 and its implementing regulations, under which the Navy had sought to limit shipbuilders' ability to bring contractual claims. *Id*. at 336-37. That action, too, arose out of the same shipbuilding contracts between plaintiff and the Navy. *Id*. The court noted that the overlapping background facts from the district court action "could not serve as the operative facts in the case before this court." *Id*. at 337. The operative facts in the contract action depended on the Navy's designs and conduct with respect to the individual contracts at issue. The district court action, in contrast, "attacks the legitimacy and validity" of a statute and its implementing rules, which "requires legal determinations as opposed to resolution of factual issues." *Id*. at 338. The facts necessary to support the claims in the CFC would thus be "of little consequence" in the district court. *Id*. While both actions at issue in *McDermott* generally arose out of the same shipbuilding contract dispute, the limited overlap in operative facts confirmed that § 1500 would not bar jurisdiction.

Lucas, too, involved claims arising out of a government procurement process being found dissimilar under § 1500. Plaintiffs won a competition sponsored by the American Battle Monuments Commission ("AMBC") to design a memorial for Korean War veterans. 25 Cl. Ct. at 301. They then entered into an agreement with an architecture and engineering firm for the construction of the monument. *Id*. at 302. Artistic differences arose among the parties in the ensuing months, resulting in litigation. Plaintiffs sued the engineering firm in the District Court for the District of Columbia, and then sued the AMBC in the CFC, asserting breach of contract claims in both actions. *Id*. at 303. The court found no procedural bar under § 1500 because, although the claims arose from the same factual background, the operative facts were different. The operative facts in the district court action related to the contract for consulting services for implementing the design. *Id*. at 305. The operative facts in the CFC action—also a breach of contract action related to the design of the memorial—related to a separate contract arising out of the design competition itself. In *Lucas*, the court found that the two claims "may be supported by some common operative facts." *Id*. Yet this degree of overlap was insufficient to result in a jurisdictional bar because "the *material* facts supporting each claim are largely dissimilar." *Id*.

(emphasis added). As a result, the court held that the two actions "do not share the same operative facts" for purposes of § 1500. *Id.*[11]

Similarly, in *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554 (Fed. Cir. 1985) ("*Whitney I*"), the CFC exercised jurisdiction over a taking claim despite the presence of a pending district court action raising claims against the government arising out of the same parcel of land. The plaintiff owned coal mining property at the time of the passage of the Surface Mining Control and Reclamation Act ("SMCRA"). *Id*. at 1555. The property was to be used for strip mining, which the SMCRA prohibited. *Id*. To alleviate the burdens of this prohibition on private landowners, the SMCRA included an "exchange" clause, which provided that private land subject to mining prohibitions could be exchanged for Federal land free from such prohibition. *Id*. (citing 30 U.S.C. § 1260(b)(5)).

Whitney Benefits sued in District Court in Wyoming under the SMCRA to compel a statutory exchange of coal tracts. *Id*. at 1556. Subsequently, Whitney Benefits brought an action in the CFC, alleging that the SMCRA had effected a taking of its coal mining property and seeking just compensation under the Fifth Amendment. *Id*. at 1555. In rejecting the government's assertion that § 1500 barred jurisdiction over the taking claim, the court found that "the plaintiffs' claim for just compensation in the CFC clearly does not arise from the same operative facts as does the citizen's suit to compel an exchange of coal tracts." *Whitney II*, 31 Fed. Cl. at 120. Specifically, it noted that the claim for the exchange of coal tracts was purely "administrative" and that the "operative facts" of that claim are "merely that conditions set forth in the statute have been met." *Id*. Unlike the claim before the CFC, that claim "required no demonstration by the plaintiffs that the government had unlawfully taken the plaintiffs' property

[11] Another procurement case, *Fire-Trol Holdings, LLC v. United States*, 65 Fed. Cl. 32 (2005), reached a similar conclusion. In district court, Fire-Trol challenged amended Forest Service specifications that required fire retardant materials to contain certain ingredients not in Fire-Trol's products. *Id*. at 33. When the Forest Service subsequently solicited bids based on those specifications, Fire-Trol sued in the CFC challenging the bidding process. *Id*. at 34. Even though the same background facts—namely, the restriction of ingredients permitted in fire retardant products—were present in both complaints, the court found that § 1500 did not apply because "the operative facts giving rise to the actions are different." *Id*. at 35.

without just compensation, operative facts which must be demonstrated for a plaintiff to succeed in a lawsuit brought under the fifth amendment to the Constitution." *Id*. As in *Whitney Benefits*, *Resource I* required no demonstration that Defendant unlawfully took Plaintiffs' property without just compensation, and its arguable pendency thus does not deprive this Court of jurisdiction under § 1500.

2. In Defendant's Cases, the Operative Facts Necessary to Establish a Right to Relief Were Identical.

The cases cited by Defendant illustrate the high degree of similarity in operative facts required before the jurisdictional bar of § 1500 will apply. For example, in *Tohono*, the two suits in question were "for all practical purposes, identical." 131 S. Ct. at 1731 (internal quotation marks omitted). The two actions alleged "that the United States holds the same assets in trust for the Nation's benefit" and that, in its capacity as trustee, the United States committed "almost identical breaches of fiduciary duty." *Id*. As the Court observed, "the Nation could have filed two identical complaints, save the caption and prayer for relief, without changing either suit in any significant respect." *Id*. And, as discussed above, *see supra* n.3, the *Tohono* plaintiffs pursued substantially the same relief in both actions, seeking "money to remedy the Government's alleged failure to keep accurate accounts." *Id*. at 1733 (Sotomayor, J., concurring in the judgment). Not only were the suits identical, they were also unquestionably duplicative because a single action in the CFC could have provided the plaintiffs with all the relief they sought. *Id*. at 1730-31 (majority op.) ("The Nation could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses caused by the Government's breach of duty.").

The two employment cases cited by Defendant are emblematic examples of plaintiffs who seek to rely on entirely the same facts to pursue claims that are functionally identical in all respects. In *Griffin v. United States*, 590 F.3d 1291 (Fed. Cir. 2009), the plaintiff filed parallel lawsuits after she was passed over for a promotion in favor of a male coworker. Both lawsuits contained virtually identical allegations of the key operative fact:

- "Review of Ms. Griffin's qualifications established that she was highly qualified for the position, but she was passed over and a younger, male applicant, William G. Veal, was selected for the position." *Id*. at 1294 (quoting district court complaint).

- "Review of Ms. Griffin's qualifications established that she was highly qualified for the position, but she was passed over and a male applicant, William G. Veal, was selected for the position." *Id*. (quoting CFC complaint).

The Federal Circuit observed that the "other allegations of the complaint mirror each other" as well. *Id*. Ms. Griffin sought to pursue a Title VII claim in the district court and an Equal Pay Act claim before the CFC. This was not permissible under § 1500 because in both actions "the pleaded facts are mirrored" and because the claims depended on "the same single event: the Army's promotion of a male candidate in her place." *Id*.; *see also Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004) (Title VII and Equal Pay Act claims that the Air Force paid "lesser compensation to women than to men for the same or substantially equal work" both arose out of the same operative facts). Ms. Griffin's case was completely duplicative in both the operative facts alleged and relief sought.

Low v. United States, 90 Fed. Cl. 447 (2009), is virtually indistinguishable from *Griffin* (a case the *Low* court repeatedly cited, *see* 90 Fed. Cl. at 452-53). Ms. Low filed parallel lawsuits after her employer allegedly breached a settlement agreement providing that Ms. Low would be assigned a GS-14 position and certain environmental duties in connection with that position. *Id*. at 450. Ms. Low brought a breach of contract and Title VII action in district court. *Id*. at 449. Relying on the same alleged breach of the same settlement agreement, Ms. Low also filed a breach of contract action in the CFC. *Id*. at 450. The key operative facts that would allow Ms. Low to obtain relief in both suits were the same: (1) certain duties were given to Ms. Low in connection with her settlement agreement; (2) those duties were subsequently taken away from her and given to a younger employee; and (3) even with the additional duties, Ms. Low was not operating at the GS-14 level as promised in the settlement. *Id*. at 453. Thus, as in *Griffin*, "Ms. Low's suits in both courts amount to no more than different manifestations of the same underlying claim." *Id*. (internal quotation marks omitted). And, as in *Griffin*, the duplication

between the two proceedings is obvious: the facts Ms. Low alleged in her district court complaint would have fully established the claims she asserted in the CFC, and the relief she sought in both actions was essentially identical.

* * *

Collectively, these cases establish a simple rule—if the operative facts necessary to prove the claim in the district court are insufficient, without more, to prove the claim in the CFC, § 1500 does not deprive this Court of jurisdiction. *See McDermott*, 30 Fed. Cl. at 334 (noting that dismissal is only proper when "[t]o obtain relief in either forum, the same facts were required to be proven"). Such an approach is consistent with § 1500's role as a form of statutory claim preclusion. *Tohono*, 131 S. Ct. at 1730 (observing that the statute "operate[s] in similar fashion" to the doctrine of claim preclusion).[12] Under longstanding principles of claim preclusion, the test for identity between two claims is: "Would the same evidence support and establish both the present and the former cause of action?" 2 H. Black, Law of Judgments § 726, p. 866 (1891) (quoted in *Tohono*, 131 S. Ct. at 1730).[13] This Court has already concluded that the operative facts established in *Resource I* are not, on their own, enough to prove Plaintiffs' taking claim as a matter of claim preclusion.

3. As This Court's Summary Judgment Order Makes Clear, Plaintiffs' Taking Claim Depends on Different Operative Facts Than Those Material to Plaintiffs' Claims in *Resource I*.

In ruling on the parties' motions for summary judgment, the Court identified ten questions that it needed to resolve in order to determine whether Plaintiffs were entitled to relief

[12] The Supreme Court's comment in *Keene* that Congress did not intend § 1500 to be "rendered useless by a narrow concept of identity" does not compel a contrary result. *See* 508 U.S. at 213; Mot. at 5-6. The Court in *Keene* used this language to reject the petitioner's argument that a mere difference in legal theory was sufficient to avoid § 1500, even if the operative facts necessary to prove each theory were identical. 508 U.S. at 212-13. *Keene* in no way called for an expansive concept of identity that would extinguish subsequent claims without any meaningful overlap in the operative facts.

[13] Claim preclusion also asks whether the same claim either was brought or could have been brought in the prior action. *See Larson v. United States*, 89 Fed. Cl. 363, 390 (2009), *aff'd*, 376 F. App'x 26 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 1027 (2011). Here, Plaintiffs did not bring their taking claim in *Resource I*, and could not have, because this Court has exclusive jurisdiction over such claims.

as a matter of law. The vast majority of these questions are fact-intensive, and turn on facts that were not before the District Court or the Ninth Circuit in *Resource I*.

The Court began with Plaintiffs' *Lucas* claim for a categorical temporary taking. The first factual issue—a fact necessary but not sufficient to establish Plaintiffs' right to relief—involved the nature of Plaintiffs' property rights. Dkt. 191 at 29; *see Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002) ("First, a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action . . . .") (internal quotation marks omitted). This issue involved background details of Plaintiffs' property rights, including the specific extent of the property interest Plaintiffs obtained. This issue has some factual overlap with relevant background facts in *Resource I*, but in both cases the facts related primarily to Plaintiffs' standing to sue. Overlap in these background facts does not give rise to § 1500's jurisdictional bar when the operative facts "are entirely different." *McDermott*, 30 Fed. Cl. at 338 (similarity in facts "alleged solely to satisfy prerequisites to maintaining suit in a particular court" does not give rise to an overlap of "operative facts"). Moreover, the property rights prong of the *Lucas* claim also requires the Court to consider the separate question of whether Washington statutory and common law prohibited landfills or considers them a nuisance. Dkt. 191 at 29-30. Whether or not the property would be considered a nuisance was simply not at issue in *Resource I*.

The second issue underlying the *Lucas* claim was whether the denial of the permit "completely eliminated all value from" Plaintiffs' property. *Id.* at 31 (internal quotation marks omitted). This required the Court to "examine the effect of that denial on plaintiffs' property interests." *Id*. at 35. The effect on Plaintiffs' property interests was wholly irrelevant to the issues in *Resource I*, which solely considered whether denial of the permit was proper irrespective of any corresponding effect. The operative facts associated with this issue were not in the record of *Resource I*.

The third factual issue underlying the *Lucas* claim is whether Plaintiffs' property retained economically viable use during the time that landfill construction was not permitted. In

evaluating this issue, the Court weighed a series of proposed alternate uses for the property offered by the Corps: construction of housing, renting the land, leasing the property for development, forestry, holding the property for future investment, farming commercially salable hay, etc. *Id*. at 42. The parties developed an extensive factual record regarding whether these uses were economically viable, including testimony from several experts, analysis of local zoning ordinances, back taxes potentially owed on the property, the price of hay, the necessary procedural prerequisites to establishing a timber operation, the hydrogeological suitability of the property for alternative uses, and the expense of constructing a residential subdivision on the property. *Id*. at 43-46. All of these operative facts were critical to Plaintiffs' ability to prove, as a matter of law, that the denial of the permit left the property with no economically beneficial use. None of these facts were relevant to the claims litigated in *Resource I*. Thus, there is no substantial duplication between the *Lucas* claim at issue here and the claims litigated in *Resource I*.

The Court next moved to Plaintiffs' extraordinary delay claim, and began by assessing whether extraordinary delay was viable once the Corps rendered its decision. The Court held that under Federal Circuit precedent, a delay that becomes "extraordinary" can effect a regulatory taking, even if the agency ultimately acts on the delayed issue. *Id*. at 49. The key factual question, then, is whether the delay rose to the level of "extraordinary." This question is fact intensive, and was not at issue in, or resolved by, *Resource I.*[14]

Indeed, the Court's summary judgment order made clear that the Corps' unreasonable assertion of jurisdiction, without more, was not enough to hold that the delay resulting from that assertion was extraordinary. The Court held that "*Resource I*'s conclusion that the Corps' interpretation of its jurisdiction under Section 404 of the CWA is unreasonable" was not the same issue for collateral estoppel purposes "as whether the delays that plaintiffs identify were

[14] As set forth above, at the time this action was filed, extraordinary delay was not yet at issue since the Ninth Circuit had not yet rendered the decision overturning the Corps' permit denial. Even if there was an overlap of operative facts with the FAC in this action, there was no other "pending" action at the time the FAC was filed.

extraordinary." *Id*. at 50 (internal quotation marks omitted). This is because the issue in *Resource I* was only "whether the Corps was right or wrong." *Id*. at 51. Answering that question could not resolve the "fact-intensive examination of each specifically-identified delay to see whether it is disproportionate to the regulatory regime from which it arises, and whether the delay is the result of bad faith on the part of the government agency." *Id*.; *see also Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366-67 (Fed. Cir. 2004). The question posed by Plaintiffs' claims in *Resource I* was "bereft of the factual details required to decide extraordinary delay" and was instead merely a "starting point" for the Court's examination of the operative facts relevant to Plaintiffs' claims in this action. Dkt. 191 at 51-52 n.73.

The Court then turned to the question of whether there was extraordinary delay in the permitting process. As the Court observed, this question requires "an extensive examination of the permitting processes surrounding plaintiffs' landfill," *id*. at 52, assessing "the reasons for delay and the nature of the permitting process," *id*. at 53. Plaintiffs identified eight individual alleged delays. *See id*. at 54-55. Certain of those delays were also mentioned in the fourth claim in *Resource I*; however, as noted above, Plaintiffs' extraordinary delay claim was only available *after Resource I* became final and was not alleged in the original Complaint in this case. Moreover, Plaintiffs offered extensive evidence in support of each delay that was developed only in discovery in this action, and was not part of the Corps' administrative record to which the review in *Resource I* was confined. Defendant, in turn, relied on additional evidence beyond the administrative record to try to rebut Plaintiffs' arguments. This additional evidence formed the core of each party's identification of the relevant operative facts, and the issues raised by that evidence led the Court to conclude that genuine issues concerning each identified delay remained for trial. *Id*. at 66.

Next, the Court evaluated Plaintiffs' *Penn Central* taking claim. The Court observed that *Penn Central* claims are "essentially *ad hoc* and fact-intensive." *Id*. at 67; *see also id*. (the *Penn Central* analysis "requires this court to engage in an extensive examination of the facts"). The facts relevant to each of the three *Penn Central* factors were only developed in this action, and

were not material, and thus not operative, to the question at issue in *Resource I* of whether the Corps' denial of the permit was proper. The first factor is the economic impact of the regulation on the claimant. *Id*. at 67; *Penn Central*, 438 U.S. at 124. In this case, Plaintiffs' proof that the Corps' conduct had rendered the property without any economically viable use—proof that, as set forth above, depended entirely on operative facts not at issue in *Resource I*—established the economic impact prong. Dkt. 191 at 68.

The second *Penn Central* factor is the interference with reasonable investment-backed expectations. This, too, is a "'fact-specific inquiry into what, under all the circumstances, the [landowner] should have anticipated.'" *Id*. at 68 (alteration in original) (quoting *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003)). Facts such as "whether the plaintiff operated in a highly regulated industry," whether the plaintiff was aware of the problem that led to government action at the time of purchase, and "whether the plaintiff could have reasonably anticipated the possibility of such [action] in light of the regulatory environment at the time of purchase" are all material to this inquiry. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (internal quotation marks omitted). Ultimately, the Court found a disputed issue of fact concerning whether Plaintiffs' expectations of successfully opening a landfill were reasonable "due to the heavily-regulated nature of the solid waste disposal industry." Dkt. 191 at 73. This issue, and the operative facts material to resolution of this issue, extends far beyond, and has no overlap with, the narrow question in *Resource I* of whether the Corps was right or wrong when it denied the permit and the facts operative to this enquiry.

The final *Penn Central* factor is the character of the government action, which requires an "intensely factual inquiry focusing on agency action." *Id*. at 74-75. As with the question of extraordinary delay, the Court declined to hold that the *Resource I* action had preclusive effect because it only "concerned the legal issue of the Corps' jurisdiction." *Id*. at 74. The Court found material disputed facts concerning the character of the Corps' action, including whether it

"treated [Plaintiffs] differently than other similarly-situated applicants," a factual issue not material to *Resource I*. *Id*. at 77.

The Court also identified an additional factual issue material to Plaintiffs' taking claim that was not at issue in *Resource I*—causation. *Id*. The Court determined that the question of whether the delays and harm were caused by the Corps' conduct, rather than issues with the state permitting process, was intensely factual and not ripe for resolution at the summary judgment stage. *Id*. at 83. The operative facts necessary to demonstrate whether the Corps was the proximate and but-for cause of Plaintiffs' harm are not the same as the facts necessary to demonstrate that the Corps lacked jurisdiction over or improperly denied Plaintiffs' permit. Causation was never even mentioned in *Resource I*, nor was there any need to compare the differing impacts caused by the Corps' permitting process and the various state permits.

Finally, the separate factual issue of the amount of just compensation to which Plaintiffs would be entitled for a taking of their property was not even before the Court at the summary judgment stage. *Id*. at 37 & n.55. Like the economic factors of the *Lucas* and *Penn Central* claims, the amount of just compensation can only be determined through a fact-intensive analysis of the value of the property, how much revenue Plaintiffs would have otherwise received had their property not been taken, the time during which Plaintiffs were deprived of use of that property, and other relevant facts. These economic questions were also not even at issue in *Resource I*.

This case is thus not duplicative or redundant of *Resource I*, and its dismissal is not required by § 1500. *Tohono*, 131 S. Ct. at 1728, 1730. Plaintiffs' taking claim, as the Court observed, is a "mountain," requiring a series of fact-intensive inquiries into a diverse number of issues that were not raised in *Resource I*. *Id*. at 51. That earlier case, by contrast, was a "molehill," (*id.*), confined to an extremely limited factual review of the Corps' administrative record and concerned with a simple (and largely legal) question of right and wrong that turned on a different set of operative facts. There is virtually no duplication between the two cases, and the claims asserted in each are certainly not redundant in any way. Applying § 1500 to bar this

action would be inconsistent with the language and purpose of the statute and would read the word "operative" out of existing Federal Circuit and U.S. Supreme Court case law. The claims raised in this case are thus not "for or in respect to" the claims at issue in *Resource I*.

D. Constitutional Avoidance Compels the Adoption of Plaintiffs' Construction of § 1500.

Plaintiffs' right to obtain just compensation for the taking of their property by the Corps is guaranteed by the Fifth Amendment of the Constitution. As such, Plaintiffs "have a right to have the Corps' permit denial reviewed, without being placed in the position of having to give up a substantial legal right protected by the Takings Clause of the Constitution." *Loveladies Harbor*, 27 F.3d at 1555. Indeed, the constitutional nature of a taking claim is such that, unlike in other actions against the government, the right to relief is "self-executing" and does not depend on a waiver of sovereign immunity. *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). Moreover, taking claims are committed to the exclusive jurisdiction of the CFC. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1362 (Fed. Cir. 2005). Thus, a party precluded from raising its claim in the CFC is precluded from exercising its constitutionally guaranteed rights.

The constitutional nature of Plaintiffs' claim is distinct from the claims at issue in *Tohono*, *Griffin*, and *Low*. The rights of action asserted in those cases were statutory, and existed only by virtue of the government consenting to be sued. *See, e.g.*, *Tohono*, 131 S. Ct. at 1731 (noting that the relief plaintiffs sought "is available by grace and not by right"). Similarly, § 1500 was passed in response to abuses in connection with statutory, not constitutional, rights to relief. *See Tohono*, 131 S. Ct. at 1728. The "cotton claimants" whose duplicative and redundant actions Congress sought to extinguish were not asserting Fifth Amendment taking claims, but were pressing rights under the Abandoned Property Collection Act. *Id*. Plaintiffs here, by contrast, pursue claims that are not merely available by the grace of the government, but exist by right under the Constitution.

Were § 1500 to operate as Defendant proposes, a prior action involving a permit denial could, by the mere incidental overlap of background facts insufficient to establish a taking claim, preclude this Court from exercising jurisdiction over a taking claim and thereby deprive a party of its constitutional rights.[15] Such a construction raises "serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Under such circumstances, the doctrine of constitutional avoidance compels the court to "'construe the statute to avoid such problems.'" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (quoting *DeBartolo*, 485 U.S. at 575). Barring such construction, the statute would then be unconstitutional if it would bar a plaintiff from asserting its rights under the Fifth Amendment as requested by Defendant in this case.

Construing § 1500 to bar jurisdiction only when the same operative facts prove the claims asserted in both cases would avoid any constitutional problems. Because of the nature of taking claims and administrative reviews of permit denials, the operative facts relevant to each claim will always be different. The factual questions highlighted above—whether government action destroyed all economically beneficial use, whether plaintiffs possessed reasonable investment-backed expectations, whether the government agency acted with extraordinary delay or in bad faith—would not be resolved in an administrative challenge to a permit denial. As shown above, existing precedent including *Tohono* holds that § 1500 does not apply when the operative facts of the respective claims are different. Even if it did not, the doctrine of constitutional avoidance would compel the Court to adopt such a construction or find the statute unconstitutional in application to Taking claims.

[15] In *Tohono*, even when the rights at issue were not constitutional, the Court noted that the tribes could have filed in the District Court without fear of losing their chance to later file in the CFC because Congress consistently provides a waiver of the statute of limitations in its appropriations bill. 131 S. Ct. at 1731. Here, prior conclusion of the District Court action was necessary to define the nature of Plaintiffs' taking claim, temporary or permanent, and thus was required prior to proceeding with the CFC taking action. Far from redundancy, this serial approach led to judicial economy and should not be precluded by the improper application of an ancient law designed to preclude redundancy of actions.

E. Jurisprudential Considerations of Efficiency and Economy Counsel Against Dismissal.

This action has been properly pending before this Court for 13 years. There was no jurisdictional defect when it was filed—either under the then-existing state of the law, where both substantially similar operative facts and requested relief was required for such a defect, or viewed in light of the Supreme Court's decision in *Tohono*—and there remains no jurisdictional defect today. Moreover, any conceivable impediment to this Court's jurisdiction has long since been cured. For all but nine months, no other action between Plaintiffs and the Corps was pending in any other court. When Plaintiffs filed their FAC, there was no action pending in any other court.[16] Had Plaintiffs simply voluntarily dismissed and refiled after the Ninth Circuit issued its mandate in *Resource I*, there would not even be a colorable ground for Defendant's motion. Of course, there was no reason for Plaintiffs to do so because at that time, as had been the case for decades, there was no question but that jurisdiction over this action was proper. Plaintiffs sought exclusively injunctive relief in *Resource I*, and exclusively money damages in this case. Without even needing to consider the operative facts (which, for all the reasons set forth above, are not the same in the two actions), it was apparent that § 1500 presented no jurisdictional hurdle because Plaintiffs did not seek the same relief. *See Loveladies Harbor*, 27 F.3d at 1551. Indeed, as Defendant concedes in its motion, it agreed that jurisdiction was proper and has never sought to challenge it before today. Mot. at 9.

In the intervening 13 years, the parties, the Court, and third-party witnesses have borne the financial and other burdens that accompany lengthy litigation. In such circumstances, the Supreme Court has recognized that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention," even when a jurisdictional flaw is found to exist. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989); *see also Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996). In

[16] Plaintiffs' FAC was filed within weeks of the conclusion of a three-year mediation, during which time all proceedings in this action were stayed and the parties were precluded from taking any action before the Court, including amending pleadings. Syrdal Decl. Ex. E.

Newman-Green, the trial court proceeded to summary judgment without detecting a jurisdictional flaw. 490 U.S. at 828-29. When the flaw was noticed and raised on appeal, the Court of Appeals initially ordered the case returned to the district court to determine whether dropping the non-diverse party would be appropriate. *Id*. at 830. Relying on jurisprudential concerns, the Supreme Court held that the Court of Appeals itself could "dismiss a dispensable nondiverse party" and thus cure a jurisdictional flaw after the fact. *Id*. at 837-38.

In *Caterpillar*, the defendant removed a case before the remaining non-diverse party was finally dismissed from the action. 519 U.S. at 65. There, the plaintiff noticed the issue and raised it before the district court in a motion to remand, but the district court erroneously denied the motion, and the case proceeded to trial and judgment in favor of Caterpillar. *Id*. at 66. Even though "the complete diversity requirement was not satisfied at the time of removal," *id*. at 70, the Supreme Court upheld the verdict, relying on "overwhelming" considerations of "finality, efficiency, and economy," *id*. at 75.

Both *Caterpillar* and *Newman-Green* thus allowed parties to cure initial jurisdictional defects once substantial litigation expense and effort had been undertaken. Should this Court conclude for any reason that there was a jurisdictional flaw at the time of filing, it should find that flaw cured by the filing of the FAC after the conclusion of the other litigation and decline to dismiss the case. Indeed, even in the context of § 1500, the Federal Circuit has permitted the comparison of operative facts to be made based on the amended complaint in the CFC, and not the original complaint. *See Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 75 F.3d 648, 653 (Fed. Cir. 1996). In that case, the plaintiff's initial complaint in the CFC sought only declaratory relief, relief that was "essentially the same relief" as the plaintiff was pursuing in a parallel district court action. *Id*. However, the plaintiff later amended its complaint to seek "money damages for breach of contract and a taking under the Fifth Amendment." *Id*. The Federal Circuit concluded that the motion to dismiss under § 1500 was "correctly denied" because "the district court suit and the suit in the Court of Federal Claims *under the amended complaint* did not seek the same relief." *Id*. (emphasis added). Thus, the Federal Circuit allowed

plaintiff's amended complaint to cure the jurisdictional defect initially present. *See also Matthews v. Diaz*, 426 U.S. 67, 75 (1976) (holding that a "nonwaivable condition of jurisdiction" could be cured by post-filing conduct and that because a "supplemental complaint in the District Court would have eliminated this jurisdictional issue . . . it is not too late, even now, to supplement the complaint to allege this fact").

The operative facts of this case are distinct from *Resource I*, and there has been no point during the pendency of this action when this Court lacked subject-matter jurisdiction. But even if this Court were to find a brief jurisdictional defect resulting from the temporally brief and factually limited overlap between this case and *Resource I*, it has long since been cured. The Court should not at this late stage undo the substantial expenditure of judicial resources in this litigation, nor deprive Plaintiffs of access to the courts for redress of a Fifth Amendment taking. Following the lead of *Caterpillar*, *Newman-Green*, *Matthews*, and *RF&P*, and finding that any initial jurisdictional defect was cured by the filing of Plaintiffs' FAC would be the only just result.

III. CONCLUSION

Defendant's Motion to Dismiss lacks merit, and is simply another procedural obstacle to avoid compensating Plaintiffs for the deprivation of their constitutional rights. This action involves totally different claims and almost entirely different operative facts from those in *Resource I*. Jurisdiction in this Court was proper when this action was filed 13 years ago, and remains proper today. The parties have spent the past 13 years developing an extensive factual record extending far beyond the scope of *Resource I*. Based on these operative facts, Plaintiffs have already prevailed on a number of key issues necessary to prove that Defendant took their property without just compensation. They are prepared to go to trial to prove the remainder of their case. No jurisdictional impediment to this Court conducting that trial exists. Defendant's motion should be denied, and this case should be set for trial.

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