In the United States Court of Federal Claims

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HEARTS BLUFF GAME RANCH, INC.,	*	
Plaintiff,	*	No. 09-498L
v.	*	Filed: June 11, 2010
THE UNITED STATES OF AMERICA,	*	
Defendant.	*	
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ORDER AND OPINION

Plaintiff alleges that the Army Corps of Engineers effected a taking of its property when the Corps declined to enter into a mitigation banking instrument with plaintiff and denied a permit that would allow plaintiff to sell mitigation banking credits. Defendant filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim. We find that we have jurisdiction to entertain plaintiff's Complaint and thus deny defendant's motion to dismiss for lack of subject matter jurisdiction. However, plaintiff has not shown that an intention to use its property as a mitigation bank is a property interest that the government could have taken. It has not explained how an interest in land that it hoped to use as a mitigation bank could have been taken for public use or in the public interest. For these and other reasons stated below, we grant defendant's motion to dismiss for failure to state a claim.

BACKGROUND

Plaintiff Hearts Bluff bought approximately 4,000 acres of land in Titus County, Texas, for

use as a mitigation bank.[1] Mitigation banking is described in the Federal Register as "the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources." *Final Guidance for the Establishment, Use and Operation of Mitigation Banks*, 60 Fed. Reg. 58605, 58607 (November 28, 1995). Mitigation banks are used to satisfy mitigation requirements of the Clean Water Act Section 404 permit program.[2] As we understand the program, mitigation banking allows those who would develop areas protected by pollution-control laws to do so despite those laws if they protect or improve similar areas in other parts of the country. Thus, developers buy mitigation credits to offset the negative impact that their projects will have on land that is being developed elsewhere – an acre of wetlands purchased from a mitigation bank is used to replace the acre of marsh that was filled in another location.

A mitigation bank holds unrelated acres of land available for developers to purchase and use as a credit to offset the damage that they intend to do in the area they expect to develop. The facts and legal issues of this case arise not on behalf of developers, however, but on the other side of this arrangement – that of the mitigation investor. Plaintiff here has purchased environmentally sensitive land to hold in a mitigation bank, to sell to developers who seek credits to offset environmental damage at their own development sites.

The Army Corps of Engineers is in charge of the mitigation banking program; it has issued limited regulations establishing procedures for granting permits for such banks. One of the requirements of a mitigation bank is that it be held by the owner-applicant in perpetuity. Property held in the mitigation bank normally consists of wetlands that are located in river bottoms. If the Corps grants the landowner's application for a mitigation banking permit, the two parties enter a mitigation banking contract that spells out their duties and responsibilities.

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[1] Plaintiff is a limited liability corporation with its principal place of business in Titus County.

[2] "The use of credits may only be authorized for purposes of complying with Section 10/404 when adverse impacts are unavoidable." 60 Fed. Reg. 58607.

FACTS

Plaintiff's 4,000 acres lie along the Sulphur River and its tributaries in Titus County, Texas. It contacted the Army Corps of Engineers prior to purchasing the property, seeking assurances that the land would be suitable for a mitigation bank. At least one reservoir, the Marvin Nichols Reservoir, had been proposed for the region in which plaintiff's 4,000 acres is located, but the Corps communicated that it saw no impediments to creating a mitigation bank.

The State of Texas had implemented a new approach to water planning in 1997, where each regional planning group organized a state-approved water plan that was then adopted and integrated into a comprehensive state water plan. The state water plans were to be implemented every five years. The first plan was adopted in January 2002, and it made several recommendations for potential reservoir sites. Various sites were designated as having unique value; the Marvin Nichols Reservoir site was not among them.

The reservoir site is located in Region D, the Northeast Texas region**,** but the Marvin Nichols Reservoir would supply water to Region C, the Dallas-Fort Worth area. Residents of Region D were adamantly opposed to the use of tens of thousands of acres of land to serve the water needs of the Dallas-Fort Worth area. Region D had included the Marvin Nichols Reservoir in its 2001 regional water plan, but amended the plan in 2002 to change the Reservoir's status from a "proposed" site to a "potential" site.

The Corps sent public notices in 2004 to interested and affected parties upon receiving Hearts Bluff's application for a mitigation banking permit. In response, the Texas Water Development Board announced that the Marvin Nichols Reservoir would again be included in the regional water plans and insisted to the Corps that the Reservoir would become a less viable, if not infeasible, project if the mitigation bank were approved.

The Texas Water Development Board informed the Corps in the fall of 2005 that the Region C water plan would include Marvin Nichols Reservoir as a recommended water management strategy and it would be given the status "unique value." The Board emphasized that because plaintiff's land was designated for reservoir use in the 2006 Region C and 2007 State Water Plan the land might not exist in perpetuity. Federal criteria require that a proposed mitigation bank be on land

that is owned in perpetuity; Hearts Bluff had until that time been in compliance with all of the Corps' requirements for granting a mitigation bank permit. The Corps learned in June 2006 that the Marvin Nichols project had been included in the Region C plan and would be adopted in the 2007 State Water Plan with a recommendation that the reservoir be constructed.

The Corps denied Hearts Bluff's application in July 2006 because the mitigation bank was in the footprint of the proposed reservoir. The Corps explained that the inclusion of the Marvin Nichols project prevented Hearts Bluff's property from contributing to the long-term ecological functioning of the Sulphur River watershed. Plaintiff sought reconsideration of the July 2006 ruling, but that motion was denied in July 2008. The permitting process for mitigation banking does not include a means of appealing the Corps' decision.

Plaintiff sued the State of Texas and the Texas Water Development Board in state court, then amended its Complaint to include the Army Corps of Engineers as a defendant. The Corps removed plaintiff's suit to the United States District Court for the Western District of Texas and filed a motion to dismiss on jurisdictional grounds. State defendants sought remand of the case against them to state court. The federal district court transferred plaintiff's takings claim to this court in 2009. Hearts Bluff filed an original Complaint in this court on August 27, 2009. The federal court in Texas remanded plaintiff's suit against the State and the Board to state court, where it remains pending.

DISCUSSION

The Tucker Act provides this court "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . not sounding in tort." 28 U.S.C. §1491(a)(1)(2006). Because the Tucker Act does not create a substantive cause of action a plaintiff must identify a separate source of substantive law that creates the right to money damages in order to come within the jurisdictional reach and waiver of the Tucker Act. *See Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008) (citing *Fisher v. United States*, 402 F.3d 1167, 1171 (Fed. Cir. 2005)). The Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction. *See Jan's Helicopter Serv.*, 525 F.3d at 1309. We need not inquire into the merits of plaintiff's claim for

jurisdictional purposes, it suffices that the "statute, regulation, or constitutional provision that is the basis for the complaint 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained..." *Id.* at 1307 (quoting *United States v. Mitchell*, 463 U.S. 206, 217 (1983)). We have jurisdiction when a source of law is money-mandating "for the damage sustained," and "the plaintiff has made a nonfrivolous assertion that it is within the class of plaintiffs entitled to recover under the money-mandating source." *Id.* (quoting *Mitchell*, 463 U.S. at 217).

A complainant fails to state a claim when the facts he has asserted do not entitle him to a legal remedy. *See Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). The court is obligated to assume as true all of plaintiff's factual allegations and draw all reasonable inferences in plaintiff's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). We must dismiss a complaint for failure to state a claim "when the allegations in the complaint, however true, could not raise an entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

Plaintiff complains that the government, acting through the Army Corps of Engineers, took its property when the Corps denied plaintiff the necessary permit to create a mitigation bank. The issue concerning us is whether plaintiff has an interest that is capable of being taken. Plaintiff must show that it had a property interest in the land alleged to have been taken when the taking occurred. *See e.g. Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004), *cert. denied,* 545 U.S. 1139 (2005) ("[A]s a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment."). Such a finding is required because "only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001). Only after identifying a valid property interest should the court "determine whether the governmental action at issue amounted to a compensable taking of that property interest." *Am. Pelagic,* 379 F.3d at 1372. A plaintiff is disqualified from claiming a Fifth Amendment taking if he or she has no valid property interest. *See Wyatt*, 271 F.3d at 1096. Plaintiff's problem lies in the fact that operating a mitigation bank is not an inherent stick in a landowner's bundle. In other words, the right to operate a mitigation bank is not part and parcel to owning land in fee simple.

An inherent right of land ownership includes the freedom to change the face of those lands,

such as by dredging and landfilling. Although highly regulated, these are activities that were not created by the government, and each would retain a purpose if the government were to deregulate the industry. By contrast, mitigation banking would not exist in absence of government regulations, as it is entirely a creature of the government. Mitigation banking is not only made possible by the government, it would have no meaning or purpose without the application of related federal regulations. For example, if Section 404 permits did not require applicants to participate in mitigation banking, no incentive would exist for anyone to purchase mitigation credits; no reason would exist for an investor or a landowner to develop a mitigation bank. By contrast, even if the government were not involved in regulating the landfill industry, a landowner could still create a viable landfill business on his property because a market for dumping trash exists independent of the government. For a taking to occur, a party must have had the intent and capacity to develop the property and failed to do so because the State prevented him. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1033 (1992) (Kennedy, J. concurring). No landowner has the capacity to develop a mitigation bank absent the enabling regulations and involvement of the Corps of Engineers.

Defendant argues that Hearts Bluff had no right to "investment-backed reliance" on obtaining permission from the Corps to sell shares from its mitigation bank, citing *Mitchell Arms. See Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993). The plaintiff in *Mitchell Arms* was a federally-licensed arms importer who purchased assault rifles after his import permit had been suspended. He filed suit for an unlawful taking after the Customs Service refused entry of the rifles for lack of a valid import license. Mitchell's only asserted taking was of its "investment-backed reliance on the issued import permits," arguing that this reliance "constituted 'property' within the meaning of the Fifth Amendment." *Mitchell Arms*, 7 F.3d at 215. The Federal Circuit rejected plaintiff's argument, reasoning that the government's revocation of the import permit did not affect plaintiff's ownership of the rifles, and that plaintiff maintained his ability to do with the rifles as he wished, other than import them into the United States. *Id.* at 217.

Defendant is mistaken in its reliance on *Mitchell Arms.* The property in question in that case was personal rather than real; plaintiff's importation permit was revoked and Hearts Bluff was never granted a permit; and while the importation of assault weapons is highly regulated and illegal

without the proper permits, a market does exist for such an enterprise regardless of an agency's involvement.

The Federal Circuit's interpretation of *Mitchell Arms* in *Cienega Gardens* is more instructive. *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). The Circuit explained that in *Mitchell Arms*, the plaintiff's expectation of being able to import and then sell the weapons in the United States was a collateral interest, one that "comes into being only upon the issuance of an import permit." *Cienega Gardens*, 331 F.3d at 1336. Such a collateral interest is not innate to the property, and thus not a compensable interest capable of being taken. *Id.* The Circuit also addressed the *Mitchell Arms* court's determination that a plaintiff cannot support a takings claim in "an area subject to pervasive government control [because] 'when a citizen voluntarily enters such an area, the citizen cannot be said to posses the right to exclude.'" *Id.* (quoting *Mitchell Arms*, 7 F.3d at 216) (internal citations omitted). The Circuit specified that the *Mitchell Arms* holding that plaintiff lacked a valid property interest is limited to those cases in which "the interest at issue does not inhere to some property that the plaintiff owns independently." *Id.* (distinguishing *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), where the interest - the right to mine land - was inherent in the ownership rights that plaintiff held independent of the denied permits.). Similarly, the business of selling mitigation credits may not be seen as an innate right associated with owning land.

The Government argues that Hearts Bluff has not suffered a taking because, like the plaintiff in *Mitchell Arms*, it had merely an expectation. Hearts Bluff invested in land as a result of its expectation that the Corps would enter into a mitigation banking instrument and grant it a mitigation banking permit. The plaintiff in *Mitchell Arms* had an expectation that it would be able to sell the guns it purchased overseas in the United States. The Circuit held that this expectation was a collateral interest and thus not truly property. *Cienega Gardens*, 331 F.3d at 1336 (citing *Mitchell Arms*, 7 F.3d at 217). Entering into a mitigation banking instrument is likewise an interest that is collateral to purchasing the land, and it comes into being only upon the Corps' grant of a permit. Given the pervasive governmental control of mitigation banking, Hearts Bluff cannot say that it has an innate right as a landowner to sell mitigation credits.

Plaintiff has not asserted a property interest that could be the subject of a Fifth Amendment taking. At most, plaintiff has been deprived of its hope or expectation that it could create a mitigation bank and sell its land in credits. In such circumstances, a court should not address the facts surrounding permit denial because it lacks jurisdiction to hear the case. *See e.g. Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000), ("[t]he Government is not obligated to pay for [plaintiff's] expectations, but only to pay for the property interest taken."). Only after a compensable property interest has been identified should a court engage in a fact specific inquiry that takes into consideration factors such as investment backed expectations.

Even if we were to define plaintiff's interest in broader terms and find that a compensable property interest exists, we hold serious doubt that plaintiff would be able to satisfy other legal criteria that is necessary to demonstrate a taking.

Not only must a plaintiff have a property interest to allege a violation of the Fifth Amendment, the government must have acted legally and for the public good. The State of Texas is the entity that seeks use of and title to the land. The only action taken by the Corps that could be argued as constituting a taking is its denial to grant a mitigation banking permit. The taking, in this case the denial, must be for the benefit of the public. Mitigation banking exists for no other purpose than to promote and insure environmental preservation. The Corps is not duty bound to enter into mitigation banking instruments indiscriminately, but explaining how the decision not to grant a mitigation banking permit would benefit the greater good would be challenging indeed.

Neither party has fully addressed the ongoing action in Texas state court. If plaintiff is successful in receiving a judgment against the State of Texas for its appropriation of the land needed for the Marvin Nichols Reservoir, plaintiff will cease to hold title to that land. This has two possible effects on the action before us. Either the right to create a mitigation bank is attached to the land, in which case plaintiff would no longer have a takings claim because it would no longer own the land. Or, if the right to create a mitigation bank is separate from the land and is a contractual right, plaintiff would be limited to a claim for tortious interference with a contract, because a contract never existed between plaintiff and the Corps, and this court lacks jurisdiction over such a claim. *See Rick's Mushroom Serv. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008)("The plain

language of the Tucker Act excludes from the Court of Federal Claims jurisdiction [over] claims sounding in tort.").

CONCLUSION

A complainant fails to state a claim for which relief can be granted when its case "does not fit within the scope of the source." *Jan's Helicopter Serv., Inc.* 525 F.3d at 1307. In the context of a Fifth Amendment takings allegation, this language means a plaintiff has failed to state a claim when it cannot establish a valid property interest, because a plaintiff is not entitled to compensation without such an interest. Because we find that plaintiff's allegations, however true, do not establish a compensable property interest capable of being taken we must dismiss its Complaint for failure to state a claim.

SO ORDERED.

s/Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge