

2007-5176

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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JOHN,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

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APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS  
IN 06-CV-289, JUDGE CHRISTINE O.C. MILLER

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BRIEF OF DEFENDANT-APPELLEE UNITED STATES

STATEMENT OF RELATED CASES

Counsel for defendant-appellee is unaware of any other appeal in or from the proceeding below that previously was before this Court or any other appellate court under the same or similar title. Counsel for defendant-appellee states that appeals in prior related proceedings were previously before this Court in People of Bikini v. United States, 859 F.2d

1482 (Fed. Cir. 1988), and People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988), cert. denied, 491 U.S. 909 (1989). Additionally, a related case pending in People of Bikini v. United States, Fed. Cir. No. 2007-5175, may be directly affected by the decision in this appeal.

### JURISDICTIONAL STATEMENT

The United States disagrees with the jurisdictional statement of plaintiffs-appellants Ismael John, et al. (“appellants”) to the extent they assert that the United States Court of Federal Claims possesses jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491.

### STATEMENT OF THE ISSUES

1. Whether Congress has withdrawn Tucker Act jurisdiction over appellants’ claims.
2. Whether this case presents a nonjusticiable political question because appellants challenge the adequacy of a claims settlement negotiated as part of the Compact of Free Association between the United States and the Government of the Marshall Islands.
3. Whether appellants’ complaint is barred by the six-year statute of limitations, 28 U.S.C. § 2501.
4. Whether appellants lack standing to invoke the Just

Compensation Clause of the Fifth Amendment to the United States  
Constitution with respect to property located outside the sovereign territory  
of the United States.

5. Whether the complaint fails to state a claim upon which relief can be granted because appellants have not alleged the occurrence of a United States Government act since 1986 that deprived them of any property interest.

## STATEMENT OF THE CASE<sup>1</sup>

### I. Nature Of The Case

This is a suit for just compensation under the Takings Clause of the Fifth Amendment to the United States Constitution. Appellants are citizens of the Republic of the Marshall Islands (“RMI”), and their claims relate to the use of Enewetak Atoll by the United States during the nuclear testing program conducted in the Marshall Islands between June 1946 and August 1958.

Although framed as a takings case, this suit effectively challenges the claims settlement provisions of the Compact of Free Association (“Compact”) negotiated in the 1980s between the United States and the Government of the Marshall Islands to establish a relationship of free association between the two governments. As an integral part of the

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<sup>1</sup> In this brief, “App. Br. \_\_\_” refers to appellants’ principal brief, dated December 21, 2007; “A\_\_\_” refers to the parties’ joint appendix; and “Compl. \_\_\_” refers to appellants’ amended complaint filed in the Court of Federal Claims on August 10, 2006.

Compact negotiations, the parties agreed to settle claims against the United States arising from the nuclear testing program. Toward this end, the Government of the Marshall Islands espoused the claims of its citizens, and settled the claims for a \$150 million payment by the United States.

A316. In exchange, the Marshall Islands agreed to establish a tribunal to hear and decide claims arising from the nuclear testing program, and to pay any tribunal awards from the settlement funds. A320-21. The Compact also includes a “changed circumstances” provision that authorizes the RMI to petition Congress for additional funds under specified conditions. A323.

The people of the Marshall Islands approved the Compact in voting plebiscites monitored by international observers from the United Nations. A24. In turn, the United States Congress ratified the Compact as a “full and final settlement” of all “claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States.” A255, 324. To further this objective, Congress enacted the Compact’s provision that “[n]o court of the United States shall have jurisdiction to entertain such claims.” A255, 324.

In 2000, the RMI Nuclear Claims Tribunal (“Tribunal” or “NCT”)

awarded appellants \$385.9 million upon claims arising from the nuclear testing program. A118. According to the appellants, the tribunal has insufficient funds to pay the award, and the RMI has submitted a “changed circumstances” petition to Congress for additional appropriations. A124. Congress has yet to act on the request, although hearings continue to be held on the matter in the current Congress. See [An Overview of the Compact of Free Association Between the United States and the Republic of the Marshall Islands: Are Changes Needed?: Hearing and Briefing Before the Subcommittee on Asia, the Pacific, and the Global Environment of the Committee on Foreign Affairs House of Representatives](#), 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 25, 2007) (available at <http://foreignaffairs.house.gov/110/36989.pdf>). Additionally, the United States and the RMI renegotiated and amended the Compact in 2004, although the issue of additional compensation for nuclear claims was not addressed. Id. at 3-4.

In the meantime, and notwithstanding Congress’ withdrawal of jurisdiction, appellants filed this suit in the Court of Federal Claims, contending that Congress’ failure to fund the Tribunal award, over and above the settlement amount, constituted a taking of Enewetak Atoll (the

“land-based” takings claims), as well as a taking of their claims before the Tribunal (the “claims-based” takings claims). Appellants seek in excess of \$384 million for the tribunal award, less amounts paid by the tribunal to date.

## II. Course Of Proceedings Below

Appellants filed a complaint on April 12, 2006, and an amended complaint on August 10, 2006, asserting claims under both contract and takings theories. A74-77. On September 18, 2006, the United States moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Court of Federal Claims Rules (“RCFC”) 12(b)(1) and 12(b)(6). Following oral argument and supplemental briefing, the Court of Federal Claims granted the United States’ motion to dismiss by decision dated August 2, 2007. Ismael John, et al. v. United States, 77 Fed. Cl. 788 (2007); A53. The court based its decision upon several alternative grounds, including the statute of limitations, withdrawal of jurisdiction by Congress, the political question doctrine, collateral estoppel, and failure to state a claim upon which relief can be granted.

Although the grounds for its decision varied, at bottom, the Court of Federal Claims correctly concluded that appellants’ remedy, if any remedy is due from the United States, is within the discretion of Congress and the Executive Branch, not the courts. As the court recognized, this case involves foreign nationals whose country has espoused and settled their

claims in the context of an international compact. Challenges to the adequacy of that settlement – by the RMI, its citizens, or otherwise – are nonjusticiable. The Compact withdraws Federal court jurisdiction in clear terms and, instead, authorizes the RMI government to petition Congress for additional relief on behalf of RMI citizens. The RMI has done so, and its request is pending in Congress, where it belongs. Placing such disputes in the courts not only contravenes the clearly expressed intent of Congress, but would also inject uncertainty into the full range of medical, radiological, rehabilitation, resettlement, and compensation programs that were carefully negotiated by the two countries in the Compact, and which continue to be implemented to this day.

Appellants filed a notice of appeal on September 27, 2007. A8. This appeal involves appellants' takings claims; appellants do not appeal from the dismissal of their remaining counts.

#### STATEMENT OF FACTS

The underlying facts and the procedural history of these cases are extensive, and cover a span of more than 60 years. Rather than repeat those facts here, we respectfully refer the Court to the exhaustive statement of facts contained in the Court of Federal Claims' decision. A11-37. In this

brief, we reference the specific facts from that decision that are relevant to our arguments below.

Additionally, the United States notes that appellants' statement of facts consists mainly of factual allegations drawn from their complaint below. Because appellants' complaint was dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, we treat their factual allegations as true for purposes of this appeal, although we do not agree with the entirety of the allegations. See, e.g., Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564, 1568-69 (Fed. Cir.1993).

#### SUMMARY OF THE ARGUMENT

The Court of Federal Claims correctly held that it lacked subject matter jurisdiction to entertain appellants' claims. In the Compact Act, Congress has expressed an unambiguous intention to withdraw Tucker Act jurisdiction for all claims arising from the nuclear testing program, including appellants' claims-based takings claims (Counts III and IV), as well as their land-based takings claims (Counts I and V).

The Court of Federal Claims judgments of dismissal can be affirmed on several alternative grounds. The political question doctrine forecloses judicial review of appellants' claims because those claims challenge the adequacy of an international settlement agreement and recognition of a

foreign government – responsibilities charged to the Executive and Legislative branches of government.

Appellants' claims are also barred by the six-year statute of limitations because they are based upon the United States' decision to enter into the Compact and the "Section 177 Agreement," i.e., acts that became effective in 1986. In this regard, appellants' pursuit of relief from the RMI nuclear claims tribunal does not affect the accrual of their claims because Congress has not expressly required the exhaustion of any remedies as a prerequisite to a Tucker Act suit challenging the adequacy of a tribunal award. Moreover, assuming for argument's sake that appellants original, reasserted takings claims accrued in 1980 (as they contend), their takings claims in Count I would be late by 20 years.

Additionally, the judgment below can be affirmed upon the ground that appellants, as nonresident aliens, lack standing to invoke the protections of the Takings Clause with respect to foreign property.

Finally, the Court of Federal Claims correctly held that the complaint fails to state claims upon which relief can be granted. Because the Compact agreements and the funds provided under them are in full settlement of all of appellants' claims, appellants cannot establish a

property interest in receiving additional funds, including payment of the amount awarded by the Tribunal. Even assuming that appellants could allege a cognizable property interest, they fail to allege any action of the United States that deprived them of any property interest.

## ARGUMENT

### I. Standard Of Review

A decision of the Court of Federal Claims dismissing a complaint pursuant to Rules 12(b)(1) and 12(b)(6) is subject to de novo review by this Court. See Shearing v. United States, 992 F.2d 1195, 1195 (Fed. Cir.1993); Adams v. United States, 391 F.3d 1212, 1218 (Fed. Cir. 2004).

### II. Congress Has Withdrawn Tucker Act Jurisdiction To Entertain Claims Arising From The Nuclear Testing Program

The central jurisdictional issue in this case is whether Congress has withdrawn the consent of the United States to be sued upon appellants' claims. In its decision, the Court of Federal Claims answered this question in the affirmative, stating that the "unambiguous express provision" of the Compact Act and its related "Section 177 Agreement" effected a "withdrawal of jurisdiction regarding claims that arise from the Nuclear Testing Program . . . ." A59. The court confined its holding to appellants' "claims-based" takings claims – at least to the extent they were premised

upon the taking of breach-of-contract claims (Count IV). A61-62. With respect to appellants' remaining takings claims, the court declined to address the issue of the withdrawal of jurisdiction, relying instead upon its alternative ruling based upon the statute of limitations. A62.

Despite the limited nature of its decision, the Court of Federal Claims' judgment of dismissal should be affirmed. As explained below, the Compact Act has withdrawn jurisdiction over all claims arising from the nuclear testing program, including appellants' claims-based takings claims (Counts III and IV) and their land-based takings claims (Counts I and V).

A. Appellants Are Collaterally Estopped From  
Relitigating The Withdrawal Of Jurisdiction Issue

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As an initial matter, appellants are barred by the doctrine of collateral estoppel from relitigating the withdrawal of jurisdiction issue. Collateral estoppel applies where: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issues in the prior litigation must have been "a critical and necessary part" of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must

have had a full and fair opportunity to litigate the issue in the prior proceeding. See Dana v. E.S. Originals, Inc., 342 F.3d 1320, 1323 (Fed. Cir. 2003).

In 1987, the Claims Court held that the Compact Act withdrew Tucker Act jurisdiction with respect to claims arising from the nuclear testing program. Juda v. United States, 13 Cl. Ct. 667, 690 (1987) (“Juda II”). This Court affirmed Juda II’s holding in appellants’ prior appeal. People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988).

Based upon these decisions, the Court of Federal Claims held that appellants were collaterally estopped from relitigating the jurisdictional issue with respect to their contract claims. A56. In contrast, the court held that appellants were not collaterally estopped from relitigating this issue with respect to their takings claims (Counts III-V) due to language contained in the Enewetak and Juda II opinions noting that some of appellants’ takings assertions were “premature” and could not be judicially challenged “at this time.” A56-57. We respectfully submit that the court erred in this latter regard because the referenced statements in Enewetak and Juda II are dicta.

In Juda II, appellants argued, among other things, that the Compact

Act was unconstitutional because it did not provide advance assurance of just compensation. 13 Cl. Ct. at 689. In its decision, the Claims Court noted that this assertion was “premature” because the alternative procedure for compensation could not be “challenged judicially” until the process “has run its course.” Id.

The court did not hold, however, that appellants were entitled to bring their constitutional challenge at a later time. Rather, the court ultimately held, without qualification, that the “consent of the United States to be sued in the Claims Court on plaintiffs’ taking claims . . . that arise from the United States’ nuclear testing program in the Marshall Islands has been withdrawn.” Id. at 690. In other words, the court reasoned that, but for the Compact Act’s withdrawal of jurisdiction, appellants’ constitutional challenge would have been dismissed as premature. But because jurisdiction “to be sued in the Claims Court” had been withdrawn, that issue was effectively rendered moot. Thus, Juda II’s characterization of appellants’ constitutional challenge as “premature” was dicta.

For this reason, the Court of Federal Claims incorrectly assumed that this Court affirmed the judgment in the Peter/Enewetak case upon ripeness grounds. The appeal in Enewetak presented multiple issues, not all of

which were decided by this Court. Notably, the Claims Court held that the Enewetak plaintiffs' takings claims were barred by the statute of limitations. Peter, et al. v. United States, 6 Cl. Ct. 768, 775 (1984) ("Peter I"). In subsequent proceedings, the court also dismissed the plaintiffs' "remaining claims" – i.e., their contract claims – upon the ground that the Compact Act withdrew Tucker Act jurisdiction. Peter, et al. v. United States, 13 Cl. Ct. 691, 692 (1987) ("Peter II").

On appeal, this Court affirmed the judgment solely upon the ground that jurisdiction had been withdrawn, and did not reach other issues. Enewetak, 864 F.2d at 136 & n.4 ("Because we affirm the decision of the Claims Court to dismiss appellants' complaints for lack of subject matter jurisdiction, we need not address other issues."). Specifically, the Court affirmed the Claims Court's holding that "it lacked subject matter jurisdiction over claims by inhabitants of the Marshall Islands because the consent of the United States to be sued on those claims had been withdrawn by an act of Congress in conjunction with the establishment of a Marshall Islands Claims Tribunal funded by the United States." 864 F.2d at 135.

Although the Court noted that "judicial intervention is [not] appropriate at this time," the Court did not hold, and did not need to rule, that the

Enewetak plaintiffs were entitled to bring their takings claims at a later time. Indeed, to make such a holding, the Court would have had to consider and reverse, sub silentio, the Claims Court's extensive analysis in Peter I, which concluded that the takings claims of the Enewetak plaintiffs were barred by the statute of limitations. Such a conclusion is untenable, particularly in the face of this Court's express statement that it was not deciding other issues.

Because the referenced statements in Enewetak and Juda II are dicta, they do not prevent those decisions from having preclusive effect. Accordingly, the judgment should be affirmed upon the ground that appellants are collaterally estopped from relitigating the issue whether Congress has withdrawn jurisdiction over their claims.

B. Congress Withdrew Tucker Act Jurisdiction To Accomplish A Full And Final Settlement Of All Claims Arising From The Nuclear Testing Program

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Assuming that appellants may relitigate the issue of withdrawal of jurisdiction, it is just as clear today, as it was in 1987, that the "consent of the United States to be sued" upon appellants takings claims "has been withdrawn." Juda II, 13 Cl. Ct. at 690.

The primary grant of jurisdiction in the Court of Federal Claims is the Tucker Act, which extends in relevant part to "any claim against the United

States founded . . . upon the Constitution.” 28 U.S.C. § 1491(a)(1). This provision

“includes on its face all takings claims against the United States.” Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1362 (Fed. Cir. 2005) (citing Preseault v. Interstate Commerce Com'n, 494 U.S. 1, 12 (1990)).

Accordingly, Tucker Act jurisdiction is generally presumed to exist for takings claims unless Congress has expressed an “unambiguous intention” to withdraw its consent to suit. Lion Raisins, 416 F.3d at 1364 (quoting Preseault, 494 U.S. at 12).

Here, Congress’ intent to withdraw a Tucker Act remedy could not be more clear. As the Court of Federal Claims emphasized, Article X of the Section 177 Agreement, which is entitled “Full Settlement of All Claims,” states that the Agreement

constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, . . . including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including . . . the courts of the United States and its political subdivisions.

A323-24. Article XII of the Section 177 Agreement, entitled “United States

Courts,” then states:

All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

A324.<sup>2</sup>

The Section 177 Agreement – including these provisions terminating proceedings, depriving United States courts of jurisdiction, and requiring dismissal of all pending suits – is incorporated into the Compact by Section 177(c) of the statute. 99 Stat. 1812; A285. In turn, the Compact itself was enacted into United States law by Title II of the Compact of Free Association Act. 99 Stat. 1800; A273.

Congress reiterated its purpose to withdraw jurisdiction in Title I of the Compact of Free Association Act, which, inter alia, sets forth the legal and policy positions of the United States regarding the Compact that was enacted by Title II of the Act. Specifically, Section 103(g)(1) of the Act states that “(i)t is the intention of the Congress” that Section 177 of the Compact and the Section 177 Agreement “constitute a full and final

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<sup>2</sup> In Juda II, the Claims Court correctly held that “the word ‘terminated’ in the first sentence of Article XII applies to termination of proceedings, and not to extinguishment of the basic claims involved.” 13 Cl. Ct. at 686.

settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement.” 99 Stat. 1782; A255. Section 103(g)(2) of the Act further underscores Congress’ purpose in this regard by stating that the Section 177 Agreement – necessarily including the jurisdictional bar in Article XII – “is hereby ratified and approved” in “furtherance of the intention of Congress as stated in paragraph (1),” which is to accomplish a “full and final settlement” of all claims. 99 Stat. 1782; A255.

In this light, Congress has reflected an unambiguous intention to withdraw Tucker Act jurisdiction for all claims arising from the nuclear testing program, regardless of the theory alleged. Consequently, the Court of Federal Claims’ judgment should be affirmed upon this ground.

C. Appellants' Reliance Upon The Doctrine Of Constitutional Avoidance Is Misplaced

Relying principally upon Blanchette v. Connecticut General Ins. Corp., 419 U.S. 102, 134 (1974), appellants contend that there are “grave doubts” as to whether the Compact Act would be constitutional if a Tucker Act remedy is not available to compensate for any shortfall in compensation awarded by the Tribunal. App. Br. 38-42. Thus, appellants contend that, pursuant to the “doctrine of constitutional avoidance,” the Compact Act should be interpreted to exclude their claims because they are not “based upon” or “in any way related to” the nuclear testing program. App. Br. 46-47. Additionally, appellants argue that Article XII’s withdrawal of jurisdiction should be construed as being contingent upon a judicial determination of the validity of the Marshall Islands’ espousal of their claims. App. Br. 47-48. Appellants’ position fails for several salient reasons.

1. Appellants' Interpretations Are Not Plausible Constructions Of Article XII

First, as Blanchette makes clear, the doctrine of constitutional avoidance does not apply where, as here, a statute’s language is unambiguous. See Blanchette, 419 U.S. at 352; Salinas v. United States, 522 U.S. 52, 60 (1997). As the Supreme Court has explained, “[t]he canon

of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.” Clark v. Martinez, 543 U.S. 371, 380-81 (2005). Thus, to invoke the canon, there must be at least two “plausible statutory constructions” to adopt. Id. See also Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (“the statute must be genuinely susceptible to two constructions . . .”).

In this case, appellants’ proffered interpretations are not reasonable. The implausibility of their first contention is self-evident. Appellants’ complaint amply reveals that their claims, however characterized and under whatever legal theory pursued, are related to nothing other than the nuclear testing program conducted in the Marshall Islands. A74-77. Appellants’ unsupported parsings of the terms “related to,” “arising out of ,” and “based upon” cannot obscure this obvious fact. Indeed, in their Statement of the Case, appellants state that they are seeking “compensation for the taking of their land by the U.S. Government's weapons testing program in the Marshall Islands.” App. Br. 4.

Similarly deficient is appellants’ contention that Article XII should be

interpreted as being contingent upon the validity of the Marshall Islands' espousal of their claims. As a threshold matter, the Claims Court considered and rejected this very argument more than 20 years ago. Juda II, 13 Cl. Ct at 684-86. Appellants raised this argument in their 1988 appeal, but this Court affirmed the judgment that Tucker Act jurisdiction had been withdrawn. Enewetak, 864 F.2d at 135. Although the Court did not expressly reference the espousal argument, it necessarily decided the issue by adopting Juda II's analysis, id. at 137, which held that "Article XII is not made contingent upon a judicial determination of the validity of espousal in Article X." 13 Cl. Ct at 686. Thus, appellants are precluded from relitigating this issue. See Dana, 342 F.3d at 1323.

In any event, the jurisdiction-stripping effect of Article XII cannot be plausibly interpreted as contingent upon a judicial determination of the validity of the Marshall Islands' espousal. Relying exclusively upon Chief Judge Wald's concurring opinion in Antolok et al. v. United States, 873 F.2d 369 (D.C. Cir. 1989) , appellants argue that Section 103(g)(2) of the Compact Act, which provides that "the jurisdictional limitations set forth in Article XII . . . are not to be construed or implemented separately from Article X," means the United States "cannot invoke the withdrawal of

jurisdiction in Article XII unless it shows that the claims were validly extinguished by the purported settlement in Article X.” App. Br. 47-48.

We disagree. Nothing in Section 103(g)(2) remotely suggests an intention on the part of Congress to authorize or require a court to adjudicate the validity of the espousal before dismissing claims covered by Article X of the Agreement. To the contrary, that sentence confirms, in unconditional language, that the “jurisdictional limitations” in Article XII “are enacted.” A255. Moreover, as the court in Antolok held, the phrase “construed or implemented separately” simply clarifies that the “deprivation of jurisdiction applies not to all claims by the Marshall Islanders against the United States, but only those described in Articles X and XI of the Section 177 Agreement.” Antolok, 873 F.2d at 375 (“Congress could hardly have spoken more explicitly in stripping jurisdiction.”). Thus, there is no support for the proposition that Article XII’s jurisdictional limitations are contingent upon a judicial determination of the validity of the espousal.

Nor is appellants’ interpretation plausible. The settlement provisions and jurisdictional limitations are part of a Compact that affects important foreign policy and national defense interests of the United States. It was entered into only after extensive negotiations and was ratified by Congress

only after it had been approved in a United Nations-recognized plebiscite of the people of the Marshall Islands. In this context, it is simply inconceivable that Congress would have unilaterally amended such a bilateral agreement, and made the effectiveness of a diplomatic undertaking contingent upon judicial approval, without expressly stating its intention to do so.

These important considerations were not addressed in Chief Judge Wald's separate opinion in Antolok. Rather, Chief Judge Wald's principal concern stemmed from the suspicion that the Act was racially discriminatory – an issue that appellants do not argue here – and because Section 103(g)(2) was facially superfluous, *i.e.*, it “repeats what is already clear from other portions of the statute . . . .” 873 F.2d at 388-89. As the majority in Antolok noted, however, the apparent redundancy was hardly surprising and in no way unclear, given that Congress was ratifying an agreement previously negotiated by the Executive Branch, as opposed to enacting standalone legislation in the first instance. *Id.*, at 376 n.5 (“For the statute to expressly adopt an intent expressed in the Agreement is not a superfluity but is in fact the granting of force of statute to a provision previously bearing the force of compact or agreement.”).

As the Supreme Court has explained, “[s]tatutes should be construed

to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.” Salinas, 522 U.S. at 60 (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)) (citations omitted). Here, the Court cannot accept appellants’ interpretation without re-writing the Compact Act to include a condition that is not there. Thus, appellants’ invocation of the canon of constitutional avoidance is inapt.

2. A Withdrawal Of Jurisdiction Incident To  
An International Claims Settlement Does  
Not Raise Serious Constitutional  
Questions

Assuming the canon of constitutional avoidance applies, appellants have nevertheless failed to establish that our interpretation must be rejected because it raises serious constitutional questions. Appellants offer no reason why Congress cannot, within the bounds of the Takings Clause, withdraw Tucker Act jurisdiction over a class of claims that have been fully and finally settled. Indeed, in the proceedings below, appellants acknowledged that “[w]ithdrawing jurisdiction over claims that have been

validly settled and released is perfectly constitutional.” A407-08.<sup>3</sup>

Appellants correctly note that, in Blanchette, the Supreme Court expressed “grave doubts” as to whether the Regional Rail Reorganization Act of 1973 (“Rail Act”) would be constitutional if a Tucker Act remedy was not available for any taking not compensated under the Rail Act itself. 419 U.S. at 354. That case, however, did not involve a claims settlement. Nor did the Court hold that the “self-executing character” of the Takings Clause precludes Congress from withdrawing Tucker Act jurisdiction with respect to takings claims. App. Br. 42. To the contrary, this Court has recognized that “it is the responsibility of Congress, and of Congress alone to decide whether, and to what extent, it will permit the courts to help it fulfill its Constitutional obligations under the Takings Clause.” Zoltek Corp. v. United States, 442 F.3d 1345, 1367 & n.14 (Fed. Cir. 2006) (citing Lynch v. United States, 292 U.S. 571, 582 (1934)).

Indeed, prior to the passage of the Tucker Act in 1887, “Congress had sole responsibility for paying takings claims. No judicial relief was

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<sup>3</sup> Additionally, as we demonstrate in Part V below, serious constitutional questions do not exist here because the Constitution does not confer just compensation rights for alien-owned overseas properties.

available.” Id. at 1367 n.14 (citing Langford v. United States, 101 U.S. 341, 343 (1879)). See also Lion Raisins v. United States, 58 Fed. Cl. 391, 397 & n.4 (2003) (“Property owners who claimed that their property was taken without just compensation had only one remedy [prior to the Tucker Act]: they could submit a private bill to Congress in the hopes that Congress would grant them relief.”). Thus, serious constitutional questions do not arise merely because the Compact Act requires appellants, through their government, to petition Congress for additional relief. Rather, the Act effectively places appellants in no different a position than U.S. citizens enjoyed prior to the Tucker Act. To the extent appellants contend that this requirement is somehow improper, their remedy lies with Congress, not the courts. See Zoltek, 442 F.3d at 1349 n.2 (“the power to limit a Congressional abuse of sovereign immunity lies in the political process rather than the judicial branch.”).

In any event, the circumstances that raised “grave doubts” in Blanchette are not present here. In that case, the Court’s concern stemmed from the nature of the compensation offered under the statute in question – i.e., not money, but common stock in an “unproved entity” of highly questionable value, perhaps zero, 419 U.S. at 355 & n.21 – coupled

with Congress' apparent determination that it would not appropriate any funds "beyond those expressly committed by the Act." 419 U.S. at 350. In stark contrast, the Compact Act provided monetary compensation to settle outstanding claims. Further, Congress has not expressed an intention to limit compensation to the funds committed by the Act but, rather, has provided procedures for the discretionary provision of additional funding. See Enewetak, 864 F.2d at 136 (noting "Congress's concern that its alternative provision for compensation be adequate."). Thus, appellants' reliance upon Blanchette is unavailing.

3. The Government Of The Marshall  
Islands Validly Espoused Appellants'  
Claims

Finally, appellants' challenge to the espousal lacks merit. They contend that the Marshall Islands government violated a "universally recognized" rule of international law that the claim espoused "must be continuously held by a national of the espousing state from the time of the wrong at least to the date of the espousal." App. Br. 48. In this regard, appellants contend that the Enewetak people were not Marshall Islands citizens at the time their land was allegedly taken but, rather, were

inhabitants of a U.N. Trust Territory administered by the United States. Thus, they assert that their claims are “domestic claims” that cannot be espoused. App. 48-51.

Appellants’ position is not well-founded. Contrary to their assertions, the legal status of the Trust Territory has been consistently held to be either a “foreign country” or something other than a Federal agency of the United States in numerous contexts. Juda v. United States, 6 Cl. Ct. 441, 457 (1984) (“Juda I”). The Court of Claims long ago recognized that citizens of the Trust Territory were not U.S. citizens, and the Trust Territory was not part of the sovereign territory of the United States. See Porter v. United States, 496 F.2d 583, 587-90, 204 Ct. Cl. 355 (1974), cert. denied, 420 U.S. 1004 (1975) (“Inhabitants of the islands are citizens of the Territory, not of the United States.”). And upon adoption of the Marshall Islands Constitution in 1979, Trust Territory citizens became citizens of the Marshall Islands, not citizens of a commonwealth or territory of the United States. Constitution of the Republic of the Marshall Islands, Article XI, Section 1.

Consequently, appellants’ assertion that their claims are “domestic claims” is misplaced. As the Claims Court recognized, the Government of the

Marshall Islands gradually assumed sovereign authority from the first days of Trusteeship until, through constitutional self-government, it became the legally recognized successor to the Trust Territory Government. See Juda II, 13 Cl. Ct. at 686 (noting that “[t]he facts of these cases, however, do not accord with the rationale for the [continuity of nationality] doctrine.”). That government had full authority to espouse the claims of the citizens of the Marshall Islands, and, under the Compact, it validly settled and extinguished those claims under long-standing principles of international law. See I. Brownlie, Principles of Public International Law, 481-482 (3rd ed. 1979).

In sum, the Compact Act is “unambiguous on the point under consideration,” Salinas, 522 U.S. at 60 – the Act reflects a clear and unconditional congressional intent to withdraw Tucker Act jurisdiction. Accordingly, the judgment of dismissal should be affirmed upon this ground alone.

### III. Appellants’ Claims Present A Nonjusticiable Political Question

Should the Court conclude that the Compact Act does not withdraw jurisdiction over any of appellants’ claims, the judgment of dismissal can be affirmed upon the alternative ground that appellants’ claims present a

nonjusticiable political question. The Court of Federal Claims held that the political question doctrine foreclosed judicial review because appellants' claims "explore the formation of an international agreement and recognition of a foreign government, responsibilities charged to the Executive and Legislative branches of government." A71-72. As explained below, the court's decision in this regard is correct and should not be disturbed.

A. These Appeals Challenge Foreign Policy Decisions That  
Are Beyond the Scope of the Judiciary

The "political question doctrine" excludes from judicial review "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986). In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court set forth six tests for determining the presence of a nonjusticiable political question, most notably "'a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (quoting Baker, 369 U.S. at 217). Each Baker test is independent and, thus, a court need only find that one factor is "inextricably present" in the

facts and circumstances of the case to conclude that the doctrine bars review. El-Shifa Pharmaceutical Ind. Co. v. United States, 378 F.3d 1346, 1362 (Fed. Cir. 2004) (citing Baker, 369 U.S. at 217).

Most if not all of the Baker factors are present in this case. The gravamen of appellants' complaint is that the United States took their property by providing inadequate funding to RMI's Claims Tribunal. Compl. ¶¶ 2-4; A75-76. In this regard, appellants contend that the United States is now obligated to pay over \$385 million more than the \$150 million amount provided for in the Section 177 Agreement. As shown above, however, the Section 177 Agreement was a "full and final settlement" of all claims against the United States arising out of the nuclear testing program. See Juda II, 13 Cl. Ct. at 684 ("[T]here is no dispute that Congress intended . . . that Compact § 177 was to include a full and final settlement of all claims . . .").

Thus, appellants' theory of takings liability centers upon the alleged inadequacy of an international claims settlement. Appellants challenge not only the sufficiency of the settlement amount, but also the espousal and, by extension, the United States' decision to recognize the Marshall Islands government as having the capacity to espouse and settle claims of its citizens. In their brief, they directly challenge the validity of the espousal

upon several grounds. App. Br. 48-51. Appellants must do this, of course, because if their claims were validly espoused, they would have no claim against the United States.<sup>4</sup>

These types of political and policy questions are beyond the power of this or any Court to consider. Although not every case or controversy that “touches foreign relations” lies beyond judicial cognizance, Baker, 369 U.S. at 211, the power to conduct foreign relations necessarily includes the power to settle claims of nationals incident to the recognition a foreign sovereign, and a diplomatic agreement accomplishing those ends conclusively binds the courts. United States v. Pink, 315 U.S. 203, 229-30 (1942) (citing United States v. Belmont, 301 U.S. 324, 328 (1937)). Similarly, this Court has held that judicial review into the adequacy of the terms of an international claims settlement is barred by the political question doctrine due to the president’s constitutionally-committed foreign relations role. See Belk, et al. v. United States, 858 F.2d 706, 710 (Fed. Cir. 1988).

Belmont and Pink are particularly instructive here. Those cases arose from the Litvinov Assignment, in which the United States and the

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<sup>4</sup> In the proceedings below, appellants acknowledged that “[w]ithdrawing jurisdiction over claims that have been validly settled and released is perfectly constitutional.” A407-08.

Soviet Union agreed to a settlement of claims and counterclaims between the two governments and their nationals in conjunction with the United States' recognition of the Soviet Union. Belmont, 301 U.S. at 326. The Soviet Government agreed not to enforce the nationalized claims of its citizens against American nationals, and to release and assign those claims to the United States, so that outstanding claims of other American nationals against the Soviet Union could be paid. Id.

The Court in Belmont, rejecting a New York bank's challenge to United States authority to collect funds deposited by a Russian corporation, held that “responsibility for recognition or non-recognition with the consequences of each rests on the political advisors of the Sovereign and not on the judges.” 301 U.S. at 329-330 (citation omitted). Noting that the two governments had agreed to claims settlement as an integral part of recognition and the exchange of ambassadors, the Court stated:

The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence. The recognition, establishment of diplomatic relations, the assignment, and agreement with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof

were within the competence of the President may not be doubted.

301 U.S. at 330.

As here, it was asserted in Belmont that the claims settlement violated the Just Compensation Clause of the Fifth Amendment. Id. at 332. The Court held that “[w]hat another country has done in the way of taking over property of its nationals . . . is not a matter of judicial consideration.” Id. (emphasis added). Rather, “[s]uch nationals must look to their own government for any redress to which they may be entitled.” Id.

Five years later, the Supreme Court again upheld the Litvinov Assignment in United States v. Pink, reaffirming its holding that “[w]hat government is to be regarded here as representative of a foreign state is a political rather than a judicial question.” 315 U.S. at 229 (quoting Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938)). Significantly, the Court explained:

That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.

315 U.S. at 229.

The Court explained that removal of “such obstacles to full recognition” as

the claims of nationals “is a modest implied power of the President who is the ‘sole organ of the federal government in the field of international relations.’” 315 U.S. at 229 (quoting United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936)).

Indeed, the “[e]ffectiveness in handling the delicate problems of foreign relations requires no less,” for:

Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals.

Recognition and the Litvinov Assignment were

interdependent. We would usurp the executive function if

we held that that decision was not final and conclusive in

the courts.

Id. at 229-230 (citation omitted).

For these same reasons, the Court of Federal Claims correctly held that there is a “textually demonstrable constitutional commitment” of the issue in this case to Congress and the Executive Branch. Baker, 369 U.S. at 217. In addition, appellants’ claims cannot be resolved without

expressing a lack of respect due coordinate branches of Government, or creating the potential “embarrassment from multifarious pronouncements by various departments on one question.” Id. These factors are particularly applicable in this case because Article IX of the Section 177 Agreement provides a process for presenting a request to Congress for its consideration, and the RMI has availed itself of that avenue. A326-330. As noted above, Congress is considering that request. See Hearings Before the Subcommittee on Asia, the Pacific, and the Global Environment of the Committee on Foreign Affairs House of Representatives, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 25, 2007) (available at <http://foreignaffairs.house.gov/110/36989.pdf>).

Allowing this action to proceed would signal to Congress this Court’s belief that Congress will not appropriately act upon RMI’s request for additional funds. The Court of Federal Claims could render a decision that directly conflicts with Congress’ disposition of RMI’s request, causing confusion, embarrassment, and more litigation. Moreover, allowing this action to proceed would express disrespect for the prior Administration and Congress that negotiated, entered into, and enacted the Compact, the Section 177 Agreement, and the Compact Act.

B. This Case Does Not Entail Solely Quintessential  
Judicial Functions, Or The Exercise Of Domestic  
Policy

Appellants broadly argue that their claims do not raise political questions but, rather, involve quintessential judicial functions, such as determining the amount of just compensation, and interpreting statutes and treaties. App. Br. 53.

This argument misses the mark. The Supreme Court has eschewed the type of “semantic cataloguing” advocated by appellants in favor of a discriminating, case-by-case analysis into the “particular question posed.” Baker, 369 U.S. at 211-12. To determine whether a question falls within the political question category, courts consider the history of the question’s “management by the political branches,” “its susceptibility to judicial handling in the light of its nature and posture in the specific case,” and “the possible consequences of judicial action.” Id.

Under such an analysis, this Court has not hesitated to apply the political question doctrine in takings and non-takings cases alike, particularly where, as here, the case implicates the president’s constitutional power to conduct the foreign relations of the United States. See, e.g., El-Shifa, 378 F.3d 1346; Belk, 858 F.2d at 710; Kwan v. Unites

States, 272 F.3d 1360, 1364 (Fed. Cir. 2001). In contrast, the political question doctrine may not foreclose judicial review for cases that, although arising in a foreign relations context, present discrete issues that do not encroach upon the foreign policy powers of the political branches.

A prime example of this dichotomy is illustrated by two cases arising from the Algerian Accords, the international agreement that precipitated the resolution of the 1979 Iranian hostage crisis. In Dames & Moore v. Regan, 453 U.S. 654 (1981), the Supreme Court addressed a narrow question of Executive authority related to the Accords – i.e., whether the president was authorized, under the Constitution and by statute, to nullify and transfer property interests in Iranian property. Id. at 662. Although the Court did not expressly discuss the political question doctrine, the issue presented, being framed as a discrete question of Executive authority, was clearly justiciable. See Baker, 369 U.S. at 211 (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”) (emphasis added).

In contrast, three years after Dames was decided, this Court held that takings claims challenging the adequacy of the settlement terms embodied in the Algerian Accords presented a nonjusticiable political question. Belk, 858 F.2d at 710. In Belk, this Court explained that, in contrast to the question of authority addressed in Dames, the determination “whether and upon what terms to settle the dispute with Iran over its holding of the hostages and obtain their release, necessarily was for the President to make in his foreign relations role.” Id. The Court further held that the “determination was ‘of a kind clearly for nonjudicial discretion,’ and there are no ‘judicially discoverable and manageable standards’ for reviewing such a Presidential decision.” Id. (quoting Baker, 369 U.S. at 217).

In this light, the cases cited by appellants, App. Br. 55-56, are easily reconcilable with the trial court’s decision in this case. For example, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986), did not present a political question because the case involved a “purely legal question of statutory interpretation” – i.e., whether the Secretary of Commerce violated a non-discretionary statutory obligation to certify Japan for harvesting whales in excess of treaty quotas. 478 U.S. at 230. Moreover, Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S.Ct. 2669, 2684

(2006), did not involve the political question doctrine but, rather, addressed whether the United States is bound by an interpretation of the Vienna Convention rendered by the International Court of Justice. Id.

Likewise, another case cited by appellants, Langenegger, et al. v. United States, 756 F.2d 1565, 1569 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985), involved the “narrow issue” whether El Salvador’s expropriation of the Langenegger’s land was the result of direct pressure by the United States. Id. Significantly, Langenegger involved no government-to-government settlement of the plaintiffs’ claims pursuant to a diplomatic agreement, no issue of El Salvador’s capacity to settle claims or the United States’ recognition of that authority, and no question of whether foreign nationals may ask United States courts to review their government’s settlement. Rather, the Court emphasized that the Langeneggers explicitly accepted that El Salvador’s “expropriation was valid.” Id. The Court thus concluded that “this is a claim of narrow focus, requiring no second-guessing of the executive branch or detailed inquiry into the ulterior motives of the two governments.” Id. at 1570.

Here, in contrast, appellants do not accept the Marshall Islands’ espousal. Rather, as in Pink, appellants’ position amounts to a

“disapproval or non-recognition” of the espousal and settlement, as well as the United States’ acceptance of those actions. 315 U.S. at 232. And just as it was improper for the New York courts to review the legality of the Soviet nationalization decrees in Pink, so too, the Court of Federal Claims may not pass upon the validity of the Marshall Islands’ espousal because both situations involved an act that “the United States by its policy of recognition agreed no longer to question.” 315 U.S. at 231. Further, as in Belk, the Court of Federal Claims may not second-guess the adequacy of settlement terms negotiated and agreed upon by the United States and the Marshall Islands. Rather, the policy by which the United States agreed to recognize the Government of the Marshall Islands, including whether and under what terms nuclear claims would be settled, involves inherently political questions that are beyond the judicial ken. See Antolok et al. v. United States, 873 F.2d 369, 379-84 (D.C. Cir. 1989) (opinion of Sentelle, J.).

Accordingly, the Court of Federal Claims correctly concluded that this action raises a nonjusticiable political question. Appellants’ remedy, if any is due from the United States, is within the discretion of Congress and the Executive Branch, and not the courts.

#### IV. Appellants' Claims Are Barred By The Statute Of Limitations

In its decision, the Court of Federal Claims held that appellants' claim-based takings claims (Counts III and IV), as well as their land-based takings claims related to the Compact (Count V), were barred by the six-year statute of limitations, 28 U.S.C. § 2501. A40-41. Alternatively, the court indicated that Counts III and IV were "premature" because appellants' Changed Circumstances petition in Congress is still pending. A41-42. In contrast, the court did not address the timeliness of appellants' original land-based takings claims (Count I); instead, the court held that Count I was barred by the doctrine of collateral estoppel because it was identical to Count I in Peter I, which the Claims Court previously dismissed upon statute of limitations grounds. A56.<sup>5</sup>

As explained below, should the Court conclude that Tucker Act jurisdiction has not been withdrawn, and that appellants' claims do not raise political questions, the judgment of dismissal can be affirmed upon the alternative ground that appellants' claims are time barred.

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<sup>5</sup> Appellants argue that the timeliness of Count I is still open for review because that issue was raised, but not decided, in the 1988 Enewetak appeal. We agree. See Masco Corp. v. United States, 303 F.3d 1316, 1330 (Fed. Cir. 2002). Nevertheless, as shown below, Count I is time barred for the same reasons identified in Peter I.

A. Appellants' Original Claim For The Taking Of  
Enewetak Atoll (Count I) Is Time Barred

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The consent to suits against the United States in the Court of Federal Claims is limited by 28 U.S.C. § 2501, which provides that “[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”

The court’s six-year statute of limitations has been held to constitute a jurisdictional condition upon the sovereign's consent to suit. Soriano v. United States, 352 U.S. 270, 276 (1957); John R. Sand & Gravel Co. v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 750 (2008); Martinez v. United States, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc).

As noted above, in 1984, the Claims Court held that the takings claims of the Enewetak people were barred by the statute of limitations because the claims accrued upon the cessation of nuclear testing in 1958. Peter I, 6 Cl. Ct. 768, 775 (1984). The court’s analysis in this regard was based upon the “stabilization principle” set forth in United States v. Dickinson, 331 U.S. 745 (1947). Id.

In their brief, appellants acknowledge that Count I of their complaint is

a “revived version” of their 1982 claim. App. Br. 13. Nevertheless, appellants seek to avoid the holding in Peter I for two reasons, neither of which has merit.<sup>6</sup>

1. The Compact Act Did Not “Re-set” The Statute Of Limitations

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<sup>6</sup> For purposes of this argument, we assume (but do not concede) that the Claims Court correctly applied Dickinson’s stabilization rule to the facts of this case. Unlike this case, the taking in Dickinson resulted from the Government’s construction of a dam that intermittently flooded the property of nearby landowners. The Supreme Court held that, when the Government allows a taking of land to occur by a continuing process of physical events, plaintiffs may postpone filing suit until the “situation becomes stabilized.” 331 U.S. at 749. Since that time, however, this Court has recognized that “the Supreme Court [has] ‘more or less limited [Dickinson] to the class of flooding cases to which it belonged . . . .” Fallini v. United States, 56 F.3d 1378, 1381-82 (Fed. Cir.1995) (quoting Kabua v. United States, 212 Ct. Cl. 160, 546 F.2d 381, 384 (1976)).

First, appellants contend that the Compact Act “effectively re-set the limitations clock” because Congress ““accepted responsibility for the just compensation owing for loss or damage resulting from its nuclear testing program.”” App. Br. 27 (quoting Enewetak, 864 F.2d at 136). We disagree. As a condition upon the sovereign’s consent to suit, statutes of limitations cannot be implied but, rather, must be unequivocally expressed, with any ambiguities strictly construed in favor of the sovereign. Soriano, 352 U.S. at 276. Thus, when Congress intends to waive an expired limitations period, it does so expressly.<sup>7</sup>

Appellants, however, do not identify any language in the Compact Act that remotely demonstrates that Congress intended to “re-set” a limitations

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<sup>7</sup> See, e.g., Pub. L. 105-277, § 741 (codified at 7 U.S.C § 2279 note):

SEC. 741. WAIVER OF STATUTE OF LIMITATIONS. (a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act, shall not be barred by any statute of limitations. . . .

(d) The United States Court of Federal Claims and the United States District Court shall have exclusive original jurisdiction over . . . (1) any cause of action arising out of a complaint with respect to which this section waives the statute of limitations . . . .

period that had been expired for nearly a quarter century. The fact that Congress “accepted responsibility” for compensation arising from the nuclear testing program does not mean that Congress intended to waive sovereign immunity or re-set a new limitations period. Rather, as shown above, Congress’ manifest purpose was to fulfill the United States’ responsibility by accomplishing a full and final settlement, without further litigation. Thus, appellants’ contention that Congress “effectively re-set the limitations clock” lacks merit.

2. Appellants' Claims Accrued Upon The  
Cessation Of Nuclear Testing In 1958

Second, appellants contend that, contrary to the holding in Peter I, their claims are timely because they accrued in April 1980, when the Enewetak people were permitted to return to the Atoll. App. Br. 33. This argument is inconsequential, however. Even if the claims in Count I accrued in 1980, they still would be late by 20 years.

In any event, appellants have not shown that the Peter I was wrongly decided. Relying principally upon Applegate v. United States, 25 F.3d 1579 (Fed. Cir. 1994); and Banks v. United States, 314 F.3d 1304 (Fed. Cir. 2003), appellants contend that the accrual of their claims was forestalled by Government promises that Enewetak Atoll would be returned in its original condition, and Government efforts to rehabilitate the Atoll from radiation damage. They further allege that, prior to 1980, they had “no way to determine the extent of the damage and thus the extent of the taking.” App. Br. 28-34. According to appellants, these events left them justifiably uncertain about the “permanence and extent” of the taking of their land until 1980. App. Br. 31.

Contrary to appellants' assertions, the facts of this case are a far cry

from the circumstances that delayed the accrual of the claims in Applegate and Banks. For example, in Applegate, representatives of the Army Corps of Engineers repeatedly promised the plaintiff that the Corps would take steps to mitigate shoreline erosion of the plaintiff's property caused by a Corps dredging project. These promises, "repeatedly renewed but never implemented" between 1962 and 1988, demonstrated that "the landowners did not know when or if their land would be permanently destroyed." Banks, 314 F.3d at 1309 (quoting Applegate, 25 F.3d at 1582). Similarly, in Banks, the Corps actually performed erosion mitigation activities "several times over a twenty-three year period" between 1970 and 1993. 314 F.3d at 1309-10. This Court held that, "[w]ith the mitigation efforts underway, the accrual of plaintiffs' claims remained uncertain . . . ." Id.

Here, in contrast, appellants do not allege that any promises of corrective action occurred between 1947 and 1980. At most, appellants assert that in 1946, and again in 1947, U.S. officials "told the Enewetak people that its taking of the Atoll would be temporary and that the Atoll would be returned to its inhabitants in its original condition." App. Br. 30-31. These isolated statements are markedly different from the "repeatedly renewed" promises in Applegate between 1962 and 1988.

Similarly, appellants have not alleged, as in Banks, that a lengthy series of mitigation activities occurred from 1947 onward. They merely contend that, “[b]eginning in the 1970s, the Government undertook a variety of rehabilitation efforts designed to enable the Enewetak people to return to their homes . . . .” App. Br. 32. By the 1970s, however, appellants’ claims had long since accrued, since they knew or should have known that the nuclear testing program would cause permanent harm. See Peter I, 6 Cl. Ct. 775 (noting that, by 1958, the taking of the five vaporized islands “hardly can be characterized as ‘temporary’” because the islands “ceased to exist.”).

Thus, unlike the plaintiffs in Applegate and Banks, appellants have failed to allege any specific corrective actions that fostered uncertainty about the permanence of the taking through 1980. In this circumstance, appellants cannot plausibly maintain that they were justifiably uncertain about the permanence of the taking, regardless of whether their claims are based upon damage from the testing, the occupancy of their land, or both. Rather, by 1958, the United States’ encroachment upon Enewetak Atoll had made “such substantial inroads into the property that the permanent nature of the taking [was] evident and the extent of the damage [was] foreseeable.”

Boling v. United States, 220 F.3d 1365, 1372 (Fed. Cir. 2000).

In this regard, appellants' claim that they had no way to determine the "extent of the damage and thus the extent of the taking" is unavailing. App. Br. 33. "[S]tabilization occurs when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined." Banks, 314 F.3d at 1308 (quoting Boling, 220 F.3d at 1370-71). Thus, even assuming that the Dickinson stabilization doctrine applies, the People of Enewetak did not need to see the islands to know that they had been taken by the United States.<sup>8</sup>

In any event, as noted above, appellants' reliance upon Dickinson "stabilization" cases such as Applegate and Banks is fundamentally misplaced. This Court has not applied Dickinson outside the context of gradual natural processes, such as erosion and flooding, where it may take a number of years before the nature of the property interference can be

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<sup>8</sup> Appellants overstate matters by asserting that they were "utterly excluded from their land for 33 years." App. Br. 33. At least by 1972, the People of Enewetak had sufficient knowledge, based upon an aerial survey and a visit to Enewetak, to file a lawsuit challenging the United States' Pacific Cratering Experiments (PACE) program. See People of Enewetak v. Laird, 353 F.Supp. 811, 814 (D. Hawaii 1973); Compl. ¶¶ 83-85, A100-01.

determined. Here, in contrast, the injury to appellants' land was fixed by the nuclear testing, which was not a gradual process akin to flooding. Unlike a property owner whose land suffers from gradual and imperceptible erosion, appellants knew or should have known by 1958 that the detonation of 43 atomic and hydrogen bombs at Enewetak Atoll would cause harm to their property.

Accordingly, the Claims Court in Peter I correctly concluded that appellants' claims were untimely because they accrued no later than 1958. The dismissal of Count I should thus be affirmed.

B. Appellants' New Takings Claims Based Upon The Compact (Counts III-V) Are Time Barred

1. Counts III, IV And V Are Based Upon Acts That Became Effective In 1986

As with their original takings claim, appellants' newly-asserted takings claims based upon the Compact accrued more than six years before the filing of their complaint on April 12, 2006. In Counts III and IV, appellants alleged that the United States took their taking and implied contract claims by failing to adequately fund the Tribunal so it could pay their awards. See Compl. ¶¶ 200-03, 206-07; A134-36. In support of these Counts, appellants alleged that, in Section 177(a) of the Compact, the United States

accepted responsibility for compensating the citizens of the Marshall Islands for damages arising out of the nuclear testing program, Compl. ¶ 200; A135, and that, pursuant to the Compact and the subsidiary Section 177 Agreement, the United States agreed to pay \$150 million to settle all claims arising from the nuclear testing program. Id. In Count V, appellants alleged that “[t]he Compact agreements constitute a taking of Enewetak Atoll . . . .” See Comp1. ¶ 210; A137.

Appellants, therefore, are attacking in these Counts the United States’ decision to enter into the Compact and Section 177 Agreement, which were approved by Congress on January 14, 1986, and became effective on October 21, 1986. A28. Plaintiffs identify no other United States Government action.

Accordingly, appellants’ claims accrued and the limitations period began to run no later than October 21, 1986, when the Compact Act and Section 177 Agreement became effective. At that time, the United States “fulfill[ed] its obligations under Section 177 of the Compact” by paying the \$150 million settlement amount to the Marshall Islands. A316. When the Compact took effect, any relief that plaintiffs may have sought from the United States arising out of the nuclear testing program was discharged.

Because the actions complained of by appellants in Counts III, IV and V became effective on October 21, 1986, the claims are untimely. See Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994).

2. Appellants' Pursuit Of Relief From The RMI Nuclear Claims Tribunal Does Not Affect The Accrual Of Their Claims

Appellants argue that their claims first accrued no earlier than February 2002, “when the [Tribunal] made only a token payment of 0.25%, acknowledging its inability to pay the award.” App. Br. 21. In this regard, appellants argue that “[w]hen a plaintiff must pursue a preliminary proceeding in order to establish Government liability, the plaintiff's claim does not accrue until the preliminary proceeding has been completed.” App. 18 (citing Martinez v. United States, 333 F.3d 1295, 1304 (Fed. Cir. 2003) (en banc)). Alternatively, appellants contend that the limitations period was tolled during their “exhaustion of that mandatory alternative process.” App. Br. 22 (citing Mitsubishi Elecs. v. United States, 44 F.3d 973, 978 (Fed. Cir. 1994)).

Appellants' reliance upon Martinez and Mitsubishi is misplaced. Martinez and similar cases explore whether a claimant has exhausted

mandatory administrative remedies because, “[a]s a general matter, if a dispute is subject to mandatory administrative proceedings, the plaintiff’s claim does not accrue until the conclusion of those proceedings.” Martinez, 333 F.3d at 1304. In this context, “congressional intent is of ‘paramount importance’ to any exhaustion inquiry” and, thus, exhaustion will be deemed mandatory where “Congress expressly requires exhaustion of administrative remedies before suit is brought . . . .” Martinez, 333 F.3d at 1305 (citations omitted). This principle applies with equal force to claims for just compensation. See id. at 1306 (citing Soriano, 352 U.S. at 276).

In this case, Congress has not expressly required the exhaustion of any remedies as a prerequisite to a Tucker Act suit challenging the adequacy of a Tribunal award. The simple reason for this is that, as shown above, Congress unquestionably intended Section 177 of the Compact to effect a “full and final” settlement of claims arising from the nuclear testing program, and thus withdrew jurisdiction for further proceedings in all United States courts. Although Congress was presumably aware that the Marshall Islands was required to establish the Tribunal – an independent establishment of the RMI government, not the United States – that step was taken “[i]n furtherance of the desire of the Government of the Marshall Islands to provide an additional long-term means for compensating claims resulting from the Nuclear Testing Program,” A320-21, not as a mandatory requirement for judicial review in United States courts.

Appellants fail to identify any provision in the Compact Act that clearly expresses an exhaustion requirement. At most, they contend that they are entitled to the benefit of “equitable tolling or estoppel” in view of this Court’s statement in Enewetak that “judicial intervention is [not] appropriate at this time” because the Tribunal process had not been exhausted. App. Br. 22.

As shown above, however, the Court in Enewetak did not address the

statute of limitations and, in any event, the Court could not impose a mandatory exhaustion requirement where Congress had not otherwise so provided. See Martinez, 333 F.3d at 1306-07 (“By imposing an exhaustion requirement that was not prescribed by statute, . . . the Court of Claims ‘was establishing a jurisdictional requirement which Congress alone had the power to establish.’”) (quoting Clyde v. United States, 13 Wall. 38, 80 U.S. 38, 39 (1871)). Moreover, Section 2501 is jurisdictional in nature and, thus, not susceptible to equitable tolling. John R. Sand & Gravel, 128 S.Ct. at 755 (citing Soriano, 352 U.S. at 273-77). Thus, to preserve their rights, appellants should have commenced a protective action in the trial court and moved to stay proceedings until the Tribunal acted upon their claims. See, e.g., Cuban Truck & Equipment Co. v. United States, 166 Ct. Cl. 381, 391 n.15, 333 F.2d 873, 879 n.15 (1964), cert. denied, 382 U.S. 844 (1965); Pacific Northern Timber Co. v. United States, 27 Fed. Cl. 331, 337-38 (1992).

V. The Just Compensation Clause Does Not Apply To Foreign-Owned Property Located Outside The United States

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The judgment below can also be affirmed upon that alternative ground that nonresident aliens lack standing to invoke the protections of the

Just Compensation Clause with respect to foreign property.<sup>9</sup>

A. Appellants Lack Standing To Invoke The Just Compensation Clause

It is well-established that the Just Compensation Clause applies to foreign-owned property located within the United States, Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931), as well as property located abroad owned by U.S. citizens. Langenegger v. United States, 756 F.2d 1565, 1570 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985). In contrast, this Court has declined to address whether, in light of the Supreme Court's decision in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), a nonresident alien has standing to invoke the Just Compensation Clause with respect to property located abroad. See El-Shifa, 378 F.3d at 1352.

However, relying principally upon Verdugo-Urquidez, the Court of Federal Claims has held that an alien must demonstrate "substantial connections" with the United States – i.e., either voluntary residency or property located within the sovereign territory of the United States – to have

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<sup>9</sup> Although the parties briefed this issue below, see Order dated June 6, 2007; A410-11, the Court of Federal Claims did not decide the question. Nevertheless, this Court "may affirm a judgment of the trial court on any ground supported by the record, whether or not that basis was given by the court or urged by a party." El-Sheikh v. United States, 177 F.3d 1321, 1326 (Fed. Cir. 1999).

standing to secure the protections of the Just Compensation Clause. See Atamirzayeva v. United States, 77 Fed. Cl. 378, 386-87 (2007), appeal docketed, No. 2007-5159 (Fed. Cir. Aug. 21, 2007); Ashkir v. United States, 46 Fed. Cl. 438, 444 (2000). Other courts have held similarly. See also Hoffman v. United States, 53 F. Supp. 2d 483 (D.D.C. 1999), aff'd in relevant part, vacated in part, 17 Fed. Appx. 980 (Fed. Cir. 2001) (unpublished); Rosner v. United States, 231 F. Supp.2d 1202 (S.D. Fla. 2002).

Under these decisions, appellants do not have standing to invoke the Just Compensation Clause because they have not alleged substantial connections to the United States. See Atamirzayeva, 77 Fed. Cl. at 386-87 (no standing where plaintiff “is a nonresident alien” and the “property is located outside the United States-- specifically, in Uzbekistan.”); Ashkir, 46 Fed. Cl. at 444 (“plaintiff is a nonresident alien and the property in question is in Somalia and thereby outside the sovereign jurisdiction of the United States. As such, it is apparent that neither the plaintiff nor his property possess the requisite substantial connection with the United States that would allow for his invocation of the Takings Clause.”). Accordingly, the judgment below can be affirmed upon that alternative ground.

B. Appellants Failed To Establish Standing In The Proceedings Below

In the proceedings below, appellants argued that they possessed standing because the Claims Court's decision in Juda I, which held that the "protections of the Bill of Rights are conveyed to the Marshall Islanders by the force of the Constitution and our system of government," constitutes law of the case. We established, however, that the law of the case doctrine does not apply in a subsequently-filed action between the same parties and asserting the same claim. See Arizona v. California, 460 U.S. 605, 618 (1983); Harbor Ins. Co. v. Essman, 918 F.2d 734, 736-38 (8th Cir. 1990). Additionally, Juda I's holding does not have preclusive effect because, although the United States raised this issue in the 1988 Enewetak appeal, A311, 394-400, the Court did not reach the question, and affirmed the judgment upon other grounds. Masco, 303 F.3d at 1330.

Moreover, we showed that the court's analysis in Juda I supports the Government's position and, to the extent it does not, the decision conflicts with Supreme Court precedent. See Ashkir, 46 Fed. Cl. at 444 n.12. For example, in Juda I, the United States moved to dismiss the taking claims upon the ground that "Congress has not extended the just compensation provision of the Fifth Amendment to property that is located in the Trust

Territory of the Pacific Islands and is owned by Micronesians who are not citizens of the United States.” Juda I, 6 Cl. Ct. at 455. The Claims Court termed this argument “substantial,” and, in fact, determined initially that the taking claims probably should be dismissed. 6 Cl. Ct. at 457-458.

In particular, the Claims Court properly distinguished cases cited by the plaintiffs, in which the Claims Court had considered but not decided whether the takings clause could be applied to property located outside of the United States. See id. (citing Porter v. United States, 496 F.2d 583, 204 Ct. Cl. 355 (1974), and noting that because, on the facts, no taking was shown, “the court did not have to reach the constitutional issue;” Fleming v. United States, 352 F.2d 533, 173 Ct. Cl. 426 (1965), noting plaintiffs failed to establish title to the disputed property; and Seery v. United States, 127 F. Supp. 601, 130 Ct. Cl. 481 (1955), property allegedly taken was owned by a United States citizen). The Court also distinguished Turney v. United States, 115 F. Supp. 457, 126 Ct. Cl. 202 (1953), in which the Court found a taking had occurred after the government of the Philippines placed an embargo on the removal of property from that country resulting from the “irresistible pressure” of the United States, after discovering that certain United States military radar equipment inadvertently had been provided to

the Phillippines government and then sold to plaintiffs. 115 F. Supp. at 463-64, 126 Ct. Cl. at 214-15. As the Court stated in Juda I, “[t]he decision in Turney, on the facts, does not control the issue of this court’s jurisdiction over a taking in the Trust Territory.” 6 Ct. Cl. at 456.

The Claims Court similarly determined that the so-called “insular cases” were not applicable because they arose from the United States’ acquisition of territories, such as Puerto Rico, by treaty and “regulated by Congress under Article IV, section 3” of the Constitution. Id. at 456-57 (discussing Torres v. Commonwealth of Puerto Rico, 442 U.S. 465 (1979); Balzac v. People of Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904)). As the Claims Court recognized, in contrast to the treaty territories in those cases, the “United States authority in the Trust Territory implements a Trusteeship Agreement with the United Nations, and the United States administration of the Trust Territory is based upon the President’s treaty power conferred in Article II, section 2, clause 2 of the Constitution.” Id. at 456. The Claims Court recognized the “unique relationship” between the Trust Territory government and the United States, and that the United States did not exercise sovereignty over the territory or its people. Id. at 457.

However, notwithstanding this analysis, and citing no support, the court ultimately concluded that “[a]ll of the restraints of the Bill of Rights are applicable to the United States wherever it has acted.” Id. at 458. In this regard, the court stated that the “concept that the Bill of Rights and other constitutional protections against arbitrary government are to be applied selectively on a territorial basis cannot be justified in the 1980’s.” Id.

This latter holding, however, was contrary to the case law as it existed at the time of the decision, as well as subsequent case law. Indeed, the Supreme Court has eschewed the notion of unlimited extraterritorial application of the Fifth Amendment. See Verdugo-Urquidez, 494 U.S. at 269 (“Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”) (citing Johnson v. Eisentrager, 339 U.S. 763 (1950)). In this light, the analysis of Juda I (if not its holding) fully supports dismissal of appellants’ claims.

Apart from Juda I, appellants also argued that they met Verdugo-Urquidez’s “substantial connections” requirement because, at the time of their evacuation, U.S. officials stated that the United States would govern the Trust Territory “with no less consideration than it would govern any part

of its sovereign territory.” Ralpho v. Bell, 569 F.2d 607, 619 n.72 (D.C. Cir. 1977) (quoting remarks of the U.S. Representative to the U.N. Security Council). The court in Ralpho, however, did not address a question of standing but, rather, held that the Due Process Clause applied to proceedings of the Micronesian Claims Commission. 569 F.2d at 619. In cases where standing has been challenged, the D.C. Circuit has squarely held that nonresident aliens without property or presence in this country lack standing to invoke constitutional protections. See, e.g., Pauling v. McElroy, 278 F.2d 252, 254 n.3 (D.C. Cir.1960) (dismissing suit brought by Marshall Islands citizens to enjoin nuclear testing upon the ground that non-resident aliens “plainly cannot appeal to the protection of the Constitution or laws of the United States.”) (citing Johnson v. Eisentrager, 339 U.S. 763 (1950)). See also People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir.1999), cert. denied, 529 U.S. 1104 (2000) (citing Verdugo-Urquidez) (“A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.”).

Consequently, the judgment below can be affirmed upon that alternative ground that, as nonresident aliens, appellants lack standing to

invoke the protections of the Just Compensation Clause with respect to foreign property.

VI. Appellants Fail To State Claims Upon Which Relief Can Be Granted

Finally, as another alternative ground for its decision, the Court of Federal Claims agreed with the Government that Counts III and V failed to state a claim upon which relief can be granted because appellants did not allege the occurrence of a United States Government act since 1986 that deprived them of any property interest. A49. In this regard, the court explained that the “Compact and the Trust Fund established pursuant to settlement of plaintiffs’ claims did not guarantee plaintiffs additional funding” and that “plaintiffs have alleged no affirmative government act that deprives them of any property interest in additional funding from the United States.” Id.<sup>10</sup>

As explained below, should the Court conclude that appellants have

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<sup>10</sup> In the proceedings below, the Government also moved to dismiss upon the same grounds Count IV of the complaint, which alleged a taking of appellants’ implied-in-fact contract claims. In addressing this argument, the court mistakenly characterized Count IV as a breach of contract claim. A49-50. Nevertheless, this error does not preclude this Court from affirming the judgment upon this alternative ground. See General Mills, Inc. v. Hunt-Wesson, Inc., 103 F.3d 978, 981 (Fed. Cir. 1997) (“we review

established subject matter jurisdiction over any of their claims, the judgment of dismissal can be affirmed upon the alternative ground that appellants' complaint fail to state claims upon which relief can be granted.

A. Legal Standards Under Rule 12(b)(6)

In Bell Atlantic Corp. v. Twombly, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955 (2007), the Supreme Court rejected a literal application of the oft-quoted rule set forth in Conley v. Gibson 355 U.S. 41, 45-46 (1957), that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” See McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007). Rather, the Court held that dismissal is appropriate for failure to state a claim where the complaint “fail[s] in toto to render plaintiffs’ entitlement to relief plausible.” Twombly, 127 S.Ct. at 1973 n.14.

B. Appellants Fail To Allege The Occurrence Of Any Federal Government Act Since 1986 That Has Deprived Them Of Any Property Interest

This Court has developed a two-part test to determine whether a taking has occurred. See American Pelagic Fishing Co., L.P. v. United  

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judgments, not opinions”).

States, 379 F.3d 1363, 1372 (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005). First, “the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment.” American Pelagic, 379 F.3d at 1372. If the plaintiff fails to demonstrate the predicate of a legally-cognizable property interest, “the court’s task is at an end.” Id. (citing Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003)). If the plaintiff identifies a valid property interest, then “the court must determine whether the government action at issue amounted to a compensable taking of that property interest.” American Pelagic, 379 F.3d at 1372.

Here, because the Compact agreements and the funds provided under them are in full settlement of all of appellants’ claims, appellants cannot establish a property interest in receiving additional funds, including payment of the amount awarded by the Tribunal. Even assuming that appellants could allege a cognizable property interest, they fail to allege any action of the United States that deprived them of any property interest. It is axiomatic, but bears repeating, that any takings claim against the United States must be based upon acts of the United States Government. Alliance of Descendants of Texas Land Grants, 37 F.3d at 1481 (citing

Langenegger v. United States, 756 F.2d 1565, 1572 (Fed. Cir.1985). See also Correlated Dev. Corp. v. United States, 556 F.2d 515, 522-25 (Ct. Cl. 1977); D.R. Smalley & Sons, Inc. v. United States, 372 F.2d 505, 507 (Ct. Cl. 1967) (citing Horowitz v. United States, 267 U.S. 458, 461 (1925)).

As shown above, appellants' allegation that the United States' failure to fund adequately the award of the Nuclear Claims Tribunal constituted a taking of their claims or, alternatively, that the Compact agreements constituted a taking of Enewetak Atoll, arose at the latest when the Compact agreements took effect in 1986. The Tribunal's issuance of its award decision on April 13, 2000, and its subsequent payment orders, do not constitute acts by the United States that deprived appellants of any property interest. Those actions were taken by an independent tribunal established by the Government of the Marshall Islands. It was not acting upon behalf of the United States and its actions cannot be attributed to the United States Government.

For their part, appellants contend that "Government inaction by delay" – here, an alleged delay in paying additional compensation – "may suffice to bring about a taking." App. Br. 25 (citing Apollo Fuels, Inc. v. United States, 381 F.3d 1338, 1351 (Fed. Cir. 2004)). This argument is

misplaced. In a regulatory takings context, takings liability may arise where the Government's consideration of a permit application is delayed an extraordinary period of time. In Apollo, for example, the Government imposed statutory surface mining restrictions and the plaintiff, a mining concern, alleged that the regulations effected a taking because the Government held its application for a mining permit in abeyance for an extraordinary period of time. Apollo Fuels, 381 F.3d at 1351.

Here, in contrast, appellants do not allege any similar action by the United States Government, regulatory or otherwise, subsequent to the settlement of their claims in 1986. Even assuming the Compact did not effect a full settlement, Congress' alleged delay in paying the Tribunal award does not, by itself, state a proper takings claim. A delay in payment of just compensation may justify an award of interest upon a declared taking. See Kirby Forest Indus. Inc. v. United States, 467 U.S. 1, 10 (1984). But the delay in payment itself cannot amount to a taking. As the Supreme Court noted in Kirby, "the Fifth Amendment does not forbid the Government to take land and pay for it later." Id. (citing Sweet v. Rechel, 159 U.S. 380, 400-403 (1895)). Accordingly, the dismissal of Counts III, IV, and V should be affirmed.

CONCLUSION

For these reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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April 4, 2008

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) (7) (C) of the Federal Rules of Appellate Procedure, defendant-appellee's counsel certifies that this brief complies with the type-volume limitation rules of Rule 32(a) (7) (B) . According to the word-count calculated by the word-processing system with which this brief was prepared, the brief contains a total of 13,974 words.

April 4, 2008

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this \_\_\_th day of April, 2008, I caused to be placed in the United States Mail (first class mail, postage prepaid) copies of "BRIEF OF DEFENDANT-APPELLEE UNITED STATES" addressed as follows:

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