



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: August 31, 2009

CBCA 1193

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Keith M. Harper of Kilpatrick Stockton LLP, Washington, DC; and R. Lee Mann, III of Kilpatrick Stockton LLP, Atlanta, GA, counsel for Appellant.

Douglas N. Harness, Office of General Counsel, Western Area Power Administration, Department of Energy, Lakewood, CO, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **VERGILIO**.

**BORWICK**, Board Judge.

Respondent moves to dismiss this appeal for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2006), because the identical contract case is pending in an earlier-filed action in the United States Court of Federal Claims. Appellant resists the motion. Appellant's opposition is not well founded and we dismiss this appeal.

Background

On May 16, 2008, appellant filed a civil action in the United States Court of Federal Claims seeking redress on a contracting officer's denial of its claim. On May 19, 2008, appellant filed an appeal at this Board seeking \$9,511,372 from respondent for continuing use and occupation of appellant's easement and right-of-way that allegedly expired March

30, 2000. Appellant anticipated that the United States would file a motion in the Court of Federal Claims arguing that the claim was not cognizable under the CDA. In its filing at the Board, appellant explained that it filed here “to protect itself in the event that it is determined for any reason that the Court of Federal Claims does not have jurisdiction over the claim.” Appellant requested that the Board stay proceedings “pending a decision by the Court of Federal Claims that it has such jurisdiction.”

On June 3, 2008, the Board granted a stay of this appeal pending the court’s decision on the United States’s anticipated jurisdictional motion, and requested that the parties submit a status report to the Board, shortly after the court ruled on the defendant’s motion.

The United States did submit a motion to dismiss the litigation in the Court of Federal Claims, for lack of jurisdiction, arguing that the CDA did not apply because the dispute over the easement and right of way concerned a procurement of “real property in being” and thus was barred by 41 U.S.C. § 602(a). Recently the court denied the defendant’s motion to dismiss, holding that the claim was cognizable under the CDA. *Salt River Pima-Maricopa Indian Community v. United States*, 86 Fed. Cl. 607 (2009). The court held that the “other than real property in being” language of the CDA did not bar CDA jurisdiction because the grant of the easement and right of way was the creation of a new property interest, not the acquisition of an existing property interest. *Id.* at 613.

After the issuance of the decision by the Court of Federal Claims, the Board requested briefs from the parties as to whether the Board appeal should not be dismissed under the CDA’s “election doctrine.” Respondent filed its motion to dismiss, which appellant opposed. Appellant says that the Board should not dismiss the appeal, but indefinitely suspend it, because the United States Court of Appeals for the Federal Circuit might sua sponte determine that the Court of Federal Claims erred in denying the United States’ motion to dismiss.

### Discussion

The election doctrine provides that:

Once a contractor makes a binding election under the Election Doctrine to appeal the contracting officer’s adverse decision to the appropriate board of contract appeals, that election must stand and the contractor can no longer pursue its claim in the alternate forum. Under the Election Doctrine, the binding election of forums is an ‘either-or’ alternative, and, as such, does not provide a contractor with dual avenues for contesting a contracting officer’s adverse decision.

*National Neighbors, Inc. v. United States*, 839 F.2d 1539, 1542 (Fed. Cir. 1988). Of course, here, appellant filed first in the United States Court of Federal Claims, and thus, under the election doctrine, is to be deemed to have elected to proceed in that forum. *Bonneville Associates v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994).

Appellant cites *States Roofing Corp. v. United States*, 70 Fed. Cl. 299 (2006), for the proposition that the Board should maintain this appeal until it is clear that the United States Court of Appeals for the Federal Circuit will not sua sponte overturn the court's decision, i.e. until jurisdiction has been definitively asserted or declined. Appellant's Opposition to Respondent's Motion to Dismiss at 1-2. The case does not support the proposition for which appellant cites it. In *States Roofing* the court declined to apply the election doctrine because the elected forum--the Armed Services Board of Contract Appeals--had not determined the timeliness of the appeal before that Board. *States Roofing*, 70 Fed. Cl. at 301. There the court refused to apply the election doctrine because "the board has not yet determined whether the appeal before it is timely." *Id.*

There was no suggestion in *States Roofing* that the court would overlook the election doctrine and keep the case on its docket until the Court of Appeal had reviewed the ruling or until the ruling became final through a non-appeal. Indeed, such a suggestion is contrary to the decision in *National Neighbors*, which plainly stated that, in cases where the elected forum's jurisdiction is questioned, the election doctrine is triggered by the decision of that tribunal (in that case the board of contract appeals) that it possessed jurisdiction to decide the case. *National Neighbors*, 839 F.2d at 1543.

Appellant has also filed suit in a United States district court, raising trespass claims. Appellant was worried about the effect of 28 U.S.C. § 1500 on its litigation in the Court of Federal Claims.<sup>1</sup>

The presence of another suit in a United States district court does not change the result here. First, respondent represents that it will not file a motion to dismiss for lack of jurisdiction the Court of Federal Claims' litigation based upon the pendency of the district court suit. Respondent's Motion to Dismiss at 3. Second, the district court has ruled that the

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<sup>1</sup> The statute provides: "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

two suits present different claims. *Salt River Pima-Maricopa Indian Community v. United States*, D.C. Ariz. No. CV-08-01005-PHX-ROS (D.C. Ariz. Oct. 24, 2008). Third, the Court of Federal Claims has determined that it has jurisdiction, a determination that triggers the election doctrine, regardless of the pendency of a third suit in a district court.

Decision

The appellant's appeal is barred by the election doctrine. Respondent's motion to dismiss is granted, and the appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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ANTHONY S. BORWICK  
Board Judge

We concur:

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BERYL S. GILMORE  
Board Judge

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JOSEPH A. VERGILIO  
Board Judge