



## Sometimes a Taking is Not a "Taking"

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The background facts of a recent Federal Circuit opinion, *TrinCo Investment Co. v. United States*, No. 2012-5130 (July 18, 2013), seem deceptively simple: the government removes \$6.6 million of timber from private property without paying just compensation. It doesn't ask permission; it simply walks onto the property and takes it. The property owner sues, claiming the fairly obvious taking. Pretty simple, and the government admits that it in fact took the \$6.6 million in timber.

But then something surprising happens. The Court of Federal Claims dismisses the case, finding that no taking had occurred.

Read on to learn about the doctrine of "necessity" and why what seems to be an obvious taking may not in fact be actionable.

### **The Underlying Facts and the Court of Federal Claims**

In June 2008, the "Iron Complex" fire roars out of control in the Shasta-Trinity National Forest. Before it is finally contained in September, more than 100,000 acres will burn. Firefighters battled the blaze using helicopters, bulldozers, and dozens of fire engines.

In addition to battling the fire on the firelines, the government commences efforts to eliminate fuel for the fire in areas in which the fire could spread. Among the areas intentionally burned are 1,782 acres of private timberland. The main fire never reaches the area, but the government's fire destroys \$6.6 million of privately-owned timber.

The owners sue, claiming the destruction of their timber constitutes a taking, but the government disagrees, claiming its conduct is protected under the doctrine of "necessity."

The Court of Federal Claims agrees with the government, granting a motion to dismiss the case, and the owners appeal to the Federal Circuit.

## **The "Necessity" Doctrine**

What seems initially to be an easy takings claims is complicated by the "necessity" doctrine. This doctrine is succinctly explained by the Supreme Court in its 1952 decision in *United States v. Caltex*, 344 U.S. 149:

[C]ommon law ha[s] long recognized that in times of imminent peril – such as when fire threatened a whole community – the sovereign could, with immunity, destroy the property of a few that the property of the many and the lives of many more could be saved.

On the one hand, it is easy to see the justification for such a rule – after all, would anyone really want the government to let a life-threatening fire burn rather than risking liability for its efforts to stop it? On the other hand, one can pretty easily understand how the "few" who paid the price to save the "many" might feel unfairly burdened by the government's efforts.

Regardless of how one feels about the doctrine, it's pretty well established, and the Court of Federal Claims applied it to protect the government's actions in *TrinCo*.

## **The Decision in the Federal Circuit**

Having analyzed – and accepted – the "necessity" doctrine, the Federal Circuit did not simply accept the lower court's decision. Rather, the court dug a bit deeper, concluding that the doctrine had historically been narrowly construed, protecting government conduct only where "there is an imminent danger and an actual emergency giving rise to actual necessity."

The Federal Circuit refused to broaden the reach of the doctrine. In reversing the lower court, the Federal Circuit did not hold that the government's conduct qualified as a taking. Rather, the Court remanded the case for further proceedings to determine whether the requisite "imminent danger" and "actual emergency" in fact existed.

Time will tell how the case will play out, but the Federal Circuit highlighted a few key facts in reaching its decision: (1) when the decision was made to burn plaintiffs' property, only 2% of the national forest was on fire; and (2) no showing had been made that the same preventative measures might have been taken by the government's burning of its own property (i.e., other portions of the national forest), rather than plaintiffs' property. The court's concluding sentence may foreshadow what happens next:

It would be a remarkable thing if the Government is allowed to take a private citizen's property without compensation if it could just as easily solve the problem by taking its own.

While the *TrinCo* case does not present facts encountered all too often, it is good to keep in mind that in some cases, even what appears on its face to be an obvious taking may in fact be something else.