No. 00-704

In the Supreme Court of the United States

CRIS REALMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The United States filed complaints in condemnation against three parcels of land in Louisiana, for inclusion in the Jean Lafitte National Historical Park and Preserve. The questions presented are:

1. Whether the court of appeals correctly applied the scope-of-the-project rule in determining the proper market value of the lands for purposes of calculating just compensation.

2. Whether the court of appeals erred in ruling that the landowners could not use the present condemnation action brought by the United States as a vehicle for reviving a time-barred takings claim against the United States based on an Army Corps of Engineers wetland permitting decision made years earlier.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 213 F.3d 830. The opinion of the district court (Pet. App. 27-45) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2000. A petition for rehearing was denied on July 31, 2000. Pet. App. 46. The petition for a writ of certiorari was filed on October 30, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this condemnation action to acquire three parcels of land in Jefferson Parish, Louisiana, for an expansion of the Jean Lafitte National Historical Park (Jean Lafitte Park). The only dispute in this case concerns the just compensation to be paid for each parcel. Although petitioners conceded that the market value of their lands at the time they were condemned was limited to their use as non-permitted wetlands, petitioners argued that the lands should be appraised as ready for development because, years earlier, the U.S. Army Corps of Engineers had denied permits that, if granted, would have made development feasible. The district court agreed. The court of appeals reversed, finding that the district court had misapplied established doctrines of valuation.

1. This case began with complaints in condemnation filed in October and November 1994 against three parcels of land, including 2.61 acres of land owned by petitioner Cris Realms, Inc.; 56.32 acres of land owned by petitioners Ronald J. and Betty Perrin Isaac; and 69.04 acres of land owned by petitioner Cristina Investment Corporation. The United States has not taken physical possession of those lands. Rather, the United States filed complaints under Federal Rule of Civil Procedure 71A to establish the amount of compensation that the United States would have to pay to acquire title. See *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 4 (1984). The lands are all wetlands lying in the Barataria Marsh, on the unprotected side of a flood control levee. Gov't C.A. Br. 3-4. There is no dispute that the lands are not suitable for development in their present condition.

In nevertheless seeking to have those lands valued as suitable and ready for development, petitioners asked the district court to look back to the history of a failed private development project that began more than 20 years before the complaints in condemnation were filed. All three parcels subject to condemnation were once part of a larger parcel (more than 2000 acres in size) owned by the Bayou Des Familles Development Corporation (BDF). Pet. App. 3. BDF acquired the property in August 1972 for a residential development project. In accordance with its development plan, BDF subdivided and sold portions of the property to petitioners Mr. & Mrs. Isaac in 1972, to petitioner Cristina Development Corporation in 1977 and 1978, and to petitioner Cris Realms, Inc., in 1987. *Ibid.*

As part of the development plan, BDF began construction of a levee to allow the wetlands to be drained and to protect the property from storm surges. Pet. App. 3. BDF began that construction—which involved the discharge of fill material into wetlands and the obstruction of navigable canals—without obtaining a permit from the Army Corps of Engineers under Section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 403, or Section 404 of the Clean Water Act of 1977, 33 U.S.C. 1344. Gov't C.A. Br. 8-9; Pet. App. 3. In October 1973, the Corps advised BDF to cease work on the levee, pending a determination as to whether permits were required. BDF refused to halt construction, insisting that permits were not necessary. In January 1974, the Corps issued a cease and desist order. Ultimately, BDF was fined $25,000 and ordered to obtain permits from the Corps before continuing the work. Pet. App. 3.

BDF submitted an application in April 1975, and a draft environmental impact statement (EIS) in June

1975. Pet. App. 3. The draft EIS revealed significant environmental concerns. Among other things, it noted that draining the land for development would "result in the total and complete alteration of the presently productive natural marsh and swamp habitats," would eliminate habitat for many wildlife species, including a rare and endangered species (the American Alligator), and would adversely affect "surrounding wetland productivity" by reducing the "normal flow of nutrients and minerals" to adjacent areas. Gov't C.A. Br. 10. The draft EIS also reported that the project would decrease water quality in surrounding wetlands through the introduction of "oils, trash, chemical fertilizers, insecticides, and other deleterious substances" in storm-water runoff. *Id.* at 10-11; see Pet. App. 4. In December 1975, Charles Decker, Chief of the Regulatory Functions Branch of the New Orleans District of the Corps of Engineers, wrote a memorandum to his supervisors stating that "all comments on the * * * application and draft EIS have been received," and that "strong opposition has been expressed by EPA, NMFS [the National Marine Fisheries Service], USFWS [the United States Fish and Wildlife Service], the State Parks and Recreation Commission, and the State Planning Office." Gov't C.A. Br. 10; see Pet. App. 3. Decker concluded that "in our opinion, there is sufficient information available now to support a recommendation for denial without preparing the final EIS." Gov't C.A. Br. 10.

For several reasons, however, the Corps delayed its decision on BDF's permit application. A separate branch of the Corps was studying proposals for the construction of a larger, hurricane-protection levee, under the Flood Control Act of 1917, 33 U.S.C. 701, to protect existing developments on the west bank of

Jefferson Parish. One of the proposals under consideration included construction along the alignment of the unfinished BDF levee. Also, in August 1972, Congress had appropriated funds to study the feasibility of creating the Jean Lafitte Park in the Barataria Marsh. Uncertainty over the location and boundaries of the Park caused delays in the Corps' study of possible alignments for the hurricane-protection levee. Gov't C.A. Br. 11-12.

Congress authorized creation of the Jean Lafitte Park on November 10, 1978. See 16 U.S.C. 230; Pet. App. 4. The enabling legislation identified a block of approximately 20,000 acres of Barataria Marsh as the site for the Park itself and a surrounding "park protection zone." *Ibid.* The legislation authorized the Park Service to acquire up to 8600 acres of designated land for the Park. See 16 U.S.C. 230a(a). The legislation directed the Park Service to protect the remaining area, the "park protection zone," by establishing land-use guidelines to be adopted and enforced by state and local governments. 16 U.S.C. 230a(b). The purpose of the guidelines was to preserve and protect (a) fresh water drainage from the protection zone into the Park, (b) vegetative cover, (c) the "integrity of ecological and biological systems," and (d) water and air quality. 16 U.S.C. 230a(c). The legislation authorized the Park Service to acquire land in the protection or buffer zone only for those enumerated purposes and only if state and local governments failed to adopt protective land-use guidelines. 16 U.S.C. 230a(e). Approximately 1000 acres of the land in the BDF development project, including all three properties subject to condemnation in this case, fell within the park protection zone. Pet. App. 4.

The Corps denied the BDF permit application by letter dated September 21, 1979. In the accompanying findings of fact, the Corps of Engineers concluded that: (1) the project (residential development) was not "water or wetland dependent"; (2) there were nearby "nonwetland" alternative sites for such development; (3) the project would have "major adverse environmental impacts" (including the destruction of 2300 acres of valuable fish and wildlife habitat); (4) the project would have "major adverse impacts on Jean Lafitte National Park" (including the degradation of water quality in the Park); (5) "approval of the project would not be in concert with national policies on development of floodplains and preservation of wetlands"; and (6) the adverse impacts were sufficiently significant to justify permit denial without preparation of a final environmental impact statement. Gov't C.A. Br. 14-15. The Corps also found that there was significant public opposition to the project, and that although some local government agencies, including the Jefferson Parish Council and the Jefferson Parish Planning Commission, expressed support, the Louisiana State Planning Office and the State Parks and Recreation Commission submitted letters in opposition. *Id.* at 14-15; Pet. App. 3-4.

2. On November 2, 1979, BDF filed suit in federal district court challenging the Corps' denial of its permit application. See *Bayou Des Familles Dev. Corp.* v. *United States Corps of Eng'rs*, 541 F. Supp. 1025 (E.D. La. 1982). The district court sustained the Corps' decision. The court concluded that "comments from the public and from other federal agencies relating to the environmental effects of the proposed work" were "[o]f key concern" to the Corps, and the court explained that, under applicable regulations, the Corps was required to consider the "ecological consequences" of the project

and could "properly deny a permit on ecological grounds." *Id.* at 1038. BDF argued that the permit denial resulted in an uncompensated taking of its property in violation of the Fifth Amendment to the Constitution. The court dismissed that claim for lack of jurisdiction, because the exclusive remedy for such an uncompensated taking is an action for compensation in the Court of Claims (now the Court of Federal Claims). *Id.* at 1042 (citing the Tucker Act, 28 U.S.C. 1491).

Following dismissal of that suit, BDF did not immediately file suit in the Court of Claims. Instead, BDF turned to Jefferson Parish. Under the federal Flood Control Act, municipalities are responsible for obtaining rights-of-way for federally funded flood control projects. BDF offered to donate land to Jefferson Parish for the federal hurricane-protection levee, if the Parish would pursue construction along BDF's original levee alignment (designated "alignment D" in previous studies). Following the public review process, the Corps denied the Parish's permit application for construction along alignment D. However, it offered the Parish a permit for construction along "modified alignment E," an alignment that followed the wetlands/uplands interface and that—unlike alignment D—minimized adverse impacts on the wetlands. Gov't C.A. Br. 20. The Corps found, among other things, that the wetlands of the Barataria estuary were "very important to fisheries production" and "one of the best such areas in the world." *Ibid.* Although the Corps noted impacts on the Jean Lafitte Park, it did not mention the Park in its official findings or conclusion. *Id.* at 20-21. The Parish Council did not seek review of the Corps' decision, and instead decided to proceed with construction along alignment E. *Id.* at 21. The Parish then condemned some of the land owned by petitioners to build

the levee. After considerable litigation in state court, petitioners were awarded compensation based on the value of the land as undevelopable wetlands. Pet. App. 6. The three parcels at issue in this case lie outside of the constructed levee, and were not subject to the state condemnation action.

BDF then, in 1991, filed a takings case in the Court of Federal Claims, joined by the Isaacs petitioners. See *Bayou Des Familles Dev. Corp.* v. *United States*, 130 F.3d 1034 (Fed. Cir. 1997). The court dismissed the suit as time-barred under the applicable six-year statute of limitations (28 U.S.C. 2501), and the court of appeals affirmed. 130 F.3d at 1037. BDF and the Isaacs argued that the alleged taking was not final until 1986, when the Corps granted Jefferson Parish a permit to build a federal hurricane-protection levee on a location that left their land unprotected. *Id.* at 1039. The Federal Circuit disagreed, holding that the takings claim ripened in 1979, when the Corps denied BDF's permit application. *Id.* at 1040. Petitioners Cristina Investment and Cris Realms filed an even later takings case, with the same result. *Cristina Inv. Corp.* v. *United States*, 40 Fed. Cl. 571, 579-580, appeal dismissed, 155 F.3d 570 (Fed. Cir. 1998) (Table).

Meanwhile, pursuant to the directive in Section 230a(b) of the enabling legislation for the Jean Lafitte Park, the National Park Service developed proposed land-use guidelines for property in the park protection zone and submitted the guidelines to Jefferson Parish. Gov't C.A. Br. 22. The Parish rejected the proposal in 1984, primarily because the Park Service would not indemnify the Parish for any liability arising out of the guidelines' enforcement. After negotiations failed to produce an agreement, the Park Service initiated plans in 1986 to acquire land in the protection zone, under the

authority of 16 U.S.C. 230a(c), which authorizes acquisition upon the failure of local government to promulgate land-use guidelines. See Gov't C.A. Br. 22-23.

3. In 1994, the United States filed complaints in condemnation to acquire the properties at issue in this case. At trial, the primary disagreement between the United States and petitioners was over the methodology for appraising the properties. The government's appraiser looked to sales of comparable wetlands properties that had not been (and were unlikely to be) permitted for residential development. He testified that the subject properties were worth approximately $300 per acre. Gov't C.A. Br. 23; Pet. App. 6. Petitioners' appraiser, in contrast, looked to the value of non-wetlands properties that were ready for development. He thus based his valuation on the market price that the subject properties would have had if: (1) the Corps had granted BDF's permit application; (2) BDF had completed its levee and other infrastructure improvements; and (3) the federal hurricane-protection levee had been built over the BDF levee. Gov't C.A. Br. 23-24. Petitioners' appraiser opined that the subject properties were worth approximately $16,000 per acre. Pet. App. 7.

The district court accepted the landowners' appraisal, Pet. App. 42, and awarded compensation accordingly, *id.* at 24-25. The court found that establishment of the Park had indirectly affected the value of the land through the regulatory actions of the Corps of Engineers. In particular, the court found that the Park was the "primary motivating factor" in the Corps' denial of permits for the BDF levee alignment, and that there was a "reasonable possibility" that petitioners could have obtained necessary development permits "but for" the Park. *Id.* at 42. Based on those findings,

the court held that petitioners were entitled to have their land valued as though the highest and best use were for "commercial and residential" development. *Ibid.*

4. The court of appeals reversed. Pet. App. 1-23. The court first considered the application to this case of the "scope of the project" rule, which provides that if the land that is subject to condemnation was within the scope of the project for which it is being condemned at the time the government became committed to the project, any increase or decrease in the value of the condemned land attributable to the project should not be taken into account in valuing the land. See *id.* at 9. In previous cases, the court of appeals explained, it had considered three factors when determining whether later acquisitions fell within the scope of the original project: (1) whether enlargement of the project was foreseeable; (2) the length of time between initiation of the project and its enlargement; and (3) the nature of governmental representations about the final borders of the project. *Id.* at 10. The court of appeals further explained that, in *United States* v. *Meadow Brook Club*, 259 F.2d 41, cert. denied, 358 U.S. 921 (1958), the Second Circuit had "articulated a further consideration that is instructive" in this context, which is whether the government's motive for pre-acquisition regulatory efforts was "to depress the market value of the property which it then intended to condemn." Pet. App. 11.

Applying those factors to this case, the court of appeals found that the scope-of-the-project rule did not justify valuing petitioners' land as if it were ready for development. The pertinent project, the court explained, was the acquisition of land for Jean Lafitte Park. Although the Park was created in 1978, there was no evidence that the government contemplated

buying—or that Congress had authorized the Park Service to buy—petitioners' land until much later. Pet. App. 12. In fact, when the Corps denied BDF's permit application in 1979, "there were no concrete plans to purchase any land in the park protection zone. Those plans to acquire lands did not begin until 1986, and the Government did not file condemnation complaints against [petitioners'] property until 1994." *Ibid.* Thus, the court of appeals concluded:

> [T]here was a sixteen-year lapse between the initiation of the project [Jean Lafitte Park] and the acquisition of [petitioners'] property; the Government action that reduced the value of [petitioners'] property (the denial of the permit application) predated any concrete plans to purchase that property; and, as in *Meadow Brook*, there is no evidence that the Government's motive in denying the permit application was to drive down the value of [petitioners'] property. Rather, the record clearly indicates that the Corps' primary purpose in denying the permit was to protect the Park's ecosystem. On these facts, compensation should be based on the value of the land at the time of the condemnation, regardless of prior Government actions that rendered the land less valuable than it might have been in the absence of prior Government activities.

Id. at 13 (footnote omitted).

The court of appeals also rejected an additional theory presented by petitioners. Although the United States has not yet sought or taken physical possession of petitioners' properties, petitioners argued: (a) that the filing of this action vested the district court with jurisdiction to determine the date of taking, (b) that the district court could invoke that authority to find that

the taking in this case actually occurred in 1979, when the Corps denied the BDF permit application, and (c) that the district court could award compensation from that date. The court of appeals rejected that theory. Pet. App. 13-21. While recognizing the possibility that a district court might in some situations have jurisdiction in a direct condemnation action to award compensation based on a taking date prior to the date of the declared taking, the court of appeals observed that petitioners' argument for allowing the court in the condemnation action to go back in time was subject to no "temporal limiting principle." *Id.* at 14. Without deciding what the result might be in other circumstances, the court of appeals held that where, as here, an inverse condemnation claim based on an alleged prior regulatory taking has been brought in a court of competent jurisdiction and dismissed as time-barred, that dismissal is res judicata and the claim cannot be "resuscitate[d]" in a later direct condemnation action. *Id.* at 15-20.

ARGUMENT

The court of appeals correctly concluded that petitioners are entitled to compensation based on the current value of their land, rather than on the hypothetical value the land would have had if it had not been subject to the legitimate permit denial more than 20 years ago that petitioners had unsuccessfully challenged in two different lawsuits. The court of appeals' fact-specific decision, moreover, does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Under established principles of eminent domain, the "just compensation" for land acquired by condemnation is generally the "fair market value of the property

on the date it is appropriated." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984) (citing *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511-513 (1979)). In other words, the government is required to pay the owner "what a willing buyer would pay in cash to a willing seller at the time of the taking." *Ibid.* (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943) (citation and internal quotation marks omitted)). Because markets generally value land in terms of both current and potential use, courts ordinarily must determine fair market value in light of the "highest and most profitable use," or most economically profitable use, that the land will support. *Olson* v. *United States*, 292 U.S. 246, 255 (1934). In so doing, however, courts must take into account any "inherent physical characteristics" limiting use of the land, and any "regulatory restrictions applicable to the property and the proposed use." *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 818 (5th Cir. 1979). A court may not, for example, consider a use prohibited by zoning rules or other regulations, unless the landowner can establish a "reasonable possibility" that the prohibition will be lifted and the use allowed. *Id.* at 819. Further, courts must also consider value attributable to neighboring land uses, including uses related to public improvements. As a general rule, such influences are to be considered when the government condemns land, just as they would be considered by willing buyers and sellers in a market transaction. See *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); see also *Miller*, 317 U.S. at 376.

This Court, however, has recognized that the effect of government activities in some instances should not be considered when determining market value. For example, if a parcel's fair market value on the date of acquisition has been increased by the acquisition itself

or in anticipation of the acquisition, the evidence of such value must be excluded. See *Miller*, 317 U.S. at 377. That rule originated in two earlier opinions, *Shoemaker* v. *United States*, 147 U.S. 282 (1893), and *Kerr* v. *South Park Commissioners*, 117 U.S. 379 (1886), both of which involved condemnation of land for parks. In those cases, the Court upheld instructions directing the finder of fact to disregard the value of land sold in the immediate vicinity of the proposed parks after the projects were announced. See *Shoemaker*, 147 U.S. at 303-305; *Kerr*, 117 U.S. at 385-387. The Court reasoned that those sales did not reflect fair market value, but instead included "conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had." See *Shoemaker*, 147 U.S. at 305 (citing *Kerr*, 117 U.S. at 380). Likewise, this Court has more recently held that a reduction in property value caused by the "threat" of condemnation must not be considered in setting just compensation. See *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961); see also *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 477 (1973).

The principle just described has come to be known as the "scope of the project" rule. See *Miller*, 317 U.S. at 377; *320.0 Acres*, 605 F.2d at 785. Under that rule, the measure of just compensation in a condemnation proceeding must not be "reduced or increased" because of an "alteration in market value" attributable to the "public project that makes the condemnation necessary." *Reynolds*, 397 U.S. at 16. In *United States* v. *Meadow Brook Club*, 259 F.2d 41, cert. denied, 358 U.S. 921 (1958), the Second Circuit considered the application of that principle where the pre-condemnation action that affected the value of the land was not earlier

acquisition of property for the project but rather land-use regulation. *Meadow Brook* involved action by the Air Force to condemn land to enlarge an airfield. *Id.* at 43. Before condemnation, a representative of the Air Force had appeared before a local zoning board to oppose the landowner's request to change the property's zoning from residential to industrial. *Id.* at 44. The issue before the Second Circuit was whether the district court could consider that opposition when determining the "probability of rezoning (as a factor entering into the ultimate calculation of value)." *Id.* at 45. The Second Circuit held that the Air Force's opposition could be considered, in light of evidence that the Air Force's position was "based in large part on the fear of flight hazards," a concern independent of any interest in acquiring the land. The court stated that if the Air Force had acted in "bad faith"—*i.e.*, if its "sole motive" in opposing the zoning change had been to "depress the market value of the property which it then intended to condemn"—then the impact of its opposition on land value would have been excluded. *Id.* at 45-46.

a. Petitioners first argue that the court of appeals erred in making "bad faith" an indispensable element that must be shown before the scope-of-the-project rule can apply. Pet. 14-18. The difficulty with that contention is that the court of appeals did not hold that bad faith is an indispensable element or that a party seeking application of the scope-of-the-project rule always must show bad faith. To the contrary, in this case, the court of appeals recited three other factors previously identified as relevant by the Fifth Circuit, Pet. App. 10, and then identified what petitioners label "bad faith" as "a further consideration that is instructive" in cases, like this one, in which land-use regulation (here, the

Corps' permit denial) allegedly affected land values before the government moved to acquire it, *id.* at 11. Moreover, in concluding that the Corps' permit denial in 1979 did not bring the condemnation actions commenced in 1994 within the scope of the original project, the court of appeals considered all of the factors it had previously identified as relevant, including the foreseeability of the later condemnation when the government first regulated the land in a manner that reduced its value, the length of time between the regulation and the later condemnation, and governmental representations regarding the scope of the project. See *id.* at 12-13. The court merely concluded that, under the circumstances of this case, in which consideration of those *other* factors did not bring this condemnation action within the scope-of-the-project rule, that rule would not apply unless the record showed "that when the Corps denied BDF's permit application in 1979, it anticipated that the denial would drive down the price of [petitioners'] property and that this would facilitate the * * * eventual acquisition of the land." *Id.* at 12.

That holding is fully consistent with this Court's decisions. As we have explained, the Court developed the scope-of-the-project rule in a case involving direct effects on market value caused by a series of condemnations of adjacent lands. See *Miller*, 317 U.S. at 377. The Court held that if the later-acquired lands were part of the initial commitment to acquire lands for the project, any increase in value in the interim could be attributed to "speculating * * * due to the Government's activities." *Ibid.* In contrast, if the lands were "merely adjacent lands" that the government later decided to acquire as part of a subsequent commitment to enlarge the original improvement, any value added in the interim by virtue of the adjacent lands' proximity to

the existing improvement would be an element of market value for which the landowner was entitled to compensation. *Ibid.*

Similarly, under *Meadow Brook* and the Fifth Circuit's decision here, if the government previously invoked a regulatory process as part of its acquisition process (in order to depress land values to facilitate acquisition), the effects of those actions on land values are to be excluded from the determination of just compensation. 259 F.2d at 45. On the other hand, if the government invoked a regulatory process to further legitimate government interests independent of the later acquisition, the regulatory actions are properly considered part of the existing landscape against which fair market value is to be determined. *Id.* at 46. Here, as in *Meadow Brook*, the court found that the prior regulation was undertaken for reasons independent of the land acquisition and that the effect of that valid prior regulation on the value of the land therefore should be taken into account in determining just compensation in the condemnation action. That fact-bound application of the general scope-of-the-project principle of *Miller* to the circumstances of this case presents no issue warranting review by this Court.

b. Alternatively, petitioners argue that the court of appeals engaged in improper de novo fact-finding in conflict with *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986), by declining to remand the "bad faith" issue to the district court. Pet. 18-21. But petitioners' brief on the merits in the court of appeals never asked for a remand, and the claim of error they now assert is wholly fact-bound. The court of appeals merely determined that there was insufficient evidence to show that the denial of BDF's permit application was undertaken for the purpose of depressing land values to facilitate

acquisition. Especially in light of the presumption of regularity that accompanies agency action—and the fact that petitioners had already challenged the agency's decision under the Administrative Procedure Act and lost—the court of appeals' decision was correct and presents no issue warranting review by this Court.[1]

The Corps of Engineers denied BDF's permit application upon written findings of fact supported by an administrative record. In its findings, the Corps determined that completion of the BDF levee would result in the destruction of a large area of important wetlands, thereby causing major adverse environmental impacts that could not be justified, given the availability of alternative sites for development. See p. 6, *supra*. The Corps also determined that the BDF levee would have adverse impacts on Jean Lafitte Park,

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[1] Petitioners assert (Pet. 6) that the *Park Service* had an ulterior motive for the position it took before the Corps of Engineers. The Park Service's memorandum, however, does not say what petitioners claim it says. It merely notes that some landowners might be demanding the right to develop their lands in order to force the government to exercise its power of eminent domain, and that the government should not allow its hand to be so forced. Gov't C.A. Br. 47-48. Far from evidencing a desire to acquire the land, the memorandum thus exhibits a desire to avoid that result. Moreover, the Park Service's comments to the Corps do not even hint at a secret plan or desire to acquire the lands later on, and nothing in the record suggests that the Corps' decision to deny the permit application was influenced by anything but legitimate regulatory concerns. Indeed, when petitioners challenged the Corps' permit denial in district court under the APA, the district court held that the Corps had properly analyzed the environmental concerns and correctly denied the permit on ecological grounds. See *Bayou Des Familles Dev. Corp.*, 541 F. Supp. at 1038. Petitioners cannot now collaterally attack that determination in the context of a new action brought decades later.

because the draining and polluting of wetlands outside the Park would damage water quality and water flows into the Park. *Ibid.* Whether the Corps would have denied the permit for ecological reasons, absent the concern for protecting the Park, was disputed at trial, as petitioners point out.[2] But that is not the relevant question in this context. The relevant question is whether the permit was denied for the purpose of devaluing the lands to facilitate their acquisition, *i.e.*, whether, but for plans to acquire the lands later on, the permits would have been granted. In this case, the need to preserve wetlands in the area of the BDF development project, and the need to protect water flows into Jean Lafitte Park, were both legitimate grounds for denying BDF's permit application, and both of those reasons were independent of whether the government might later acquire the land being regulated. Petitioner never proved nor offered to prove at trial in this case, or in their prior APA action, that the Corps' statement of reasons was a pretext for devaluing the land so as to facilitate its later acquisition. See Pet. App. 13 n. 1.[3]

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[2] The district court found that the Park was the "primary motivating factor" in the Corps' denial of the BDF permit. Pet. App. 42. On appeal, the United States argued that that finding was clearly erroneous, in light of the regulations governing permit applications under Section 404(b) of the Clean Water Act of 1977 (33 U.S.C. 1344(b)), which emphasized wetlands impacts and required BDF to prove that there was "no practicable" alternative site for development, other than the wetlands in question. See Gov't C.A. Br. 51-57 (addressing 40 Fed. Reg. 31,320 (1975) (Corps' regulations), and 40 Fed. Reg. at 41,292 (EPA regulations)). The court of appeals did not reach that question.

[3] As noted by the court of appeals (Pet. App. 13 n.1), petitioners had every incentive to present such evidence at trial. Although the precise question in *Meadow Brook* was not presented to the

For the foregoing reasons, this case is not at all like *Icicle Seafoods*. That case involved the standard of review applicable to trial court decisions under the Fair Labor Standards Act of 1938. 475 U.S. at 710-712. Although some courts of appeals had read this Court's decisions to allow de novo appellate review of certain factual questions, the Court held that de novo review was not appropriate. This case, by contrast, does not involve a question of de novo review of factual issues. The court of appeals simply determined that the record did not contain sufficient evidence to support a judgment for one of the parties. That is the sort of decision that courts of appeals regularly and properly make.

2. Finally, petitioners argue (Pet. 21-27) that the court of appeals erred in rejecting their attempt to resuscitate their time-barred taking claims. As noted above (see p. 8, *supra*), petitioners previously filed suits under the Tucker Act in which they asserted that the 1979 permit denial resulted in a taking of their property for which compensation was due under the Fifth Amendment. The Federal Circuit and the Court of Federal Claims held that those suits were time-barred. *Bayou Des Familles Dev. Corp.* v. *United States*, 130 F.3d 1034 (1997); *Cristina Inv. Corp.* v. *United States*, 40 Fed. Cl. 571 (1998). Because the judgments in those actions operate as adjudications on the merits, see

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district court in this case, petitioners did present evidence and argument regarding the motives of the Corps and the Park Service. Petitioners have failed to identify any material deficiency in the factual record that could be corrected on remand. Further, contrary to petitioners' assertion (Pet. 20-21), it was not the United States' obligation to identify and advance a theory supporting petitioners' claim of highest and best use. That burden rested with them. See *United States* v. *62.50 Acres of Land*, 953 F.2d 886, 890 (5th Cir. 1992).

Plaut v. *Spendthrift Farms, Inc.*, 514 U.S. 211, 228 (1995); *United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916), petitioners are now foreclosed from seeking compensation for the 1979 permit denials in later lawsuits, including this one. Thus, quite aside from the limitations imposed by the scope-of-the-project rule discussed above, the doctrine of res judicata now limits petitioners to seeking compensation only for those events that took place after they filed their time-barred taking claims.

Petitioners argue that res judicata does not apply here. In particular, they argue that this Court's decision in *United States* v. *Dow*, 357 U.S. 17 (1958), stands for the proposition that district courts always have jurisdiction in direct condemnation actions to award compensation for prior takings, notwithstanding otherwise applicable jurisdictional limits, statutes of limitations, or prior litigation involving an inverse condemnation claim. Pet. 21-27. *Dow*, however, does not support that contention. In *Dow*, the United States filed a complaint in condemnation for an easement, took possession of the easement under a court order, and then filed a formal declaration of taking for the easement. 357 U.S. at 18-19. Between the date on which the United States took possession and the date on which it filed the declaration of taking, the underlying tract was conveyed. *Id.* at 19. Because claims against the United States cannot be assigned, this Court had to determine on which of the two dates the taking occurred, in order to determine which private party (the seller or purchaser) was entitled to compensation. *Id.* at 20. The Court held that the taking occurred when the United States entered into possession under the court order. *Id.* at 22-27. That ruling recognized that when the United States files a com-

plaint in condemnation, the district court has authority to grant possession on the complaint and to order compensation for the possession, even though a formal declaration of taking has yet to be filed. See also Fed. R. Civ. P. 71A(i)(3) (authorizing district court to award compensation for interests taken by United States after filing complaint).

Dow did not address the effect that an earlier *judgment* has in later litigation. And it certainly does not hold that an earlier judgment that a claim for just compensation based on certain events is time-barred loses its preclusive effect in later litigation over the amount of compensation due for a *subsequent* taking. The two trial court rulings relying on *Dow* cited by petitioners—*Georgia-Pacific Corp.* v. *United States*, 568 F.2d 1316 (Ct. Cl.), cert. denied, 439 U.S. 820 (1978), and *Stephenson* v. *United States*, 33 Fed. Cl. 63 (1994)—are inapposite for the same reason.[4]

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[4] *Georgia-Pacific* involved parallel condemnation actions: an inverse condemnation action filed in the Court of Claims and a later direct condemnation action filed by the United States in district court. See 568 F.2d at 1318. Under the Tucker Act, the Court of Claims had exclusive jurisdiction over the inverse condemnation claim. See 28 U.S.C. 1491. Nevertheless, for reasons of judicial economy, the Court of Claims declined to entertain the claim, in deference to the later-filed proceedings in district court. See *Georgia-Pac.*, 568 F.2d at 1319. The Court of Claims reasoned that the district court could resolve all compensation issues—*i.e.*, those related to both the direct condemnation and the alleged inverse condemnation—because, under *Dow*, the district court had jurisdiction to determine the date of taking and award compensation from that date. *Id.* at 1322. In *Stephenson*, the Court of Federal Claims followed *Georgia-Pacific* on similar facts. See 33 Fed. Cl. at 63.

Even if those two trial court decisions were correct (and we do not believe they were), neither addressed the preclusive effect of a

Finally, petitioners assert (Pet. 24-27) that res judicata does not apply because the previous decisions in the Tucker Act suits were not "on the merits." Although judgments on statute-of-limitations grounds are generally considered to be on the merits for res judicata purposes, petitioners contend that that rule does not apply to judgments applying the Tucker Act's statute of limitations, because in that setting the statute of limitations restricts the scope of the waiver of sovereign immunity and thus is jurisdictional. Pet. 24. That contention is without merit. It is true that, when conditions are placed on a waiver of sovereign immunity, those conditions necessarily "define [a]

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judgment regarding an alleged taking on later litigation regarding a later taking. Moreover, in our view, those decisions mistakenly relied on *Dow* for the proposition that a district court may exercise jurisdiction over an inverse condemnation claim that is within the exclusive jurisdiction of the Court of Federal Claims, if those claims are alleged in response to a direct condemnation action instituted by the United States. *Dow* did not address that jurisdictional issue. In *Dow*, the "prior" taking was not an alleged inverse condemnation prior to the direct condemnation, but rather a physical taking that occurred under court order in the direct condemnation action itself. See 357 U.S. at 22-27. That distinction is fundamental. As sovereign, the United States is immune from suit, except as it consents to be sued. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Only Congress can waive the United States' sovereign immunity, *Block* v. *North Dakota*, 461 U.S. 273 (1983), and such waivers "cannot be implied but must be unequivocally expressed." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). Consequently, the United States does not, simply by filing its own action, waive sovereign immunity to a counterclaim that is subject to the exclusive jurisdiction of another court. See *United States* v. *Shaw*, 309 U.S. 495 (1940); *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 512-515 (1940); *Narramore* v. *United States*, 960 F.2d 1048, 1050 (Fed. Cir. 1992).

court's jurisdiction to entertain the suit," and thus are in that important sense "jurisdictional." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). But it does not follow that a judgment on statute-of-limitations grounds in a Tucker Act suit does not *also* have the effect of judgments on such grounds generally, insofar as the doctrine of res judicata is concerned. Indeed, it would be an odd result if the special jurisdictional nature of statutes of limitation in suits against the United States, which affords the government *added* protection not available to private parties against the assertion of untimely claims, had the effect of depriving the United States of even the usual preclusive effect of a judgment on statute-of-limitations grounds.

Petitioners also claim that the Tucker Act statute of limitations is inapplicable to their request for compensation based on the alleged 1979 regulatory taking, because that request is not in the nature of a counterclaim, but simply part of the compensation due for the proposed acquisition of title at issue in the present case. Under that theory, however, petitioners' regulatory takings claim could never be time-barred, and could always spring back to life if made in response to a direct condemnation action. As the court of appeals observed, that notion is at odds with this Court's holdings that waivers of sovereign immunity must be narrowly construed. Pet. App. 16. Further, it is at odds with existing precedent that holds that a direct condemnation action filed by the United States does not revive a party's right to compensation for an inverse condemnation that was lost under the statute of limitations. See *United States* v. *422,978 Square Feet of Land*, 445

F.2d 1180, 1188 (9th Cir. 1971).[5] The court of appeals' refusal to adopt petitioners' novel legal theory therefore does not warrant review by this Court.

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[5] Petitioners' attempts to distinguish *422,978 Square Feet* (Pet. 23-24) are unpersuasive. In that case, the United States filed a complaint in condemnation against submerged lands in San Francisco Bay. The United States had taken physical possession of those lands years earlier. 445 F.2d at 1181-1183. The United States urged two distinct reasons why no compensation was owed to the State of California: (1) the land was subject to a navigational servitude; and (2) the State had failed to file a timely inverse condemnation action under the Tucker Act. *Id.* at 1184-1188. Contrary to petitioners' suggestion (Pet. 23- 24), the two issues were not interdependent. On the latter issue, the court of appeals ruled that the United States' complaint in condemnation was not itself a taking, but simply a method of adjudicating rights to compensation. 445 U.S. at 1188. Because the property in question had already been taken, and because the State had failed to file a timely action seeking compensation for that taking under the Tucker Act, the State's right to compensation was lost. The court of appeals held that the United States did not lose the ability to raise the statute of limitations against the inverse condemnation claim simply because it had filed a direct condemnation action. *Ibid.* It follows *a fortiori* that petitioners' regulatory takings claim is barred, because here there is a prior *judgment* holding that the inverse condemnation action is time-barred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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