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When *Fisher* Meets Water: Federal Circuit Establishes Standard for Rule 12(b)(1) Motions

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In *Crow Creek Sioux Tribe v. United States*,[1] a panel for the Federal Circuit established a "plausibility" requirement for facial challenges to subject-matter jurisdiction under Rule 12(b)(1).[2] In doing so, the court bypassed a bright-line rule established by the *en banc* Federal Circuit in *Fisher v. United States*[3] that a plaintiff need only allege a "money-mandating" Constitutional provision, statute, or regulation in order to establish jurisdiction for cases under the Tucker Act.[4] Instead, the court in *Crow Creek Sioux Tribe* found that the plaintiff failed to allege an injury-in-fact, an indispensable requirement for constitutional standing. Despite plaintiff's insistence, the court did not address or even acknowledge the *Fisher* rule. The court's decision here may ultimately be best read as confining *Fisher* to merely one different component of the standing inquiry, redressability.

While the majority of the Federal Circuit's appellate review relates to patent cases,[5] the court's subject matter appellate jurisdiction extends to monetary claims against the United States.[6] These cases often originate in the United States Court of Federal Claims, over which the Federal Circuit has exclusive appellate jurisdiction.[7] The Court of Federal Claims and its predecessor, the Court of Claims, have a long and controversial

[1] 900 F.3d 1350 (Fed. Cir. 2018).

[2] *Id.* at 1354–55.

[3] 402 F.3d 1167 (Fed. Cir. 2005).

[4] *Id.* at 1173. There are three versions of the Tucker Act, each applying to different classes of plaintiffs. The statute at issue in *Crow Creek Sioux Tribe* was the Indian Tucker Act, 28 U.S.C. § 1505 (2012).

[5] In the 2017 fiscal year, the Federal Circuit's docket consisted of 63% patent law cases (29% from district courts, 33% from the U.S. Patent and Trademark Office, and 1% from the International Trade Commission). United States Court of Appeals for the Federal Circuit, Appeals Filed by Category FY 2017, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY_17_Filings_by_Category.pdf (last visited Sep. 29, 2018).

[6] *Id.* (disclosing that approximately 12% of appeals cases arise from monetary claims against the United States).

[7] 28 U.S.C. § 1295(a)(3).

history.[8] Currently, the Court of Federal Claims is an Article I tribunal.[9] While most causes of action at the Court of Federal Claims arise from contracts between the Federal Government and private parties,[10] takings claims under the Fifth Amendment and violations of trust responsibilities under statute also fall under the court's jurisdiction.[11] The Indian Tucker Act is one such statute that both waives sovereign immunity of the United States for claims by Indian tribes and grants jurisdiction to the Court of Federal Claims to hear such claims.[12]

The Crow Creek Sioux Tribe, a federally-recognized tribe, resides in a reservation in South Dakota. The western boundary of the reservation is marked by the Missouri River. In the 1940s and 1950s, the Federal Government constructed several dams along the Missouri River that flooded about 15,000 acres. In 1962, the Tribe received over $5 million "in settlement of all claims, rights, and demands . . . arising out of" the dams' construction for the loss of land.[13]In 2017, the Tribe filed suit against the United States seeking $200 million in damages associated with the Government's alleged mismanagement of the Tribe's waters rights.[14]The Tribe alleged two causes of action. First, the Tribe claimed that the Government "had abdicated its fiduciary trust responsibilities to the tribe . . . namely the preservation of its reserved water use rights."[15] Second, the Tribe claimed that the alleged mismanagement of that water and

[8] Initially, Court of Claims final judgements were reviewable by the Treasury Department. As such, the Supreme Court ruled in *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), that this non-finality precluded appellate review by the Court. Congress later amended the governing statute to remove review by the Executive Branch. Still, judgements above a certain threshold required appropriation by Congress. Nevertheless, the Supreme Court in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), held as a plurality that the judges of the Court of Claims possessed Article III status and the salary guarantees that accompanied it. Congress subsequently amended the governing statute to remove Article III functions from the Court of Claims and formally designated its successor, the Court of Federal Claims, as an Article I tribunal. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

[9] *See* Federal Courts Improvement Act, *supra* note 8.

[10] *See supra* note 5.

[11] *See, e.g.*, Osage Tribe of Indians v. United States, 93 Fed. Cl. 1, 267 (2010) (holding that 25 U.S.C. § 162a is a money-mandating provision under the Tucker Act because it requires the U.S. Government to act as a fiduciary for Indian trust funds)

[12] *See* Indian Tucker Act, *supra* note 4.

[13] 900 F.3d at 1352 n.1.

[14] Crow Creek Sioux Tribe v. United States, 132 Fed. Cl. 408 (2017).

[15] *Id.* at 409. The statutory claim of breach of fiduciary duty was discussed at length at the Claims Court and in appellate briefs before the Federal Circuit. Because the takings claim is an established money-mandating source under the *Fisher* standard

construction of the dams resulted in a taking under the Fifth Amendment.[16] The United States responded by filing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[17] Among the grounds for dismissal, the Court of Federal Claims, in an opinion by Senior Judge Hodges, focused on the threshold issue of standing.[18]

Critical to the case are the Tribe's water rights under the *Winters* doctrine. The *Winters* doctrine originates from a series of Supreme Court decisions beginning with *Winters v. United States*.[19] These cases together held that "when Congress creates an Indian reservation, the water necessary to fulfill the reservation's purposes is reserved implicitly."[20] Although water use is traditionally under the authority of the states, because these water rights are associated with reservations created under Federal authority, they supersede any state law claims.[21]

At the Claims Court, the Government argued that the Tribe could not show that it had been damaged by the diversion of water resulting from the dams. In the alternative, the Tribe had not shown or even alleged that the reduction resulted in the Tribe lacking sufficient water for its purposes.[22] The Tribe responded by arguing that any diversion affects the Tribe's possessory interest in the waters and further that discovery would permit the Tribe to demonstrate the amount of water diverted.[23] The Claims Court ruled in favor of the government, holding that the Tribe had not alleged that the diversion "reduced the amount of water available to the Crow Creek Sioux."[24] In addition, the governing statute, 25 U.S.C. § 162a, "does not direct any specific actions to be taken by the government" in managing the natural resources of the tribes.[25] The

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and the statutory finding was not vital to the court's holding, the money-mandating status of 25 U.S.C. § 162a(d)(8) is not the focus of this comment.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 409–10.

[19] 207 U.S. 564 (1908).

[20] Cynthia Brougher, Cong. Research Serv., Indian Reserved Water Rights Under the Winters Doctrine: An Overview (June 8, 2011).

[21] *Id.* at 2–3.

[22] *Crow Creek Sioux Tribe*, 132 Fed. Cl. at 410.

[23] *Id.*

[24] *Id.* at 411.

[25] *Id.*

Claims Court dismissed the suit for lack of subject matter jurisdiction under Rule 12(b)(1)[26] and the Tribe appealed.

The Federal Circuit panel, in a unanimous opinion by Judge Dyk, affirmed.[27] The court began by analyzing whether the Tribe sufficiently alleged Article III standing.[28] In doing so, the court held—for the first time in its own jurisprudence—that "the Supreme Court's 'plausibility' requirement for facial challenges to claims under Rule 12(b)(6), as set out in [*Twombly* and *Iqbal*], also applies to facial challenges to subject-matter jurisdiction under Rule 12(b)(1)."[29] The court noted that this holding comports with the majority of its sister circuits.[30] Under this standard, "a complaint must contain sufficient factual matter that would plausibly establish standing if accepted as true."[31]

The court then applied the plausibility standard to determine if the Tribe had sufficiently alleged an injury-in-fact.[32] The Tribe admitted that their *Winters* rights served as the sole basis for both the constitutional (takings) and statutory (mismanagement) claims.[33] Since *Winters* rights only extend to "that amount of water necessary to fulfill the purpose of the reservation, no more"[34] and "the complaint [did] not allege that the amount of water flowing by the Reservation and available for the Tribe's use is insufficient" to meet the purpose, the court held that the Tribe failed to allege an injury in fact.[35] As such, the Tribe failed to allege standing, the court lacked jurisdiction, and the case was dismissed.

The court never addressed the Tribe's argument at both the Claims Court and Federal Circuit regarding the already-established jurisdictional test for claims under the Tucker Act by the *en banc* Federal Circuit in *Fisher*. True, *Fisher* was decided before both *Twombly* and *Iqbal*. If, however, the court is implying—by avoiding the question—that the two latter Supreme Court cases overruled or limited *Fisher*, it should say so.

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[26] *Id.*
[27] Crow Creek Sioux Tribe v. United States, 900 F.3d 1350, 1352 (Fed. Cir. 2018).
[28] *Id.* at 1354–55
[29] *Id.*
[30] *Id.*; *see also id.* at 1355 n.2.
[31] *Id.* at 1355 (internal quotations and citations omitted).
[32] *Crow Creek Sioux Tribe*, 900 F.3d at 1355.
[33] *Id.*
[34] *Id.* at 1356 (quoting Cappert v. United States, 426 U.S. 128, 141 (1976)).
[35] *Id.* at 1356.

It did not. In fact, *Fisher* was not mentioned a single time in the court's opinion.

Importantly, *Fisher* was decided precisely to deal with the unique issues that arise under Tucker Act cases where "the court's jurisdictional grant blends with the merits of the claim."[36] The *Fisher* court sought to correct this by setting forth a bright-line rule dictating that "[w]hen a complaint is filed alleging a Tucker Act claim based on a Constitutional provision, statute, or regulation . . . the trial court at the outset shall determine . . . whether the [provision] is money-mandating."[37] If the court determines that the source of the claim is money-mandating, then it "*shall* declare that it has jurisdiction over the cause, and *shall* then proceed with the case in the normal course."[38] The Takings Clause of the Fifth Amendment is a money-mandating provision, and the Tribe alleged a taking in its complaint.[39] The Tribe could rightfully think it had satisfied the jurisdictional requirements under *Fisher*; however, the Tribe may be misinterpreting the role *Fisher* plays in the standing and jurisdictional inquiry.

Perhaps *Fisher* is now better understood as addressing simply one component of Article III standing and, by extension, jurisdiction under the Tucker Act. Namely, *Fisher* may address the third part of the standing inquiry, whether the alleged injury is redressable by the court.[40] Because the Court of Federal Claims does not have equitable powers independent of calculating damages,[41] whether a plaintiff may obtain redress, a requirement for Article III standing, under the Tucker Act depends on whether the plaintiff is entitled to damages. Damages, however, are often a merits question, and *Fisher* was designed to bypass the problems of answering a merits question at the pleading stage by directing the court to effectively defer on this question until later in litigation (e.g., summary judgement or trial).[42] While redressability is addressed by *Fisher*, the question of injury-in-fact and causation remain.

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[36] *Fisher*, 402 F.3d at 1171–72.

[37] *Id.* at 1173.

[38] *Id.* (emphasis added).

[39] Opening Brief of Plaintiff-Appellant Crow Creek Sioux Tribe at 8, Crow Creek Sioux Tribe v. United States, 900 F.3d 1350 (Fed. Cir. 2018) (No. 2017-2340), 2017 WL 4699008, at 8.

[40] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

[41] *See* United States v. Tohono O'Odham Nation, 563 U.S. 307, 313 (2011).

[42] *See Fisher*, 402 F.3d at 1171–73.

Indeed, whether the Tribe had sufficiently alleged an injury-in-fact—the first component of Article III standing—was the focus of the court here.[43]

This, however, is likely not the end of the case. A dismissal under Rule 12(b)(1) is a denial of jurisdiction; it does not reach the merits of the case. Now, the Tribe is free to file a new suit against the United States, appropriately alleging an injury-in-fact in hopes of meeting the new standing/jurisdictional "plausibility" threshold. The question remains whether *Fisher* is good law—especially in light of the heightened pleading standards of *Twombly* and *Iqbal*—or whether *Fisher* merely addresses one aspect of the standing inquiry. ■

[43] The Federal Circuit suggested that the Claims Court had meant "injury" when it said "damages" during its standing analysis. *See Crow Creek Sioux Tribe*, 900 F.3d at 1355.