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**Fraser Constr. Co. v. United States, No. 03-5155, 2004 U.S. App. LEXIS 20338 (Fed. Cir. Sept. 27, 2004)**

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Three Forks Ranch Corporation (“Three Forks”) appealed the United States District Court for the District of Colorado’s dismissal of its complaint requesting damages and an injunction against the City of Cheyenne, Wyoming, the Cheyenne Board of Public Utilities, Wyoming’s State Engineer, and Wyoming’s Water Development Commission (collectively “Wyoming Defendants”). Three Forks’ complaint alleged Three Forks owned Colorado water rights and the Wyoming Defendants diverted additional water from the Little Snake River Basin for Cheyenne’s municipal supply. The Little Snake River Basin flows south of Wyoming across the Colorado border and the Three Forks property was the first property downstream from the Wyoming Defendants’ intended diversions. Three Forks owned Colorado water rights with a priority date of 2000 and claimed the Wyoming Defendants’ diversions violated the Colorado River Basin Compact (“Compact”) by injuring those water rights.

While Three Forks raised a variety of challenges to the district court’s decision, the United States Court of Appeals for the Tenth Circuit only considered whether the Compact provided Three Forks with a private right of action that allowed Three Forks to invoke the Compact to protect Three Forks’ rights. The Compact prevented parties from interfering with the right of other parties to regulate water appropriation within their boundaries; however, the court held that the Compact created no private right of action. The court determined no private right of action existed under the Compact because: (1) Three Forks was not a part of the class that the Compact was enacted to protect, (2) the intent behind the Compact did not support a private right of action, (3) a private right of action was not consistent with the underlying scheme of the Compact, (4) the Compact lacked an explicit private right of action, and (5) signatory states possess no right of action under the Compact. The court also concluded no private right of action existed under the Compact because the Compact itself only apportioned water among the states, and did not create private water rights.

Finally, the court addressed Three Forks’ argument that federal common law created a private right of action under the Compact. The court held that only signatories of the Compact could assert federal common law theories under an interstate water compact. Because Three Forks was not a signatory of the Compact, it could not assert such a right of action. The court accordingly held the Compact provided no private right of action for Three Forks and affirmed the decision of the District Court dismissing Three Forks’ complaint.

*Jared Ellis*

### COURT OF FEDERAL CLAIMS

**Fraser Constr. Co. v. United States, No. 03-5155, 2004 U.S. App. LEXIS 20338 (Fed. Cir. Sept. 27, 2004)** (affirming the trial court’s

judgment that the contractor failed to prove the elements of a constructive acceleration claim and subsequently, was not owed additional compensation under the contract).

In 1993, the Army Corps of Engineers (the "Corps") contracted Fraser Construction Company ("Fraser") to excavate material from the bottom of Silver Lake in connection with the Corps' flood control project on the South Fork Zumbro River in Rochester, Minnesota.

Fraser designed a dike capable of withstanding a water flow rate of 800 cubic feet per second to divert the stream running through the otherwise dry lakebed. The Corps informed Fraser of the likelihood of damage to the dike due to high water flows. Their contract stipulated severe, unanticipated weather could warrant an extension, however, delays due to anticipated water flow could not. High water flows continually flooded the work site from May through the month of August. Each month Fraser negotiated with the Corps for an extension. In July, Fraser asked for monetary relief and asserted a constructive acceleration claim. The Corps denied the acceleration claim, as well as the request for equitable adjustment, but granted extensions amounting to thirty days due to the rain and times when the wetness prevented the use of the truck. The Corps did not grant extra days based on the inadequacy or poor design of the trench and diversion system. After completing the project, Fraser asked the contracting office for additional compensation because the Corps denied reasonable extensions and made Fraser work in flood conditions, which subsequently caused Fraser substantial expenses.

Following the contracting office's denial, Fraser filed suit in the Court of Federal Claims. The trial court initially granted summary judgment in favor of the Corps, but the Court of Appeals for the Federal Circuit, finding genuine issues of material fact, remanded the case for trial. The trial court ultimately ruled Fraser failed to establish its constructive acceleration claim.

An acceleration claim asserts that the government shortened the time of performance, thereby modifying the contract and entitling the contractor to compensation. The circuit court stated a constructive acceleration claim must prove: (1) an excusable delay under the contract, (2) the contractor requested an extension in a timely manner, (3) the government denied the request or responded in an untimely manner, (4) the government insisted the contractor complete the project, and (5) the contractor incurred extra expenses as a result.

On appeal, the circuit court examined whether the trial court erred with regard to four issues: (1) the foreseeability of the delays and the dike's destruction, (2) the timeliness of the Corps' extensions, (3) Fraser's entitlement to long-term suspension, and (4) the nature of the Corps' orders to continue performance.

First, the trial court held Fraser failed to prove the delays resulted from unforeseeable causes irrespective of any fault of Fraser. The circuit court specifically addressed the foreseeability of the high water levels following high peak flows. Fraser conceded the overtopping of the dike due to high peak flows was foreseeable, but argued the extended high water level that occurred days after the overtopping was not foreseeable. The trial court reasoned that if Fraser designed the dike to withstand foreseeable high peak flow incidents, than the higher average daily flows would not have created problems. Therefore, the circuit court concluded the trial did not err in its analysis.

Next, Fraser argued argument the Corps' thirty-day extension was inadequate. Fraser asserted the Corps' extension was untimely, was only granted after adverse weather conditions occurred, and the Corps forced Fraser to work during the period anyway. The trial court reasoned the Corps expressed a willingness to grant extensions and the Corps did not necessarily need to grant extensions on the spot. The circuit court agreed with the trial court's finding against Fraser on this issue.

Third, Fraser contended the Corps' extension was inadequate because the project should have been suspended rather than just extended. However, Fraser failed to specify dates that the Corps should have granted an extension. In addition, evidence showed that during times of dike repair, Fraser could still haul material from the excavation site. The circuit court again found no error in the trial court's decision that Fraser failed to show its entitlement to long-term suspension.

Finally, the circuit court reviewed the trial court's holding that the Corps' insistence that Fraser uphold the contract and complete the project did not constitute forced acceleration of performance. Fraser asserted the Corps pressured Fraser to finish the job while also refusing to grant every requested extension. The Corps presented evidence it was willing to grant extensions for which Fraser had sufficient claim. Despite the mixed evidence, the circuit court agreed with the trial court's decision that it was reasonable for the Corps to remind Fraser of its responsibility and insist Fraser complete the project according to the contract.

Thus, the circuit court concluded the trial court did not err and affirmed the trial court's ruling that Fraser failed to prove its claim of constructive acceleration.

*Lynn Noesner*

#### UNITED STATES DISTRICT COURTS

**Cent. Valley Water Agency v. United States, 327 F. Supp. 2d 1180 (E.D. Ca. 2004)** (holding when Congress enacted the Central Valley Project Improvement Act, Congress deferred to the Bureau of Reclamation regarding the operation of the Central Valley Project in California in