

assumes that provision twelve, which is located on the reverse side of the purchase order, is binding on the parties. As discussed earlier, this is a determination that the district court must make on remand.

The appellant also claims that the district court applied an incorrect measure of damages to its breach of warranty claim. The district court ruled that the appellant could not recover its cost of cover because it did not properly effect cover under § 2-712. The appellant, however, argues that because it accepted the goods and did not revoke its acceptance, it is entitled to damages under § 2-714. Although the district court did state that the appellant could not recover its cost of cover, see District Court's Order at 11, it is clear that the district court did not determine whether an actual breach of warranty occurred. The district court expressly stated:

The court makes no finding as to whether the coal when delivered contained more than the maximum 37 percent fines or whether a stable burn could be obtained or whether a given amount of the coal was actually used by the plaintiff. A finding is unnecessary for resolution of the motion.

8 Tr. 1220. Therefore, until the district court determines whether a breach of warranty has occurred, any appeal on the issue of damages for breach of warranty is premature.

IV

For all the foregoing reasons, the decision of the district court is

REVERSED AND REMANDED.



reasonable time requirement of § 2-607(3)(a). See *Kiser v. Lemco Indus., Inc.*, 536 S.W.2d 585, 599 (Tex. Civ. App. 1976) ("When any action is to be taken within a reasonable time. § 1.204(a)

**PEOPLE OF ENEWETAK, Rongelap,
and Other Marshall Islands Atolls,
Plaintiffs-Appellants,**

v.

**The UNITED STATES,
Defendant-Appellee.**

Nos. 88-1307, 88-1308.

United States Court of Appeals,
Federal Circuit.

Dec. 8, 1988.

Complaints for "taking" against the United States by inhabitants of the Marshall Islands for post-War nuclear testing were dismissed by order of the Claims Court, 13 Cl.Ct. 690 and 13 Cl.Ct. 691, Harkins, Senior Judge. On appeal, the Court of Appeals, Nies, Circuit Judge, held that: (1) compact of free association between United States and Marshall Islands withdrew Claims Court's jurisdiction over claims, and (2) to be constitutionally adequate, alternate mode of settling taking claims need not preserve Tucker Act jurisdiction.

Affirmed.

1. United States ⇐125(27)

Congress' creation of alternate mode of compensation to resolve "taking" claims of inhabitants of Marshall Islands, arising from post-War nuclear testing pursuant to compact of free association between Government of the United States and Government of Marshall Islands, which withdrew jurisdiction for those claims under the Tucker Act, precluded Claims Court's jurisdiction, notwithstanding inhabitants' contentions that the alternate mode of compensation was inadequate. 28 U.S.C. § 1491(a)(1); Compact of Free Association Act of 1986, § 201, sec. 177, 48 U.S.C. A. § 1681 note; U.S.C.A. Const. Amend. 5.

specifies that the parties may fix by agreement, as the parties here fixed, a time which is not manifestly unreasonable.")

(Civ. or Fed. 2d 134 (Fed. Cir. 1988))

2. United States ⇐125(4)

To be constitutionally adequate, Congress' creation of alternate mode of resolving "taking" claims need not preserve ultimate resort to the Tucker Act. 28 U.S.C.A. § 1491(a)(1); U.S.C.A. Const. Amend. 5.

Abram Chayes, Harvard Law School, Cambridge, Mass., argued for plaintiffs-appellants. With him on the brief was Anne-Marie Burley. David R. Anderson, Wilmer, Cutler & Pickering, Washington, D.C., argued for plaintiffs-appellants. With him on the brief were Lloyd N. Cutler, Andrew B. Weissman and Stephen J. Schnably. Also on the brief were E. Cooper Brown, Marshall Islands Atomic Testing Litigation Project, Takoma Park, Md., Richard F. Gerry, Casey, Gerry, Casey, Westbrook & Reed, San Diego, Cal., and Fred Baron, Baron & Budd, of Dallas, Tex.

John T. Stahr, Dept. of Justice, Washington, D.C., argued for defendant-appellee. With him on the brief were Roger J. Marzulla, Asst. Atty. Gen., Jacques B. Gelin and Gary B. Randall. Also on the brief was Howard L. Hills, U.S. Dept. of State, Washington, D.C., of counsel.

Before SMITH, Circuit Judge,
SKELTON, Senior Circuit Judge, and
NIES, Circuit Judge.

NIES, Circuit Judge.

These appeals are from the final judgments of the Claims Court in *Peter v. United States*, 13 Cl.Ct. 691 (1987), and *Nitot v. United States*, 13 Cl.Ct. 690 (1987), dismissing the complaints of inhabitants of the Enewetak, Rongelap, and other Marshall Islands Atolls for lack of subject matter jurisdiction. In dismissing the subject complaints, the Claims Court relied on its decision of the same date in *Juda v. United States*, 13 Cl.Ct. 667 (1987),¹ a closely relat-

1. The claimants in *Juda* also appealed. That appeal was dismissed with prejudice upon the unopposed motion of claimants, following the enactment of special legislation which appropriated funds for the benefit of the People of Bikini. *People of Bikini, Enewetak, Rongelap, Utrik & Other Marshall Islands Atolls v. United States*, 859 F.2d 1482 (Fed. Cir. 1988).

ed case involving claims by inhabitants of Bikini Atoll. In *Juda*, the Claims Court held that it lacked subject matter jurisdiction over claims by inhabitants of the Marshall Islands because the consent of the United States to be sued on those claims had been withdrawn by an act of Congress in conjunction with the establishment of a Marshall Islands Claims Tribunal funded by the United States.² We affirm.

I

[1] In early 1980, complaints were filed in the United States Court of Claims by inhabitants of the Marshall Islands, asserting individual damage claims resulting from a United States nuclear testing program in the Marshall Islands lasting from June 30, 1946 through August 18, 1958. Certain claims were held to be viable under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), hence trial preparations relating to those claims proceeded.

While the individual inhabitants were pursuing their claims before the Claims Court, the governments of the United States and of the Marshall Islands negotiated and signed a Compact of Free Association (Compact) and its related agreements. The Compact was approved by plebiscite votes in the Marshall Islands; that approval was certified to the United States Government on February 24, 1986. Legislation approving the Compact was submitted to Congress in 1985 and was signed into law by the President on January 14, 1986, thereby becoming the Compact of Free Association Act of 1985, Pub.L. No. 99-239, 99 Stat. 1770 (1986) (Act).

Under section 177 of the Compact, the United States Government accepted responsibility for the just compensation owing for loss or damage resulting from its nuclear testing program. The United States Government committed an initial sum of

2. Because the cited opinion details the historical background of the nuclear testing program, the Compact of Free Association, the section 177 Agreement, and the Compact Act, as well as the procedural background involved in these appeals, we have not reiterated such matters here.

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\$150,000,000, with additional financial obligations over fifteen years for the settlement of all claims.³ The initial amount was to establish a Claims Settlement Fund (Fund), and that amount has been appropriated. The payment and distribution of money from that Fund is to be made in accordance with provisions set forth in a separate agreement (section 177 Agreement), referenced in the Act, between the governments of the United States and the Marshall Islands. That agreement, *inter alia*, creates a Claims Tribunal which will administer the Fund in conjunction with the settlement of claims. In that regard, Article XII of the section 177 Agreement provides:

All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

Once the Act became law, the government moved to dismiss each case. After oral argument on the motion and additional briefing, the court granted the government's motions to dismiss, and final judgments of dismissal were subsequently entered.

The Claims Court agreed with the government that pursuant to Article XII of the section 177 Agreement, the consent of the United States to be sued in the Claims Court, on appellants' claims arising from the nuclear testing program conducted by the United States in the Marshall Islands, had been withdrawn in conjunction with the establishment of an alternative tribunal to provide just compensation.⁴

3. In addition, Article IX of the referenced section 177 Agreement provides:

Changed Circumstances

If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Govern-

ment of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

(2) Appellants acknowledge that "Congress can, of course, provide alternative modes of compensation for Fifth Amendment takings." While appellants assert broadly that the "alternative remedy is manifestly incapable of providing meaningful relief," their principal argument is, in essence, that no alternative remedy can be constitutionally "adequate" unless it preserves ultimate resort to the Tucker Act, citing *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 124-25, 96 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974), as well as *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) and *Dames & Moore v. Regan*, 458 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981). The Claims Court held that appellants' attack on the "adequacy" of the alternative procedure provided by Congress for compensation of their claims was premature. *Juda*, 13 Cl.Ct. at 689.

We cannot agree that the Claims Court committed legal error in its ruling. The Act and the section 177 Agreement, provide, in perpetuity, a means to address past, present and future consequences, including the resolution of individual claims, arising from the United States nuclear testing program in the Marshall Islands between June 30, 1946 and August 18, 1958. Congress intended the alternative procedure to be utilized, and we are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate. Indeed, the recent appropriation by Congress for other Marshall Islanders, supplementing an existing Resettlement Trust Fund, see *supra* note 1, evidences Congress's concern that its alternative provision for compensation be adequate. Fur-

ther, appellants overstate the holding in *Blanchette*. The Court did not hold that a fallback Tucker Act claim was necessary to sustain the constitutionality of every alternative procedure for compensation. In *Blanchette*, such claim remained available; therefore, the Court did not have to decide that issue. In any event, we do not read *Blanchette* to mandate such a determination in advance of the exhaustion of the alternative provided.

4. Because we affirm the decision of the Claims Court to dismiss appellants' complaints for lack of subject matter jurisdiction, we need not address other issues.

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II

For the foregoing reasons, the judgments of the Claims Court in the *Peter and Nitot* cases are affirmed, and we adopt that court's more extensive analysis in *Juda v. United States*, 13 Cl.Ct. 667 (1987), relating to the issues discussed above.

AFFIRMED.



The BOSTON FIVE CENTS SAVINGS BANK, FSB, Plaintiff-Appellant,

v.

The UNITED STATES,
Defendant-Appellee.

No. 88-1396.

United States Court of Appeals,
Federal Circuit.

Dec. 16, 1988.

Bank brought action against Department of Housing and Urban Development seeking money damages after apartment building on which it held a HUD-guaranteed mortgage was converted to a cooperative. The Claims Court, 14 Cl.Ct. 217, Wiese, J., dismissed the action, and bank appealed. The Court of Appeals, Bissell, Circuit Judge, held that Claims Court was not required to dismiss action for money damages even though declaratory action arising out of same operative facts and

concerning same dispositive issues was pending in district court.

Reversed and remanded with instructions to stay.

1. Federal Courts \Leftarrow 1073

Although plaintiff's suits in federal district court and Claims Court arose out of same operative facts and involved same dispositive issues, district court claim involved equitable relief and Claims Court action involved monetary damages, and thus Claims Court had jurisdiction over monetary claim. 28 U.S.C.A. § 1500.

2. Federal Courts \Leftarrow 1145

Plaintiff's unsuccessful attempt to amend declaratory judgment complaint in district court to include claim for money damages did not cause that money damages claim to be pending at time plaintiff's previously filed Claims Court action for money damages based on same operative facts was filed as would require Claims Court to dismiss action; no money damages claim was pending in district court at time Claims Court action was filed. 28 U.S.C.A. § 1500.

3. Federal Courts \Leftarrow 1139

Claims Court had exclusive jurisdiction over bank's breach of contract claim for money damages against United States even though bank filed identical action against United States in district court on same day. 28 U.S.C.A. § 1500.

4. Action \Leftarrow 69(6)

Action in Claims Court for monetary damages arose out of same operative facts and involved same dispositive issues as already-pending action for declaratory judgment in district court, and thus Claims Court action would be stayed until disposition of district court action. 28 U.S.C.A. § 1500.

Steven P. Perkhautler, Harrison & McGuire, P.C., Boston, Mass., argued for plaintiff-appellant.