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ORIGINAL

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

MARIA A. GANGE, JESUS CRUZ CHARFAUROS, ANA A. CHARGUALAF, JESUS G. AGUIGUI, for themselves and on behalf of all others similarly situated,

Plaintiffs,

vs.

GOVERNMENT OF GUAM, GUAM ANCESTRAL LANDS COMMISSION by and through its individual Commissioners (for injunctive relief only to prevent a transfer) and DOES One 91) through Three hundred (300), inclusive.

Defendants.

CIVIL CASE NO. 10-00018

OPPOSITION TO EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR A PRELIMINARY INJUNCTION; AND MOTION TO DISMISS

The Guam Ancestral Lands Commission ("GALC"), an instrumentality of the Government of Guam, by and through its appointed Commissioners, through the Office of the Attorney General, respectfully oppose plaintiffs' *Ex Parte* application as follows:

I.

The plaintiffs do not meet the four part test for obtaining preliminary relief.

The plaintiffs do not cite to it -- the plaintiffs do not cite to any federal case law authority at all -- but there is a four part test a plaintiff seeking a preliminary injunction must meet. A plaintiff must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Alliance for the Wild Rockies; Native Ecosystems Council v. Cotrell*, __ F.3d __, WL2926463 (9th Cir. July 28, 2010). The plaintiffs do not meet this test, so their *Ex Parte* application should be denied. For additional reasons, plaintiffs' entire First Amended Complaint should be dismissed.

II.

Plaintiffs' claim is unripe; the government is not required to pay compensation in advance in a condemnation action and so the plaintiffs could suffer no cognizable immediate and irreparable harm even if they actually did own the Lots in question.

Even if the plaintiffs were to have owned the Lots in question, their *Ex Parte* application and First Amended Complaint ("FAC") would have to be denied and dismissed because their claim would be unripe. Plaintiffs' claim is that the government has taken their private property by eminent domain without paying just compensation *in advance*. But there is no requirement that a government pay compensation in advance in a condemnation action.

This matter is unripe because even under facts as alleged by plaintiffs, no federal cause of action could at all arise until the plaintiffs had pursued an inverse condemnation action and allegedly been denied just compensation in that action. The United States Supreme Court so held in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985):

A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, U.S., at 297 n. 40, 101 S.Ct., at 2371, n. 40. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation' " exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659, 10 S.Ct. 965, 971, 34 L.Ed. 295 (1890)). See also *Ruckelshaus v. Monsanto Co.*, 467 U.S., at 1016, 104 S.Ct., at 2879-2880; *Yearsley v. W.A. Ross Construction Co.*,309 U.S. 18, 21, 60 S.Ct. 413, 414, 84 L.Ed. 554 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 E.Ed 637 (1932). If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Monsanto*, 467 U.S., at 1013, 1018, n. 21, 104 S.Ct., at 2878, 2881, n. 21. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. *Monsanto*, 467 U.S., at 1016-1020, 104 S.Ct., at 2880-2882. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the court's holding in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). There, the Court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide and adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532, n. 12, 104

> S.Ct. 3194, 3203, n. 12, 82 L.Ed.2d 393 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

105 S.Ct. 3108, 3120-21 (footnotes omitted).

The government of Guam provides an adequate procedure for obtaining just compensation in takings actions.

7 GCA §11311.1, **Inverse Condemnation,** provides in relevant part:

> In any taking by the government of Guam after July 1, 1994, in which the government fails to follow the eminent domain provisions of Title 21, Guam Code Annotated, the person whose land is taken shall have four (4) years from the time of the such taking to institute an action for inverse condemnation. An action shall lie for the taking of a person's fee or for lesser compensable interest in the property which has been expropriated by the government of Guam without according the person due process. In any action for inverse condemnation in which an award is made to the person for a taking, the court shall also award reasonable attorney's fees and costs.

The plaintiffs do not claim to have availed themselves of this statutorily provided procedure and to have been denied just compensation in that action. Their present unconstitutional takings claim would thus be unripe even if they did own the Lots in question.

Under *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008), the plaintiffs have to establish a *likelihood*, not just a possibility, of irreparable harm in order to be entitled to a restraining order or preliminary injunction. Not having even attempted to pursue an inverse condemnation action the plaintiffs cannot establish the requisite likelihood that they will suffer irreparable harm if their *Ex Parte* application is not granted. The motion should be denied.

III.

The plaintiffs have never owned the Lots in question; they are being held by the GALC in public trust; and the legislature is free to revoke or modify the terms of a public trust that it creates.

The plaintiffs allege that 21 GCA §80104(e) created a public trust with the Class as the designated beneficiaries. FAC ¶10; *Ex Parte* Application p.2, ll.13-14.

But a public trust created by a legislature can be modified or revoked by the same or a succeeding legislature and this is so regardless of whether any power of revocation is expressly reserved in the law creating the public trust. One legislature cannot bind another.

In *A.B.A.T.E. of Illinois, Inc. v. Giannoulias, Treasurer, State of Illinois, et al.*, 2010 WL 2222801 (Ill.App.4Dist. 2010), a similar class-action suit was brought for declaratory judgment and for preliminary and permanent injunctions. The plaintiffs sought to prohibit the transfer of funds from a government created trust fund to the government's general fund.

The government created trust fund was a motorcycle Cycle Rider Safety Training Fund. It was funded from the annual fees paid from motorcycle registrations. Illinois law provided that the fund would be a trust fund outside the state treasury.

For the sake of argument, the *A.B.A.T.E.* court accepted the following as true: (1) that the plain language of the law showed the legislature created a trust and placed it outside the State Treasury with the intent that no General Revenue Funds could be placed in the trust; (2) that amendments to the law showed the legislature intended to change the fund from a special fund inside the State Treasury to a trust fund outside the State Treasury and to deprive the legislature of the power to transfer funds from it into the General Revenue Fund; and (3) that the legislative history showed the legislature intended to place the funds beyond the power of later legislatures to sweep.

Just as in the present case, the *A.B.A.T.E.* plaintiffs argued the transfer violated the takings clause of the Fifth Amendment to the United States Constitution. They argued the fund was a trust fund constituting private monies. They argued the transfer was inconsistent with the Fund's enabling statute and that an earlier legislature, the legislature that created the Fund, had intended to place the Fund beyond the powers of later legislatures to sweep, by making it a trust fund outside of the state treasury.

The *A.B.A.T.E.* court ruled that since no private monies had ever been placed into the fund, the plaintiffs could not show a takings violation.

Likewise in our case, since no private lands were placed into the GALC land bank the plaintiffs cannot show a takings violation.

The *A.B.A.T.E.* plaintiffs argued the court should apply the general rules of trusts and hold the legislature was without power to transfer the funds to the General Revenue Fund. The *A.B.A.T.E.* court ruled, as it noted courts in other jurisdictions had in similar contexts, that a legislature need not expressly reserve the power to revoke or modify the terms of a trust it creates.

The basis for this ruling was the axiom that a legislature has no power to bind future legislatures; and that a legislature cannot limit its absolute power to appropriate funds by creating an irrevocable public trust. See also, *Barber v. Ritter*, 196 P.3d 238, 254 (Co. 2008) ("To hold that the General Assembly could limit this plenary power to appropriate by creating an irrevocable public trust would be to effectively hold that the General Assembly could abrogate its constitutional powers by statute.... The status of the three cash funds as public trusts does not, and constitutionally cannot, have any limiting effect on the legislature's plenary power to amend or repeal those funds' enabling statutes."); *Board of Trustees of the Tobacco Use*

Prevention And Control Foundation v. Boyce, 925 N.E.2d 641 (Ct.App.Oh. 2009) (one legislature cannot make a binding promise that next will not change the law; former smokers had no vested rights in endowment fund that state created with funds received from settlement with tobacco companies).

Similarly in our case the Guam Legislature could at any time decide to transfer all of the property in the GALC Trust into the general land inventory of the government for public benefit use in general. As was observed by the court in *Price v. State of Hawaii*, 921 F.2d 950, 955-56 (9th Cir. 1990): "All property held by a state is held upon a 'public trust.'"

It would be entirely within the Legislature's prerogative to simply abolish the GALC and place all of the land in its Trust back into the government's general land inventory. *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 110 S.Ct. 1868, 1877 (1990) (a state has plenary power to create and destroy its political subdivisions); *Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution, et al.,* 50 N.W.2d 424, 434 (Wis. 1951) (a municipal corporation derives all its rights and privileges from legislative act and may have such rights or charter abolished by the legislature and is not to be regarded thereby as being deprived of any vested rights); *Attorney General ex rel Kies, et al. v. Lowrey,* 92 N.W.2d 289, 290 (Mich. 1902) (the state has the power to create and to destroy governmental agencies; the property of a government agency is in no sense private property, but is public property devoted to the purposes of the state, for the general good).

The GALC was created by Guam Public Law 25-45. The Guam Supreme Court recounted the history behind the creation of the GALC in *Taitano v. Lujan*, 2005 Guam 26 ¶¶4-5:

> In 1994 the United States Congress passed the Guam Excess Lands Act, Pubic Law No. 103-339, 108 Stat. 3116 (1994), requiring identification and valuation of lands that had been condemned under eminent domain on Guam, but which were no longer needed for the purposes for which they were condemned. After identifying and valuing those lands, the Administrator of General Services was to "transfer all right, title and interest of the United States in and to the parcels of land ... to the Government of Guam for public benefit use, by quitclaim deed." Guam Excess Lands Act § 2(a).

The Lots in question were transferred to the Government of Guam pursuant to the Guam Excess Lands Act. But these are not Lots that had been condemned from private landowners. Just the same as the land transferred pursuant to the Guam Excess Lands Act that had indeed been condemned from private landowners, the Lots in question were transferred to the government of Guam for "public benefit use."

The Guam Legislature:

> recognize[d] the mandate under which the properties listed in this Act were released, namely, for public benefit and use. Upon an historical review, however, the Legislature has concluded that the government of Guam is not the best nor most responsible guardian of the lands. For surplus federal properties to best serve the community, they must be placed under progressive and responsible growth-oriented management. It is genuinely felt that it is the original landowners and their heirs who possess the drive, the know-how, the motivation and the capacity to develop these lands to their highest and best use. It is the entrepeneurial spirit that will generate greater returns for the community as a whole and not government or political brokerage.

P.L. No. 22-145 § 1 (Dec.29, 1994).

As the plaintiffs allege, the Lots in question were placed into the GALC's Land Bank, for the GALC to take title to them as Trustee "on behalf of ancestral landowners who, by virtue of continued government or public benefit use cannot regain possession or title to their ancestral lands." Income resulting from the Commission's administration of these lands was "to be used to provide just compensation for those dispossessed ancestral landowners." 21 GCA §80104(e).

As the Lots in question were not condemned from private landowners, they had apparently always been administered by the governing powers in some sort of public trust; whether as federal government land, before that as "Crown Lands," or before that as non-privately owned lands subject to the dictates of the then powers-that-be. Upon passage of the federal Guam Excess Lands Act, the Guam Legislature made findings concerning the history and impact of the federal land condemnations on Guam in the World War II era and decided to designate the Lots to benefit landowners whose lands were condemned but who, despite the Guam Excess Lands Act, could not regain possession or title to their lands due to continued government or public benefit use of those lands. The present plaintiffs' claim of a taking of their private property is no stronger than would be a claim brought by any member of the public who is not a dispossessed ancestral landowner and who was to claim that the Legislature's having earlier designated the revenues from the Lots to benefit dispossessed ancestral landowners was a taking from him or her of private property.

The relevant statute, 21 GCA §80104(e), does not provide that all dispossessed ancestral landowners own the Lots; or are entitled to make any use of them at all. The statute provides that the GALC that shall administer all assets and revenues of the lands in its land bank to provide just compensation for dispossessed ancestral landowners. It was only resulting income of the land, not the land itself, that was at all dedicated to dispossessed ancestral landowners.

The legislature can always re-direct, re-designate, non-private property that the government holds in trust. The plaintiffs had no vested private property rights in the Lots or in any revenues of the Lots. If the Lots had ever been deeded to any of the plaintiffs individually, or if revenues of the Lots had ever been distributed to any of the plaintiffs, then the circumstances would of course be different. But that is not the case here.

IV.

The legislature is allowed to attack piecemeal the problem of dispossessed ancestral landowners.

Finally, the Legislature is not required to treat all the different dispossessed ancestral landowners the same, or to address all their different circumstances at the same time. The Legislature's decision in Public Law 30-158 to deed the two Lots in question to a particularly identifiable group of persons who are generally recognized under the Guam Ancestral Lands Act as dispossessed ancestral landowners was within its lawful powers. A legislature is allowed to attack piecemeal a perceived problem.

The plaintiffs' own exhibits evince appreciation of the common knowledge that different dispossessed ancestral landowners received different levels of compensation over the years. *See, e.g.*, attached as Exhibit 3 to the July 23, 2010, Declaration of Debbie Quinata In Support Of *Ex Parte* Application, the private testimony of GALC Commissioner Anthony P. Ada submitted to the legislature concerning Bill 278, p.2, ll.56-59:

> The commission is now working on rules and regulations on how to classify all dispossessed ancestral landowners for equitable compensation; for example, taking into consideration that some have been compensated (up to two times) while others received nothing.

Under the rational basis test, a legislature may legitimately make imperfect and piecemeal classifications in the area of economics. *Development Authority of Dekalb County et al. v. State of Georgia*, 684 S.E.2d 856 (Ga. 2009); *Bean v. State of Montana*, 179 P.3d 524 (Mont. 2008); *Cortes v. City of Houston*, 2007 WL 4376106 (S.D. Tex. 2007).

The Tiyan dispossessed ancestral landowners are similarly situated as a group. It was rational and lawful for the Legislature to decide to address their situation as a whole. If any of the individual Tiyan dispossessed ancestral landowners were to have been treated differently,

better or worse than the rest, then that might have given rise to legitimate "unfairness" or lack-of-rational-basis claims such as the plaintiffs or any other Guam residents might want to raise. As it is, however, the Legislature has made a rational and lawful decision about how to address the circumstances of a particularly identifiable group of dispossessed ancestral landowners and the court should not overturn it.

V.

Plaintiffs' complaint should be dismissed.

For all of the reasons above stated, pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Government of Guam moves the court to dismiss plaintiffs' First Amended Complaint in its entirety. A complaint should be dismissed when, even accepting all of the allegations in the complaint as true, and drawing all reasonable inferences in favor of the plaintiff, the complaint fails to state a claim upon which relief may be granted. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

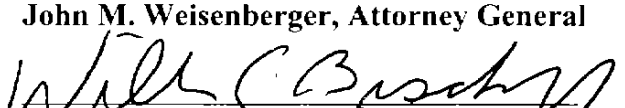
Particularly for the reasons stated in Part II, above, plaintiffs' complaint must be dismissed. Even if the Lots in question were privately owned by the plaintiffs and even if they were taken from them by the government without payment in advance of just compensation, the plaintiffs' complaint would fail to state a cause of action upon which this court could grant relief. That is because no federal cause of action could exist at all under the facts as alleged by the plaintiffs until they had pursued the inverse condemnation action provided for in 7 GCA §11311.1 **Inverse Condemnation**, and allegedly been denied just compensation in that proceeding. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985).

Conclusion

For all of the foregoing reasons, plaintiffs' *Ex Parte* application should be denied and their complaint should be dismissed in its entirety.

Dated this 9th day of August, 2010.

OFFICE OF THE ATTORNEY GENERAL
John M. Weisenberger, Attorney General

By: 

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CERTIFICATE OF SERVICE

I, William C. Bischoff, do hereby certify that on August 9, 2010, I caused to have one copy of **OPPOSITION TO EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR A PRELIMINARY INJUNCTION; AND MOTION TO DISMISS**, to be served upon the following by hand delivery and leaving said document at the office of their attorney of record.

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Dated this 9th day of August, 2010.

OFFICE OF THE ATTORNEY GENERAL
John M. Weisenberger, Attorney General

By: _____
WILLIAM C. BISCHOFF
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