

## Stephanie Tatham

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**Subject:** Section 1500 Comments

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**From:** Dan Syrdal

**Sent:** Monday, October 15, 2012 1:37 AM

**To:** Comments

**Cc:** Parris, Mark; 'Dave Keenan'

**Subject:** Section 1500 Comments

To Whom it may concern:

I would like to commend ACUS for the most recent approach as expressed in the "Further Revised Section 1500 Draft Recommendation". Most importantly for my clients, I would like to commend ACUS for the new proposal to make this new repeal/amendment section applicable to pending cases since it is precisely plaintiffs in those pending cases which had the least opportunity to avoid the unfairness associated with the fact the Tohono decision put extra requirements onto unsuspecting plaintiffs, requirements that could not have been anticipated even when exercising the utmost of caution. While 1500 has been a problem for a long time, the Department of Justice is attempting to apply the Tohono decision most unfairly to my clients and others involved in regulatory takings cases. My clients were following the necessary sequence in APA regulatory takings actions when the Tohono case changed the rules in midstream by eliminating the adequacy of "different relief sought" as a well-recognized defense against a Section 1500 motion to dismiss. Without retroactive application, plaintiffs in regulatory takings cases would be caught without recourse if the DOJ's argument that an APA case reviewing the correctness of an administrative action involves the same operative facts as a resulting takings claim were to be accepted (an argument we believe to be most incorrect given the very different facts that must be proven to overturn a regulatory permit decision versus a proof of "takings damages" as a result of an improper regulatory decision). Success of that argument by the DOJ would be most unfair, and eliminate a constitutional right to be compensated for a takings despite the legal requirement in regulatory takings to bring the APA action first in District Court and then the takings claim later in the Federal Court of Claims. The proposed application of this amendment/repeal of Section 1500 to pending actions will not only avoid this extreme unfairness (should the DOJ succeed in its argument regarding operative facts), but it will avoid a great deal of duplicative and unnecessary litigation caused by DOJ's attempt after the Tohono decision to apply Section 1500 to a myriad of regulatory takings cases.

Sincerely,

Dan Syrdal

Attorney for Resource Investments Inc.