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NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Paul M. Hoffenberg,

Plaintiff,

vs.

United States of America; United States
Forest Service,

Defendants.

) No. CV-08-08164-PCT-FJM

) **ORDER**

The court has before it plaintiff Paul Hoffenberg’s motion for partial summary judgment (doc 25), defendant the United States’ response (doc. 29), and plaintiff’s reply (doc. 32). We also have before us defendant’s motion for summary judgment (doc. 35), plaintiff’s response (doc. 39), and defendant’s reply (doc. 41). Finally, we have before us plaintiff’s motion to strike Exhibits A and B to defendant’s reply (doc. 43), and defendant’s response (doc. 44). Plaintiff’s time to reply has not run.

In our Order of May 14, 2010 (doc. 38), we granted the parties’ stipulation to extend the briefing schedule and advised them that it could not affect the timing of our decision. Because of the timing of plaintiff’s motion to strike, and because consideration of the exhibits in question would not affect our decision, we will decide the motion without a reply and deny it as moot.

I

1
2 In 1994, plaintiff purchased about thirty-two acres of land in Yavapai County
3 northwest of Oak Creek and a few miles south of Sedona, Arizona. Plaintiff seeks access to
4 his property in order to develop a residential subdivision. The Coconino National Forest
5 borders the property on the west, north, and east. The Rancho Chavez subdivision, which
6 was platted in the 1950s, borders it on the south. Chavez Ranch Road provides access to the
7 subdivision from the west. It runs along the south edge of the subdivision and ends after
8 entering the national forest to the east of plaintiff's property. Before Chavez Ranch Road
9 ends, Hilltop Road branches off and runs north across a two-acre parcel. Plaintiff also owns
10 this parcel, the northwestern corner of which overlaps the southeastern corner of his main
11 parcel by about seventeen feet. Hilltop Road enters the national forest about seventy feet
12 from the overlapping corners, bends west, and enters plaintiff's main parcel. Thus, the road
13 providing access to plaintiff's main parcel since the 1950s crosses about 150 feet of national
14 forest land.

15 In 1973, defendant patented the main parcel, along with an additional eight acres, to
16 plaintiff's predecessor in interest without access. Defendant concedes that the highest and
17 best use of the land at the time was residential development and investment. Response at 2.
18 It also "asserts that access to the Main Parcel via Chavez Ranch Road requires crossing a
19 small portion of federal land on Hilltop Road." DRSOF ¶ 4.

20 In June 2006, plaintiff submitted a proposal to the Forest Service for a permit to use
21 and improve the portion of Hilltop Road in the national forest. Several months later, a
22 Yavapai County official told him that the portion of Chavez Ranch Road in the Rancho
23 Chavez subdivision was not a public right-of-way because the county abandoned a dedicated
24 right-of-way in 1959. Tr., Ex. 17 at 2. He was also told that Chavez Ranch Road would
25 need improvements to meet county standards, but that he could seek waivers. Id. Based on
26 this information, plaintiff amended his proposal in December 2006. Instead of seeking
27 authorization to use Hilltop Road, he requested a permit to build about one mile of new road
28 across the national forest to access his main parcel from the west. This road would extend

1 an old road which branches off from Chavez Ranch Road west of the Rancho Chavez
2 subdivision.

3 After a delay, and the filing of a complaint in this court, the Forest Service rejected
4 plaintiff's proposal in December 2008. The Forest Supervisor decided that plaintiff's
5 proposed road would not meet the permit criteria, which limit authorization to "modes of
6 access that are needed for the reasonable use and enjoyment of the land," based on similarly
7 situated land, and "that minimize the impacts on the Federal resources." 36 C.F.R.
8 § 251.114(a). She concluded that the negative impact of a road across an undeveloped area
9 of national forest would be unreasonable "when an existing roadway was in place at the time
10 [plaintiff] acquired the parcel, is still in existence, is currently being used as access to the
11 parcel, and is the same type of access adjacent residential properties have in this area." Tr.
12 Ex. 35 at 2. She also said, "The Forest Service is willing to consider expansion of existing
13 forest roads in this area in order to allow some level of improved access to this private
14 parcel." Id.

15 Plaintiff appealed this decision, which was upheld on the merits initially. On
16 discretionary review, however, the Chief of the Forest Service determined that plaintiff
17 lacked standing to appeal because his application was not "in response to a prospectus or
18 written solicitation or other notice by the Forest Service." 36 C.F.R. § 251.86(a). Plaintiff's
19 appeal was dismissed, and the Forest Supervisor's decision became final.

20 Plaintiff alleges violations of the Administrative Procedure Act ("APA"), 5 U.S.C.
21 §§ 701-706, and the Takings Clause of the Fifth Amendment. He also seeks to quiet title to
22 an easement by necessity under 28 U.S.C. § 2409a, and to apply collateral estoppel based on
23 the decision in Tobias v. United States, No. CV-00-1107-PCT-MHM. In Tobias, a
24 landowner with property half a mile from plaintiff's quieted title to an easement by necessity
25 where defendant conveyed a parcel, which was best suited for residential development or
26 investment, without access in 1968 and denied the landowner's request for access. PSOF,
27 Ex. J (copy of an otherwise unavailable order).

28 Defendant moves for summary judgment on all claims. Plaintiff moves for partial

1 summary judgment to establish several issues. We will consider these issues in the context
2 of defendant's motion.

3 II

4 Plaintiff challenges defendant's administrative actions under two APA provisions.
5 First, he seeks to compel a decision "unreasonably delayed." 5 U.S.C. § 706(1). Because
6 plaintiff received a final decision on his proposal, there is nothing left to compel. This claim
7 is moot. Second, plaintiff contends that the Forest Supervisor's decision did not comply with
8 36 C.F.R. § 251.114(a), which, as described above, establishes guidelines for evaluating
9 certain access permits. We may only set aside final agency action if, on highly deferential
10 review of the record before the agency, it was "arbitrary, capricious, an abuse of discretion,
11 or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Nw. Ecosystem Alliance
12 v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007).

13 Defendant primarily analyzes the Chief of the Forest Service's conclusion that
14 plaintiff lacked standing to appeal, which is not the subject of plaintiff's APA claim. It
15 correctly points out, however, that plaintiff all but abandons his APA claim by failing to
16 address it in his response. In any event, the Forest Supervisor's decision to reject plaintiff's
17 proposal to build a new road complied with 36 C.F.R. § 251.114(a). Plaintiff argues, as he
18 did before the agency, that a new road from the west is necessary for the reasonable use and
19 enjoyment of his land because Chavez Ranch Road does not provide a public right-of-way
20 through the Rancho Chavez subdivision. He bases this argument on the actions of the Board
21 of Supervisors of Yavapai County in the 1950s.

22 In July 1958, a plat map was recorded for the Rancho Chavez subdivision. Tr., Ex.
23 1 at 1. It dedicated the roads shown, including Chavez Ranch Road, to the public. On
24 February 16, 1959, the board abandoned the roads shown on the 1958 map and approved a
25 revised plat map, which again dedicated the roads shown to the public. Tr., Ex. 2 at 1-2. The
26 revised plat map was recorded the same day. A copy of the 1958 map announcing that the
27 roads shown on it had been abandoned was recorded in March 1959. Id. at 2.

28 As defendant explains, the board only abandoned the roads as shown on the 1958

1 map, and it did so to make way for the revised map, which dedicates Chavez Ranch Road to
2 the public. Plaintiff attempts to cast doubt on the sequence of these events by pointing out
3 that the revised map contains a February 16, 1958 date as well as a handwritten February 16,
4 1959 filing date. The difference is likely due to an outdated year stamp. In any case, the
5 board did not approve the revised map five months before it approved the original map in
6 July 1958. Plaintiff cannot show that a new road from the west is necessary based on the
7 legal status of Chavez Ranch Road.

8 Plaintiff also maintains that his proposed road is necessary because Chavez Ranch
9 Road is otherwise impractical based on its elevation changes, turns, and surface. Much of
10 this evidence was not before the agency, and none of it is persuasive. Because the Forest
11 Supervisor's conclusion that a new road was not "needed" within the meaning of 36 C.F.R.
12 § 251.114(a) was not arbitrary, capricious, or contrary to law, we grant defendant's motion
13 for summary judgment on plaintiff's APA claims.

14 III

15 Plaintiff also claims that defendant's refusal to grant him access denies him any
16 economically viable use of his land and violates the Fifth Amendment, which requires just
17 compensation when private property is taken for public use. U.S. Const. amend. V.
18 Defendant asserts that any compensation claim plaintiff may have under the Fifth
19 Amendment would exceed \$10,000.00. Therefore, it would generally have to be filed in the
20 Court of Federal Claims and not this court. See McGuire v. United States, 550 F.3d 903,
21 910-11 (9th Cir. 2008) (discussing the granting of jurisdiction and limited waiver of
22 defendant's sovereign immunity under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Little
23 Tucker Act, 28 U.S.C. § 1346(a)(2)). In response, plaintiff represents that he seeks only
24 declaratory relief.

25 The taking of private property for public use without just compensation violates the
26 Fifth Amendment. Landowners in plaintiff's position may not seek declaratory relief in lieu
27 of compensation. See Bay View, Inc. ex rel. AK Native Vill. Corps. v. AHTNA, Inc., 105
28 F.3d 1281, 1286 n.6 (9th Cir. 1997) ("[N]either injunctive nor declaratory relief is available

1 for a takings claim against the United States.”). Because, “we have no jurisdiction to address
2 the merits of takings claims where Congress has provided a means for paying compensation
3 for any taking that might have occurred,” id. at 1285, we dismiss plaintiff’s takings claim for
4 lack of subject matter jurisdiction.

5 IV

6 Next, plaintiff claims title to an easement by necessity under the Quiet Title Act, 28
7 U.S.C. § 2409a, which waives defendant’s sovereign immunity for certain claims involving
8 real property. We have exclusive original jurisdiction. 28 U.S.C. § 1346(f). Defendant
9 concedes that it is subject to the common law of easements by necessity. Such an easement
10 is created when: “(1) the title to two parcels of land was held by a single owner; (2) the unity
11 of title was severed by a conveyance of one of the parcels; and (3) at the time of severance,
12 the easement was necessary for the owner of the severed parcel to use his property.”
13 Fitzgerald Living Trust v. United States, 460 F.3d 1259, 1266 (9th Cir. 2006). The ability
14 to access a public road over a third party’s property will not defeat an easement by necessity,
15 but the end of the necessity ends the easement. Id.

16 Defendant severed the unity of title between plaintiff’s main parcel and the adjacent
17 national forest land by conveying the parcel to his predecessor in interest in 1973. It did so
18 without granting access to a public road.¹ Automobile access was and is necessary to use the
19 main parcel, which has been best suited for residential development and investment since the
20 time of severance. Although the allegations in his complaint encompass quieting title to an
21 easement by necessity across Hilltop Road, plaintiff primarily contends that he requires a
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24 ¹ A 1971 appraisal report, apparently used during the conveyance, said that the main
25 parcel could be reached from State Highway 179 and Forest Development Road 623. Tr.,
26 Exs. 4-5. State Highway 179 is east of Oak Creek and did not connect with the relevant
27 portion of Forest Development Road 623, which is Chavez Ranch Road. Moreover, no
28 portion of Forest Development Road 623 ran to the main parcel. Without crossing a third
party’s property, access was possible by crossing national forest land from the end of Chavez
Ranch Road or from the west. Today, access is possible over Hilltop Road without crossing
a third party’s property.

1 new road from the west.

2 **A**

3 Defendant moves for summary judgment on a statute of limitations defense. The
4 Quiet Title Act provides a twelve-year limitations period for private plaintiffs. 28 U.S.C.
5 § 2409a(g). As an initial matter, plaintiff contends that collateral estoppel should apply and
6 prevent defendant from re-litigating when an action accrues under the Quiet Title Act, an
7 issue which arose in the Tobias case. The parties dispute whether nonmutual offensive
8 collateral estoppel is ever available against the United States. See United States v. Mendoza,
9 464 U.S. 154, 162, 104 S. Ct. 568, 573 (1984) (holding the doctrine inapplicable against the
10 United States); United States v. Alaska, 521 U.S. 1, 13, 117 S. Ct. 1888, 1896 (1997)
11 (discussing “the rule that the doctrine of nonmutual collateral estoppel is generally
12 unavailable in litigation against the United States” and declining to develop an exception).
13 In any event, we conclude that application of the doctrine to a threshold issue in a statute
14 waiving defendant’s sovereign immunity is unwarranted because it “would substantially
15 thwart development of important questions of law.” Mendoza, 464 U.S. at 160, 104 S. Ct.
16 at 572.

17 Quiet Title Act claims accrue “on the date the plaintiff or his predecessor in interest
18 knew or should have known of the claim of the United States.” 28 U.S.C. § 2409a(g). In the
19 context of an easement, however, knowledge of the United States’ claim of ownership is
20 insufficient because fee ownership of the land “may be entirely consistent with a plaintiff’s
21 claim.” Michel v. United States, 65 F.3d 130, 132 (9th Cir. 1995). Thus, a claim for an
22 easement accrues when the United States denies or limits the use of an access road adversely
23 to a plaintiff. Id.

24 Defendant contends that plaintiff was aware of potential access problems when he
25 purchased the property in 1994. Earlier in the year, his predecessors in interest granted an
26 easement in favor of an adjacent private parcel across the portions of Hilltop Road on
27 plaintiff’s parcels. Tr., Ex. 10. They also granted an easement across the overlapping
28 corners of his parcels contingent on the obstruction or denial of access across the Hilltop

1 Road easement. Id. at 4-5. While these easements show that plaintiff and his predecessors
2 in interest knew defendant owned a portion of Hilltop Road, this knowledge did not give rise
3 to a Quiet Title Act claim because defendant itself asserts that it has never denied access
4 across Hilltop Road.

5 Defendant also argues that plaintiff's claim is stale insofar as he claims an easement
6 by necessity across a new road from the west because he and his predecessors in interest
7 should have known that it would not allow access other than across Hilltop Road. Defendant
8 does not contend, however, that it has ever authorized access across Hilltop Road. Other
9 than the Forest Supervisor's decision in December 2008, defendant does not offer evidence
10 of any action adverse to someone's access to the main parcel. Therefore, we deny its motion
11 for summary judgment on statute of limitations grounds.

12 **B**

13 Defendant also moves for summary judgment based on plaintiff's inability to show
14 that an easement is currently necessary. First, defendant contends that an easement is not
15 necessary because access to Chavez Ranch Road is possible across the seventeen-foot
16 overlap at the corners of plaintiff's parcels. This contention is foreclosed by defendant's
17 assertion "that access to the Main Parcel via Chavez Ranch Road requires crossing a small
18 portion of federal land on Hilltop Road." DRSOF ¶ 4. Moreover, though it need not be
19 convenient, an alternative access route must be sufficient to defeat an easement by necessity.
20 McFarland v. Kempthorne, 545 F.3d 1106, 1111 (9th Cir. 2008). There is no evidence in the
21 record that suggests the narrow gap in question would provide adequate access to a large
22 parcel best suited for residential development and investment.

23 Second, defendant raises the effect of statutory rights of access available to plaintiff,
24 such as through the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. §§ 1701-
25 1785. The FLPMA and the Alaska National Interest Lands Conservation Act ("ANILCA"),
26 16 U.S.C. § 3210(a), which grant national access rights, were formerly interpreted to have
27 preempted the common law of easements where, as here, the United States owns the servient
28 estate for the benefit of the public. See Adams v. United States, 255 F.3d 787, 794 (9th Cir.

1 2001) (restating the holding in Adams v. United States, 3 F.3d 1254 (9th Cir. 1993)). In
2 deference to federal regulations recognizing common law access rights, however, the
3 prevailing view is that access statutes do not broadly preempt the common law of easements.
4 See Skranak v. Castenada, 425 F.3d 1213, 1219-20 (9th Cir. 2005) (interpreting the
5 ANILCA). Nevertheless, the existence of statutory rights of access defeats the present
6 necessity required for an easement by necessity. Fitzgerald, 460 F.3d at 1267 (citing United
7 States v. Jenks, 129 F.3d 1348 (10th Cir. 1997)). For example, the plaintiffs in Fitzgerald
8 did not have an easement by necessity where they were offered an FLPMA easement to
9 access their ranch over a forest development road. Id. If a plaintiff is denied an adequate
10 statutory right of access, he may have a claim for an easement by necessity. Jenks, 129 F.3d
11 at 1354; see McFarland, 545 F.3d at 1111 (analyzing the existence of an easement by
12 necessity while upholding the United States' denial of a statutory right of access).

13 In this case, plaintiff's claim for an easement by necessity is premature because
14 defendant is holding out the availability of an adequate statutory right of access. Like the
15 plaintiffs in Fitzgerald, who were offered adequate access, plaintiff was told by the Forest
16 Supervisor that his proposal for a new road was denied, in part, because access across Hilltop
17 Road was available and that she was willing to consider expanding existing forest roads. Tr.,
18 Ex. 35 at 2. For all of the reasons discussed above in the context of plaintiff's APA claims,
19 access across Hilltop Road would be adequate under the common law of easements by
20 necessity. Unlike the plaintiffs in Tobias, who were denied adequate access by the United
21 States, plaintiff has not been denied access across Hilltop Road. Indeed, given the Forest
22 Supervisor's decision and defendant's assertions in this case, we would fully expect
23 defendant to expeditiously grant authorization for plaintiff to use and improve Hilltop Road,
24 should he request it. Were defendant to deny such a request, plaintiff would have a ripe
25 claim for an easement by necessity. The doctrine of judicial estoppel would also bar
26 defendant from unfairly taking any inconsistent position in a future judicial proceeding. See
27 New Hampshire v. Maine, 532 U.S. 742, 749-50, 121 S. Ct. 1808, 1814 (2001).
28 Accordingly, while defendant is not entitled to summary judgment, we dismiss plaintiff's

1 Quiet Title Act claim without prejudice as premature.

2 **IT IS THEREFORE ORDERED DENYING** plaintiff's motion for partial summary
3 judgment (doc. 25). **IT IS FURTHER ORDERED GRANTING IN PART** and
4 **DENYING IN PART** the United States' motion for summary judgment (doc. 35). **IT IS**
5 **FURTHER ORDERED DENYING** plaintiff's motion to strike as moot (doc. 43).

6 Summary judgment is granted in favor of the United States and against plaintiff on
7 plaintiff's Administrative Procedure Act claims. Plaintiff's takings claim is dismissed
8 without prejudice for lack of subject matter jurisdiction. And plaintiff's Quiet Title Act
9 claim is dismissed without prejudice as premature.

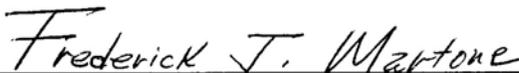
10 The clerk shall enter final judgment in favor of the United States and against plaintiff.

11 The trial set for September 14, 2010 is vacated.

12 DATED this 5th day of August, 2010.

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Frederick J. Martone
United States District Judge

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