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ARTICLE

Equitable Defenses Against the Government in the Natural Resources and Environmental Law Context

MARY V. LAITOS, DANIELLE V. SMITH, and AMY E. MANG*

INTRODUCTION

When the government brings an action against a private citizen or entity, possible defenses include (i) estoppel; (ii) delay-based defenses such as laches, waiver, and unclean hands; and (iii) statutes of limitations. Estoppel, laches, waiver, and unclean hands are all equity based defenses and, as such, are grounded upon notions of fairness. Despite that foundation, courts are reluctant to allow the application of equitable defenses against the government when their application would defeat the public interest, even if the result confers an unfair advantage onto the government.¹ Courts exercise their equitable discretion to decide whether and for what reasons equitable defenses may be successfully asserted against the government.² Although different courts

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1. See, e.g., *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 925-26 (9th Cir. 1975); *Securities and Exchange Comm'n v. Rosenfeld*, 1997 WL 400131, at *2 (S.D.N.Y. 1997).

2. See *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Note that Congress has the authority to preempt a court's equitable discretion through legislative action. Congress has exercised that authority by restricting the court's equitable jurisdiction in some of the environmental regulations it has promulgated. For example, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") mandates liability "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section." 42 U.S.C. § 9607(a)

rely on varying policy considerations, courts generally define the public interest very broadly, making it difficult to successfully prevail on these defenses against the government.³

A private party has a better chance of asserting a statute of limitations defense against the government than an equitable defense.⁴ Separation of powers is not a concern in statute of limitations cases because Congress has acted to legislate in the challenged area.⁵ The legal analysis for statutes of limitations is also distinguishable because it invokes statutory construction principles. The ambiguities inherent in general statutes of limitation, intended to cover an enormous array of governmental agency claims, can cause significant or impossible hurdles for the practitioner to overcome.⁶

This paper discusses these defenses and provides suggestions to the practitioner asserting them. The discussion is intended to offer guidance to practitioners defending against government actions. It does not constitute an exhaustive analysis of all the issues or cases involved in the application of equitable defenses against the government. Instead, the discussion sets forth general principles and highlights cases in the natural resources and environmental law context which illustrate these principles. Although the focus of this paper is on suits involving the federal government and its agencies, actions involving states and state agencies are discussed as well.

(1994). Congress's intent in imposing strict liability notwithstanding equitable defenses that may be present was to enforce the public policy of assuring that responsible parties bear the costs of hazardous waste cleanup.

3. See, e.g., *United States v. Kramer*, 757 F.Supp. 397, 427 (D.N.J. 1991); *Shokal v. Dunn*, 707 P.2d 441, 449 (Idaho 1985) (quoting *Young & Horten v. Hinderlider*, 110 P. 1045, 1050 (N.M. 1910)).

4. See, e.g., Brock E. Czeschin, *United States v. Navistar International Transportation Corp.: Seventh Circuit Bars Government's CERCLA Claim Based on Violation of the Statute of Limitations*, 10 VILL. ENVTL. L.J. 399, 402 (1999).

5. See, e.g., James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 593 (1996).

6. See, e.g., Roger M. Klein, *The Continuing Nature of Notification Violation under Environmental Statutes*, 26 ENVTL. LAW 565, 586 (1996).

THE GENERAL PROHIBITION AGAINST APPLYING ESTOPPEL AGAINST THE GOVERNMENT

I. Introduction

Estoppel is a doctrine based on principles of fair dealing.⁷ It prevents a party from assuming inconsistent positions to the detriment of another party.⁸ The doctrine of estoppel is a response to the unfairness inherent in denying a party some benefit after the party has reasonably relied on the misrepresentations of an adverse party.⁹ In order to successfully assert the defense of estoppel, a party must show: (i) the government had knowledge of the facts; (ii) the government intended that its conduct be acted upon or acted in a manner so that the party asserting the defense had a right to believe it so intended; (iii) the party asserting the defense was ignorant of the true facts; and (iv) that party relied on the government's conduct to his or her detriment.¹⁰

The argument for applying estoppel against the government is supported by two equitable goals. First, the government should be prevented from taking unconscionable advantage of its own wrong.¹¹ Second, the government should be prevented from as-

7. See, e.g., Kenneth D. Dean, *Equitable Estoppel Against the Government — The Missouri Experience: Time to Rethink the Concept*, 37 ST. LOUIS U. L.J. 63 (1992); Randy L. Parcel, *Making the Government Fight Fairly: Estopping the United States*, 27 ROCKY MT. MIN. L. INST. 41 (1981); Fred Ansell, *Comment Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026 (1986); Michael Cameron Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Governmental Contracting*, 19 PUB. CONT. L.J. 606 (1990); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws"*, 64 TEX. L. REV. 1 (1985); Uisdean R. Vass and Margaret A. Nunery, *Estoppel of the Government to Collect Mineral Royalties: A Blind Alley*, 28 TULSA L.J. 409 (1993); Kenneth M. Williams, *Office of Personnel Management v. Richmond: Estopping the Government — A Brighter Line?* 1 WIDENER J. PUB. L. 455 (1992); Frederick S. Kuhlman, *Comment, Government Estoppel: The Search for Constitutional Limits*, 25 LOY. L.A. L. REV. 229 (1991); Deborah Walrath, *Note, Recent Developments in Administrative Law: Liability of Administrative Agencies and Officials: Estopping the Federal Government: Still Waiting for the Right Case*, 53 GEO. WASH. L. REV. 191 (1985).

8. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970). See also Jan G. Laitos, *LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS OF GOVERNMENT POWERS* § 3.03 (1999).

9. See *United States v. Marine Shale Processors*, 81 F.3d 1329, 1348 (5th Cir. 1996).

10. See *Georgia-Pacific Co.*, 421 F.2d at 96 (citing *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960)).

11. See *id.*

serting legal rights where such an assertion would work a fraud or injustice on a private party acting in good faith.¹²

Asserting a successful estoppel defense against the government is, to say the least, difficult.¹³ It is well-settled in Supreme Court precedent that "equitable estoppel will not lie against the Government as it lies against private litigants."¹⁴ While the Supreme Court has never placed a definitive bar upon the application of estoppel against the government, its consistent reversal of the application of the doctrine against the government has not been encouraging to defendants.¹⁵ Rather, estoppel against the government is applied "with great reluctance."¹⁶

As discussed below, courts have used various tools to analyze whether estoppel should lie against the government, including (i) public policies, such as the separation of powers doctrine and a balancing test of the public and private interest; (ii) a strict analysis of whether the defendant suffered detriment and whether defendant's reliance on the government was reasonable; (iii) determining whether the government engaged in affirmative misconduct; and (iv) determining whether the government was acting in its proprietary or sovereign capacity.¹⁷

II. Public Policies Enforced in Government Estoppel Cases

A. Separation of Powers

1. Introduction

One of the responsibilities of the federal judiciary is to maintain the separation of powers among the three branches of government.¹⁸ In estoppel cases involving the government, courts are concerned with invading the legislative province of Congress by

12. See *Marine Shale Processors*, 81 F.3d at 1348.

13. See, e.g., Kenneth D. Dean, *Equitable Estoppel Against the Government – The Missouri Experience: Time to Rethink the Concept*, 37 ST. LOUIS U. L.J. 63, 70 (1992).

14. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419 (1990). See also *Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917).

15. See *Richmond*, 496 U.S. at 419; See also Frederick S. Kuhlman, Comment, *Government Estoppel: The Search for Constitutional Limits*, 25 LOY. L.A. L. REV. 229, 230 (1991).

16. See *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980).

17. See, e.g., *Home Sav. & Loan Ass'n v. Nimmo*, 695 F.2d 1251, 1259 (10th Cir. 1982); *Portmann v. United States*, 674 F.2d 1155, 1158, 1167 (7th Cir. 1982).

18. See, e.g., Matthew J. Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 966 (1995).

allowing "government employees to 'legislate' by misinterpreting or ignoring an applicable statute or regulation."¹⁹ In validating unauthorized "legislation" that is contrary to the governing law, courts are infringing upon Congress' constitutionally exclusive authority to make law.²⁰ The importance of separation of powers to the operation of a limited government, often leads a court to reject a claim for estoppel when a party is seeking to estop the enforcement of a statute or regulation.²¹

The concern for the separation of powers has been a decisive factor in many lower court decisions.²² Although the Supreme Court has recognized that its refusal to invade the legislating authority of Congress can sometimes result in a serious hardship to the party who relied on the misinformation supplied by the government agent,²³ it has stated that "'not even the temptations of a hard case' will provide a basis for ordering recovery contrary to the terms of the regulation, for to do so would disregard 'the duty of all courts to observe the conditions defined by Congress.'"²⁴ Thus, the separation of powers concern permits the use of the estoppel defense only in cases where "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation."²⁵

2. Application of the Separation of Powers Doctrine: Unauthorized Governmental Action

a. Unauthorized Payments

Courts enforce the separation of powers doctrine through a rejection of an equitable defense when the result would compel governmental action unauthorized by the legislature.²⁶ For example, the Supreme Court has consistently refused to apply estoppel when it would require the government to make payments which

19. See *Portmann*, 674 F.2d at 1159.

20. *Id.*

21. See *Ansell*, *supra* note 7, at 1036-38.

22. See, e.g., *Double J. Land & Cattle Co., v. United States Dep't of Interior*, 91 F.3d 1378 (10th Cir. 1996) (stating that estoppel should only be applied against the government when its application "would not frustrate the purpose of the statutes expressing the will of Congress") (citations omitted); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 622-23 (D.C. Cir. 1992).

23. *Federal Crop Ins. Corp.*, 332 U.S. at 385.

24. *Richmond*, 496 U.S. at 420 (discussing and quoting *Federal Crop Ins. Corp.*, 332 U.S. at 385-86).

25. *Browning*, 630 F.2d at 702.

26. See *Richmond*, 496 U.S. at 434; See also *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259-60 (2d Cir. 1997).

have not been authorized by the government.²⁷ The Supreme Court recently drew a bright line in this area by stating: "[T]he equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized."²⁸

b. Unauthorized Acts of Individual Government Officials

Courts have also enforced the separation of powers doctrine by refusing to apply estoppel when the result would be that misdeeds and unauthorized acts of individual government officials would compel governmental action unauthorized by Congress.²⁹ In the seminal case of *Utah Power & Light Co. v. United States*,³⁰ a utility company argued that the government should be estopped from objecting to the improvements it had made on public land without a permit or license from the Secretary of Interior or the Secretary of Agriculture because government officials had assured the company that no permits or licenses were necessary.³¹ The Court rejected the argument, stating:

[I]t is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit . . . [N]eglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.³²

More recent cases have continued to follow the precedent of *Utah Power*. For example, in *Christmann & Welborn v. Department of Energy*,³³ the court held that statements of a Department of Interior employee regarding mandatory petroleum price regulations could not bind the government where the regulations provided that agency interpretation must be in writing.³⁴

The corollary to the rule that unauthorized acts cannot bind the government is that agents acting within their authority may

27. See *Richmond*, 496 U.S. at 434.

28. *Richmond*, 496 U.S. at 426.

29. See generally Ansell, *supra* note 7; Kuhlman, *supra* note 7; Williams, *supra* note 7.

30. 243 U.S. 389 (1917).

31. See *id.*

32. *Id.* at 409.

33. 773 F.2d 317, 320 (T.E.C.A. 1985).

34. See *id.*

bind the government.³⁵ The case of *United States v. Eaton Shale Co.*,³⁶ illustrates this point. In *Eaton Shale*, the government brought a suit to invalidate and cancel a patent based upon oil shale placer mining claims that it had mistakenly issued more than twenty-one years earlier.³⁷ The court found that the government was estopped from asserting its claim based on the fact that when the patent was issued, the government agency had acted within its authority and in accordance with its prescribed duties.³⁸

c. Unauthorized Acts of Individual Government Officials: The State Context

In the state context, courts are also reluctant to apply estoppel when the acts of individual governmental officials would compel governmental action unauthorized by law. For example, in *Natural Resources and Environmental Protection Cabinet v. Kentucky Harlan Coal Co., Inc.*,³⁹ the Natural Resources and Environmental Protection Cabinet issued a notice of compliance to the operator of a coal washing plant in 1981 for illegally dumping processing waste outside the areas authorized by its permits.⁴⁰ The proceeding was eventually dismissed on the ground that the operator had not violated the applicable law.⁴¹ Five years later, in 1986, a notice of noncompliance was issued and a penalty was assessed after the operator was seen dumping waste rock materials into a residential site on two different occasions.⁴² On appeal, the operator argued that the government should be estopped from pursuing the enforcement action because the 1981 cessation notice, assessed for the same or similar conduct as the 1986 violation, had been dismissed.⁴³ However, the court rejected the operator's argument, stating that "a public officer's failure 'to correctly administer the law does not prevent a more diligent and

35. See, e.g., *United States v. Eaton Shale Co.*, 433 F.Supp. 1256 (D. Colo. 1977); *Oil Shale Corp. v. Morton*, 370 F.Supp. 108, 125 (D. Colo. 1973) (stating that "the government can be estopped by the conduct of its agents, *within the scope of their authority.*" *Id.*) (Emphasis added).

36. 433 F.Supp. 1256 (N.D. Colo. 1977).

37. See *id.*

38. See *id.* at 1272.

39. 870 S.W.2d 421 (Ky. 1994).

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

efficient' officer's proper administration of the law, as '[a]n erroneous interpretation of the law will not be perpetuated.'"⁴⁴

However, at least one court has found that a state can be estopped based on the representations of a state attorney. In *Zufall v. Department of Environmental Resources*,⁴⁵ plaintiffs were the owners of a tract of land which subsequently became subject to a declaration of taking.⁴⁶ The declaration of taking excluded all oil and gas and mining rights.⁴⁷ Plaintiffs thereafter leased the oil and gas rights under the tract which had been condemned, but the state refused to permit the lessee to drill for the oil and gas.⁴⁸ The plaintiffs filed an action seeking to enjoin the state from claiming any ownership interest in the oil and gas rights in the property.⁴⁹ In a prior action relating to the amount of damages that should be awarded as a result of the taking, the state attorney had represented that the taking did not include any mineral rights.⁵⁰ Plaintiffs argued that the state attorney's representations estopped the state from thereafter claiming that it owned the mineral rights. The court agreed with plaintiffs, holding that the state should be estopped from asserting ownership to the mineral rights "in light of the clear assertions made by the Commonwealth's attorney concerning the oil and gas rights."⁵¹

B. The Balancing Test: Public Interest v. Private Interest

1. Introduction

In addition to giving great deference to the separation of powers doctrine, many courts engage in a balancing test to determine

44. *Natural Resources and Environmental Protection Cabinet v. Kentucky Harlan Coal Co., Inc.*, 870 S.W.2d 421, 427 (Ky. 1994) (quoting *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet, Ky.*, 689 S.W.2d 14, 20 (Ky. 1985)). *But see Durell v. Miles*, 206 P.2d 547 (N.M. 1949). (In that case, the Commissioner of Public Lands of the State of New Mexico cancelled plaintiff's oil and gas leases because of failure to pay annual rentals. The plaintiff brought suit to rescind the cancellation of the leases, arguing that the state should be estopped from canceling the leases because of misrepresentations made by the Commissioner regarding when the leases would be canceled. Although the case was decided in favor of plaintiff on other grounds and thus the court did not find it necessary to decide the estoppel issue, the court stated: "[T]here are strong equities favoring the plaintiff who . . . was advised by the commissioner that his leases could not be legally cancelled" until a later date.) *Id.* at 550.

45. 590 A.2d 812 (Pa. Commw. Ct. 1991).

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See Zufall*, 590 A.2d at 812.

51. *Id.* at 816.

whether the application of estoppel would result in "a serious injustice outweighing the damage to the public interest of estopping the government."⁵² Not surprisingly, the scales usually tip in favor the government. As one court has stated, "The possibility of harm to a private party inherent in denying equitable estoppel is often (if not always) grossly outweighed by the pressing public interest in the enforcement of congressionally mandated public policy."⁵³

This type of balancing test is illustrated in *Union Oil Co. of California v. Morton*.⁵⁴ In *Union Oil*, the Secretary of the Interior granted oil and gas leases to four oil companies allowing them to construct drilling platforms in the Santa Barbara Channel.⁵⁵ Two such platforms were constructed and one application pending for a third when a major blowout occurred on one of the platforms, causing serious ecological, economic and environmental damage.⁵⁶ The government then notified the oil companies that another platform would not be permitted.⁵⁷ The companies objected and asserted estoppel based on the terms of the lease.⁵⁸ The court balanced the interests of the public against the interests of the oil companies and rejected the defense, finding that the costs to the public could be enormous if the government were estopped from maintaining vigorous regulation of the oil companies' drilling, while in contrast, the costs to the oil companies were "merely" the loss of anticipated profits.⁵⁹

2. Public Land Cases

The balancing test approach to estoppel claims has also clearly favored the public interest in cases involving public lands. In *United States v. California*,⁶⁰ the government brought suit against the State of California alleging that California executed numerous mineral leases with private parties relating to lands located off the coast of California, which the United States claimed

52. *Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991); *See Dean, supra* note 13, at 103.

53. *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985).

54. 512 F.2d 743 (9th Cir. 1975).

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.* at 749, n. 2.

60. 332 U.S. 19 (1947).

it owned.⁶¹ The Supreme Court held that despite the conduct of the federal government's agents in conducting its affairs, including denying oil and gas leases in the California coastal belt on the assumption that California owned the lands, the government was not estopped from asserting its rights with respect to the lands.⁶² While *California* involved a state government defendant, not a private party, the Supreme Court still held that in cases involving the potential loss of public lands, the federal government, as trustee of those lands, would have the superior interests.⁶³ Specifically, the Court stated:

The Government, which holds its interests here . . . in trust for all the people, is not deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.⁶⁴

There is however, at least one case in which the government has been estopped from complaining of trespass on public lands. In *United States v. Wharton*,⁶⁵ the Interior Board of Land Appeals denied a patent under the Color of Title Act, which authorizes claims of adverse possession against the United States under limited circumstances.⁶⁶ The defendant claimed the government should be estopped from claiming title to the land based on misrepresentations made by officers of the Bureau of Land Management.⁶⁷ In accepting the estoppel argument, the court conducted the balancing test and found that the government's conduct would work a serious injustice to the party in the case because defendant

61. *See id.*

62. *See id.*

63. *See id.*

64. *California*, 332 U.S. at 40. *See also Utah Power.*, 243 U.S. at 409 ("A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane . . . from the ordinary private suit. . ."); *United States v. Osterlund*, 671 F.2d 1267, 1268 (10th Cir. 1982) ("courts have no power to adjust the parties' equities in determining title to federal lands" because Congress alone determines how to manage public lands.); *United States v. Ruby Co.*, 588 F.2d 697, 705 (9th Cir. 1978) ("[W]hile one may be sympathetic with the landowners in this case, we must not be unmindful that the land involved belongs to all the people of the United States.").

65. 514 F.2d 406 (9th Cir. 1975).

66. *See* 43 U.S.C. § 1068 (1994).

67. *See Wharton*, 514 F.2d 406.

had lived on and worked the land for over 55 years.⁶⁸ The court further found that the interest of the public would not be unduly threatened or damaged by granting defendant the opportunity to obtain the relevant tract of land because, in part, the government would benefit once defendant gained title to the land and started paying taxes.⁶⁹ This case, however, seems to be an anomaly in an overwhelming body of law in which courts have not sacrificed the public interest under the facts of "a hard case."⁷⁰

3. Environmental Cleanup Cases

In addition to the hurdles imposed in public land cases, a defendant will also have a difficult time showing that a private harm outweighs the public interest in environmental actions where the government is seeking reimbursement for recovery costs of cleanup actions. One court has stated that in the context of actions brought by the government for recovery of costs incurred in the connection with cleanup of hazardous waste sites, the defendant must overcome the public interests in: (i) ensuring the proper disposal of hazardous wastes; and (ii) recovering expended funds for use in recovery actions.⁷¹ The public interests in environmental recovery actions impose an almost insurmountable barrier to an estoppel defense.

4. The Balancing Test in the State Context

Courts also examine the public and private interests at stake when determining whether to apply estoppel in the state context. Estoppel will not generally lie against the State when its application would defeat the public interest.⁷² In the natural resources context, the public interest in the conservation of natural re-

68. *See id.*

69. It should be noted that this case was decided before the passage of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785 (1994), in which Congress expressed an intent that "the public lands be retained in Federal ownership, unless as a result of the land planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest. . ." *Id.* at § 1701(a)(1).

70. *See id.*

71. *United States v. Mottolo*, 695 F.Supp. 615, 628 n.13 (D.N.H. 1988). Although this case involved the cleanup of hazardous waste sites under CERCLA, these public interests would carry over into virtually any of the environmental statutes.

72. *See State Highway Comm'n v. Sheridan-Johnson Rural Electrification Ass'n*, 784 P.2d 588, 592 (Wyo. 1989) (citing *Big Piney Oil & Gas Co. v. Wyoming Oil and Gas Conservation Comm'n*, 715 P.2d 557, 560 (Wyo. 1986)).

sources has been called a "matter of paramount concern."⁷³ In *Big Piney Oil & Gas Co. v. Wyoming Oil and Gas Conservation Comm'n*,⁷⁴ an oil and gas company appealed an order issued by the Wyoming Oil and Gas Conservation Commission which restricted production from its gas wells in order to prevent the waste of hydrocarbons from an adjoining unit.⁷⁵ In its appeal of the decision, the company argued that the Commission had a duty to investigate to determine if waste was occurring, and that its failure to do so for eighteen years resulted in an estoppel.⁷⁶ The Wyoming Supreme Court refused to apply the doctrine of estoppel, holding that estoppel should not be invoked "where it would serve to defeat the effective operation of a policy adopted to protect the public."⁷⁷ The court noted the specific statutory prohibition against the waste of oil and gas and determined that the public interest in the conservation laws was a matter of paramount concern.⁷⁸

Obtaining full value from state leases has also been deemed to be an important public policy such that estoppel does not apply.⁷⁹ In *Plateau Mining Co. v. Utah Division of State Lands and Forestry*,⁸⁰ the State of Utah leased lands for the mining of coal. The leases required that the lessee pay a royalty to the state in an amount equal to the higher of (i) 15 cents per ton; or (ii) the prevailing rate for federal lessees of land.⁸¹ The lessees continued to pay the state a royalty in an amount equal to 15 cents per ton even after the federal coal lease royalty rate had surpassed 15 cents per ton.⁸² When the state demanded payment from the lessees for delinquent royalties, the Utah Supreme Court held that the state was not estopped from obtaining royalty payments at the prevailing federal rate because the application of estoppel would

73. *Big Piney*, 715 P.2d at 559 (quoting *Edgar v. Stanolind Oil & Gas Co.*, 90 S.W.2d 656, 658 (Tex. Civ. App. 1935)).

74. *Big Piney*, 715 P.2d 557 (Wyo. 1986).

75. *See id.*

76. *See id.*

77. *Id.* at 560.

78. *See also* *State Air Resources Bd. v. Wilmshurst*, 81 Cal. Rptr.2d 221 (Cal. App. 1999) (holding that the state's strong public policy in protecting air quality precluded the application of estoppel).

79. *See* *Plateau Mining Co. v. Utah Div. of State Lands and Forestry*, 802 P.2d 720 (Utah 1990).

80. *See id.*

81. *See id.*

82. *See id.*

contravene the public policy of the state to recover full value from the lease of school trust land.⁸³

III. Elements of Estoppel

A. Introduction

As stated earlier, in order to be successful on a claim on estoppel, a defendant is required to show: (i) The government had knowledge of the facts; (ii) the government intended that its conduct be acted upon or acted in a manner so that the party asserting the defense had a right to believe it so intended; (iii) the party asserting the defense was ignorant of the true facts; and (iv) that party relied on the government's conduct to his or her detriment.⁸⁴ Thus, "the party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse'" and "that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading."⁸⁵

The first three elements of estoppel are relatively straightforward and have warranted little discussion in the case law. However, courts routinely focus on whether detriment existed and whether the defendant's reliance was reasonable.⁸⁶

B. The Requirement of Detriment

In determining whether to apply estoppel, courts often focus on whether the party asserting the defense has relied on the government's misinformation to his or her detriment.⁸⁷ Detrimental reliance may be present in cases in which the party claiming estoppel is deprived of something he or she is entitled to by right.⁸⁸ The Supreme Court has suggested that detrimental reliance cannot be established where the party asserting estoppel received a

83. See *id.*

84. See *Georgia-Pacific Co.*, 421 F.2d at 96 (citing *Hampton*, 279 F.2d at 104). For a more in-depth discussion of the traditional elements of estoppel, see Kuhlman, *supra* note 7, at n. 34.

85. See *Heckler*, 467 U.S. at 51, 58 (1984). See also Restatement (Second) of Contracts, § 90 cmt. A (1981) ("Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation.").

86. See, e.g., *Elmore v. Cone Mills Corp.*, 181 F.3d 442, 446 (4th Cir. 1999).

87. See, e.g., *Hansen v. Harris*, 619 F.2d 942, 948 (2d Cir. 1980); *Richmond*, 996 U.S. at 433.

88. See, e.g., *New York Inst. of Dietetics v. Riley*, 966 F.Supp. 1300, 1315 (S.D.N.Y. 1997).

benefit that he or she was not entitled to receive.⁸⁹ This situation occurs when the government confers a benefit, commonly a monetary benefit, to a party that is not entitled to it.⁹⁰ For example, the Supreme Court rejected a claim of estoppel in *Heckler v. Community Health Serv. of Crawford County, Inc.*,⁹¹ where the plaintiff was attempting to estop the government from recouping overpayments that it had mistakenly made under Medicare cost reimbursement procedures.⁹² The court found that "the consequences of the government's misconduct were not entirely adverse" because respondent had received "an immediate benefit as a result of the double reimbursement."⁹³

Similarly, in *United States v. Mottolo*,⁹⁴ the government brought an action under CERCLA to recover costs incurred in connection with the cleanup of a hazardous waste site from the owner and operator of the site.⁹⁵ The defendants asserted the defense of estoppel, arguing that they gave consent to the Environmental Protection Agency (EPA) to enter their site based on the EPA's representations that it would not seek response costs.⁹⁶ The court denied the estoppel defense, holding that the defendants could not establish detrimental reliance because the EPA did not need defendants' consent to enter the site where it was already afforded that authority under CERCLA and the Clean Water Act.⁹⁷

C. The Requirement of Reasonableness

1. Reliance on Oral Representations of Government Officials is Unreasonable

The issue of detrimental reliance is a difficult hurdle for a party to overcome where the party has relied upon representations of a government agent. Courts have consistently found that reliance on oral representations of a government official is unreasonable,⁹⁸ especially in cases where the regulation or statute at

89. *Heckler*, 467 U.S. at 61-62.

90. *See id.*

91. *See id.*

92. *See id.*

93. *Id.* at 62. Note, however, that the Court's primary justification for denying the estoppel claim was in protection of the public fisc. *See id.* at 63.

94. 695 F.Supp. 615 (D.N.H. 1988).

95. *See id.*

96. *See id.*

97. *See id.*

98. *See United States Env'tl. Protection Agency v. Environmental Waste Control Inc.*, 917 F.2d 327, 334 (7th Cir. 1990) (holding that reliance on information provided

issue provides that any agency interpretation must be provided in writing.⁹⁹ When dealing with the issue of reliance on a misstatement about a regulation or statute, courts have relied heavily on the principle that all citizens, especially citizens dealing with the government, are presumed to know the law.¹⁰⁰ The application of this principle has resulted in almost a per se prohibition on finding that reliance on a government employee's statement was reasonable if a statute or regulation provides the correct information.¹⁰¹

In *United States v. Marine Shale Processors*,¹⁰² the government brought an action alleging, in part, that the defendant stored hazardous waste without a permit or without interim status in violation of the Resource Conservation and Recovery Act (RCRA).¹⁰³ The defendant asserted the defense of estoppel, arguing that it relied on statements in a letter sent to it by the Louisiana Department of Environmental Quality to the effect that it did

by a government hotline is not reasonable); *See also* Christmann & Welborn v. Department of Energy, 773 F.2d 317, 320 (T.E.C.A. 1985) (noting that the information relied upon had been given orally).

99. *See Christmann & Welborn*, 773 F.2d at 320 (discussing authority of agent to bind the government).

100. *See, e.g., Heckler*, 467 U.S. at 63-64 ("...[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law."); *Marine Shale Processors*, 81 F.3d at 1349 ("Courts considering estoppel claims against the government involving an official's misstatement that a particular statute or regulation does not apply to the claimant have read the element of reasonable reliance in light of the principle that all citizens, especially citizens dealing with the government, are presumed to know the law."); *Trapper Mining Inc. v. Lujan*, 923 F.2d 774 (10th Cir. 1991) ("A party who enters into an arrangement with the government and relies on an official's interpretation of the law 'assume[s] the risk that that interpretation [is] in error'" *Id.*).

101. *See Atlantic Richfield Co. v. United States Dept. of Energy*, 772 F.Supp. 654, 662 (D.D.C. 1991) (government was not estopped by the actions of the DOE because it had reason to know that it had to comply with the published DOE regulations); *See also Environmental Waste Control*, 917 F.2d at 334 (defendant's reliance on information provided by a government hotline was not reasonable in light of the clarity of the regulations). One court made a distinction from this general rule to apply the defense of estoppel and stated that this rule "has less impact . . . when those persons are dependent upon a governmental agency to interpret its own complex body of rules and regulations." *Tosco Corp. v. Hodel*, 611 F.Supp. 1130, 1204 (D. Colo. 1985), *vacated* 826 F.2d 948 (10th Cir. 1987). However, a compelling factor in that case was that the government was changing its position after consistently taking a different position for more than twenty-eight years. *See id.* While the decision has since been vacated, it indicates a certain leniency where the equities weigh heavily in favor of defendant. *See id.*

102. 81 F.3d 1329 (5th Cir. 1996).

103. *See id.*

have interim status.¹⁰⁴ The court rejected the argument, finding that 42 U.S.C. § 2925(3) provided “clear guidance” regarding interim status and there was no excuse for defendant’s failure to read the statute.¹⁰⁵

2. The Duty to Inquire

Reliance on a position of the government has also been held to be unreasonable where the party has a “duty to inquire” into the accuracy of the position based on other facts within its knowledge. For example, in *United States v. Menominee, Mich.*,¹⁰⁶ the court found that the defendant’s reliance on a new permit under the National Pollutant Discharge Elimination System issued in 1979 was unreasonable in light of the notices sent by the state informing defendant that it was not in compliance with a 1973 permit, as well as the defendant’s knowledge that the EPA could veto a proposed permit incorporated into a consent judgment.¹⁰⁷ In rejecting defendant’s claim for estoppel, the court stated:

Under all these circumstances, [defendant] had a duty to make some inquiry as to whether its activities were in fact governed by the 1979 or 1973 permit. [Defendant] is a sophisticated corporate player, represented by experienced counsel, heavily involved in activities that are pervasively regulated by both Michigan and [the EPA]. It is disingenuous for [defendant] to now assert, in its words, that it simply ‘assumed all was well’ with the 1979 permit despite the signs that [the EPA] might insist on the continuing applicability of the 1973 permit.¹⁰⁸

A party’s duty to inquire into the accuracy of the information supplied by the government may therefore preclude a defense of estoppel.

3. Reasonable Reliance in the State Context

In cases involving a state or state agency, courts have also been reluctant to find that a party actually relied on the state’s conduct and that such reliance was reasonable.¹⁰⁹ For example, in

104. *See id.*

105. *Id.* at 1350.

106. 727 F.Supp. 1110 (W.D. Mich. 1989).

107. *See id.*

108. *Id.* at 1122.

109. *See, e.g., Wells Fargo Bank v. Goldzband*, 61 Cal. Rptr.2d 826 (Cal. App. 1997) (The court found that plaintiff could not establish reliance on state’s failure to timely address idle and abandoned oil and gas wells because plaintiff had no interest in the

Consolidation Coal Company v. Utah Div. of State Lands and Forestry,¹¹⁰ two coal companies brought a declaratory judgment action against the Utah Division of State Lands and Forestry regarding the royalty rate due under a coal lease.¹¹¹ The coal lease at issue provided that the lessee would pay royalties at the higher of 15 cents per ton or the rate prevailing for federal lessees of land of similar character prevailing under coal leases issued by the United States at that time.¹¹² In 1984, the state began an audit of coal leases and discovered that in 1977 the royalty rates on newly issued federal coal leases had been increased to 8%, but the lessee had not reported or paid the higher rates on their state leases.¹¹³ The lessee argued that the state should be estopped from asserting an 8% royalty rate because personnel from the Utah Division of State Lands and Forestry told the lessee that under the alternative rate provision in the lease, it should pay the same rate as it was paying the federal government under its federal lease at the same mine, which was 17.5 cents royalty.¹¹⁴ The Supreme Court of Utah held that the lessee did not reasonably rely on the Division's representations because: (i) the lessee's only action to determine the correct royalty rate was to talk to employees of the Division; (ii) the lessee never sought a written decision from the State Land Board regarding the proper royalty rate; and (iii) although the lessee was aware of the existence of the 8% royalty rate for federal coal leases, the lessee had failed to disclose it to the State Land Board and the Utah Division of State Lands, or obtain a clarification from them.¹¹⁵ This case is significant in that it shows how difficult it is to assert estoppel against the state even if the state's position directly contradicts its earlier representations.

wells during the period of the state's inaction); *See also* Usibelli Coal Mine, Inc. v. Department of Natural Resources, 921 P.2d 1134 (Alaska 1996) (The Alaska Supreme Court rejected a claim for estoppel in a state action brought to collect past-due royalty payments by holding that the lessee's reliance on the failure of the Department of Natural Resources to object to its method of calculation of royalties was not reasonable given that both the Department of Natural Resources regulations and the terms of the leases themselves specifically provided that the Department of Natural Resources had a right to audit the royalty payments.).

110. 886 P.2d 514 (Utah 1994).

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See Consolidation Coal*, 886 P.2d 514.

D. The "Fifth Element": Affirmative Misconduct

1. Introduction

In several cases, the Supreme Court has indicated in dicta that estoppel may lie where the government agent has engaged in some sort of "affirmative misconduct."¹¹⁶ Lower courts have latched onto this language and incorporated the requirement of affirmative misconduct as a "fifth element" for a successful estoppel defense.¹¹⁷ As one commentator points out, and the cases reveal, the requirement of this additional element in government cases severely limits the application of the doctrine because there are few cases in which government agencies have intentionally misled the public.¹¹⁸

2. The Requirement of Affirmative Action

The case law has clearly established that the government official must act affirmatively in order for the court to make a finding of affirmative misconduct. Indeed, modern courts are clear that they are looking for facts that establish an "active or intentional concealment."¹¹⁹ Thus, negligent,¹²⁰ indifferent or passive conduct of the government official will not be found to rise to the level of affirmative misconduct.¹²¹ The government's reluctance to be of

116. See, e.g., *Immigration and Naturalization Service v. Hibi*, 414 U.S. 5, 8 (1973); See also *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961). For a discussion of the development of the affirmative misconduct concept, see Pitou, *supra* note 7, at 638-47 (1990); See also *Richmond*, 496 U.S. at 419.

117. See, e.g., *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Bolt*, 944 F.2d at 609; *Leimbach v. Califano*, 596 F.2d 300, 305 (8th Cir. 1979); *United States v. Sheyenne Tooling & Mfg. Co., Inc.*, 952 F.Supp. 1414, 1419 (D.N.D. 1996). See also *Braunstein*, *supra* note 7, *Kuhlman* *supra* note 7.

118. See *Kuhlmann*, *supra* note 7, at 257.

119. *United States v. Louisiana-Pacific Corp.*, 682 F.Supp. 1122, 1139-40 (D. Colo. 1987) (citations omitted). But see *Floyd Higgins*, 147 IBLA 343, 6FS Min 22 (1999) (holding that BLM is estopped to cancel unpatented mining claims where failure to timely file assessments was created by BLM administrative errors. The Interim Board of Land Appeals found that the BLM's action, while not malicious or ill intended, constituted concealment of material facts within the meaning of estoppel doctrine.)

120. See, e.g., *Marine Shale Processors*, 81 F.3d at 1329; *Louisiana-Pacific Corp.*, 682 F.Supp. at 1139-40.

121. See, e.g., *United States v. City of Toledo*, 867 F.Supp. 603, 607 (N.D. Ohio 1994) ("Although the doctrine of equitable estoppel may be used in circumstances of deliberate and egregious misconduct where a governmental agency has acted affirmatively, it is not available where the agency has simply acted in an indifferent, passive, or negligent manner."); *Menominee*, 727 F.Supp. at 1121-22 (inaction on the part of the EPA "in the face of known NPDES [National Pollutant Discharge Elimination System] permit violations is not affirmative misconduct upon which equitable estoppel will lie."); If a jurisdiction does not consider affirmative misconduct to be a fifth

assistance does not amount to affirmative misconduct.¹²² Furthermore, affirmative misconduct will not be found where the government has merely failed to inform a party of the possibility of, or actual, violation of a regulation¹²³ or to apprise the public of regulations which are easily accessible to the public.¹²⁴ For example, in *United States v. Eastern of New Jersey, Inc.*,¹²⁵ the court held that the government did not engage in affirmative misconduct when it failed both to apprise the defendant of the regulations promulgated under RCRA and to assist the defendant in complying with the regulations.¹²⁶

Basically, courts are reluctant to find affirmative misconduct where the result would be to impose a duty on the government official that is not set forth under the statutes promulgated by Congress.¹²⁷ In reaching this result, courts are undoubtedly mindful of the separation of powers doctrine. The converse of this policy occurs in the rare instance when a government official fails to comply with an affirmative duty to act imposed by statute or otherwise.¹²⁸ In this circumstance, affirmative misconduct may be found. That was the holding of *Corniel-Rodriguez v. Immigration and Naturalization Serv.*,¹²⁹ (2nd Cir. 1971), where the court found affirmative misconduct when a government agent failed to comply with his statutory duty to inform the petitioner of certain restrictions on her visa.

element to estoppel, inaction may be the basis for application of the doctrine. For example, in *USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed. Cir. 1987), the government brought an action to recoup overpayments made on a contract for the purchase of petroleum. The court found that the government's failure to inform defendant of problems with measurement of oil delivered for six months was "inequitable" and "egregious" and the court applied the doctrine of estoppel based on the government's inaction. *Id.*

122. See *Ven-Fuel, Inc.*, 758 F.2d at 761.

123. See *United States v. Eastern of New Jersey, Inc.*, 770 F.Supp. 964, 983-84 (D.N.J. 1991) (holding that the government's failure to inform defendant that it had violated RCRA did not constitute a misrepresentation); See also *Gilmore v. Lujan*, 947 F.2d 1409, 1412 (9th Cir. 1991) (BLM's failure to inform defendant that it would be denying his non-conforming oil and gas lease application did not rise to the level of affirmative misconduct).

124. *Id.* at 984.

125. 770 F.Supp. 964 (D.N.J. 1991).

126. See *id.*

127. See *Sun Il Yoo v. Immigration & Naturalization Serv.*, 534 F.2d 1325 (9th Cir. 1976).

128. See, e.g., *Corniel-Rodriguez v. Immigration & Naturalization Serv.*, 532 F.2d 301, 306-07 (2d Cir. 1971).

129. 532 F.2d 301, 306-07.

3. The Requirement of Ill Intent

Recent cases indicate that courts are looking for some type of ill intent on behalf of the government official in order to find affirmative misconduct.¹³⁰ For example, in *United States v. City of Toledo*,¹³¹ the United States EPA and Ohio EPA brought suit against the City of Toledo, alleging that the city's wastewater treatment plant was operated in violation of the Clean Water Act.¹³² Prior to bringing the suit, the Director of the Ohio EPA issued an administrative enforcement decision which, defendant argued, excused compliance with the limitations imposed by the National Pollution Discharge Elimination System permits.¹³³ On the basis of this order, defendant asserted the defense of estoppel, arguing that once it had been excused from compliance with the Director's decision, it was entitled to rely on that excuse and could not later be held accountable for its actions.¹³⁴ With respect to the element of affirmative misconduct, the court stated:

The record in this case shows, at worst, inaction on the part of the EPA and State EPA, despite awareness of the circumstances and the risks that they posed for the City and similarly situated permit holders. That inaction was not, however, *purposefully* undertaken to cause harm or injury to the City. It reflects, rather, the difficulties encountered by the agencies as they sought to resolve complex regulatory and policy issues.¹³⁵

Not surprisingly, presenting evidence of intentional conduct on the part of the government may be the biggest hurdle for an estoppel defense as it is uncommon for a government official to act

130. See, e.g., *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970) (the court made a finding of affirmative misconduct based on notions of fairness rather than intentional conduct. The court found that misinformation supplied by the Bureau of Land Management ("BLM") was sufficient to estop the government because it constituted advice "in the form of a crucial misstatement in an official decision." *Id.* at 57. The court stated: "Not every form of official misinformation will be considered sufficient to estop the government . . . Yet some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement." *Id.* at 56). The requirement of intent seems to have evolved more recently, as there was no mention or consideration of the government official's intent in earlier cases in which the court found affirmative misconduct.

131. 867 F.Supp. 603 (N.D. Ohio 1994).

132. See *id.*

133. See *id.*

134. See *id.*

135. *Id.* at 607 (emphasis added).

with such intent.¹³⁶ This point is illustrated by the case of *Alaska Limestone Corp. v. Hodel*.¹³⁷ In that case, the court found that although the Secretary of the Interior's failure to comply with certain inventory and reporting deadlines for unpatented mining claims "merits no applause," the defendant had not made a case for estoppel because it failed to demonstrate that the Secretary "intentionally ignored his responsibilities or affirmatively sought to deceive or mislead . . . [defendant] concerning his intentions to contest the corporation's . . . mining claims."¹³⁸

The requirement of this extra burden of proof is especially damaging in the environmental context. As one commentator aptly observed, "a case would no doubt have to involve truly reprehensible government conduct before the court would even consider upholding an estoppel claim on behalf of a convicted criminal violator of the environmental laws."¹³⁹

IV. Sovereign v. Proprietary Function

A final analytical tool used by courts to determine if estoppel should lie against the government is an analysis of whether the government was acting in its sovereign or proprietary capacity.¹⁴⁰ Courts generally favor the estoppel defense when the government's activity is classified as proprietary and do not allow the defense when the government is acting in its sovereign capacity.¹⁴¹ The government is generally acting in its proprietary function when it is involved in commercial transactions relating to the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency.¹⁴² The government is acting in its sovereign role when it carries out

136. See *Alaska Limestone Corp. v. Hodel*, 614 F.Supp. 642, 647-48 (D.C. Alaska 1985).

137. See *id.*

138. *Id.* at 648; See also *Hoyl v. Babbitt*, 927 F.Supp. 1411, 1417 (D.Colo. 1996) (BLM officials' expression of optimism of a defendant's chance at getting a suspension of operations and production under the Mineral Leasing Act of 1920 does not amount to affirmative misconduct).

139. Robert D. Daniel, *Environmental Law*, 28 TEX. TECH L. REV. 531, 560 (1997) (citing *Marine Shale Processors*, 81 F.3d at 1344 n.7).

140. For a more detailed discussion of this issue, see John F. Conway, Note: *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 FORDHAM L. REV. 707 (1987).

141. See *id.* at 708-09.

142. See *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984).

unique governmental functions for the benefit of the entire public.¹⁴³

In the natural resources and environmental law context, courts have held that sovereign functions include the act of granting a permit under the Federal Water Pollution Control Act,¹⁴⁴ the exercising of eminent domain power,¹⁴⁵ and the preservation of the government's interest in public trust land.¹⁴⁶ The government's proprietary functions, on the other hand, include enforcing a private contract to gain new title to lands.¹⁴⁷

V. The Future of the Estoppel Defense after *Office of Personnel Management v. Richmond*

In the context of cases involving natural resource and environmental issues, it appears that litigants enjoyed the greatest amount of success in the application of the doctrine during the late 1970's and early 1980's.¹⁴⁸ Working in a litigant's favor is Supreme Court dicta which suggests that there may be some circumstances in which the United States is estopped because of the conduct of its officials.¹⁴⁹ However, the court's prior statements in dicta have "taken on something of a life of . . . [their] own" in the lower courts, who have grasped onto this language as an invitation to find the right case in which to apply the doctrine.¹⁵⁰ At the same time, courts are increasing their reliance on policy considerations based on the separation of powers and protection of the public interest to reject estoppel defenses.¹⁵¹

Most discouraging for the future vitality of the defense is the Supreme Court's most recent decision on estoppel, *Office of Personnel Management v. Richmond*.¹⁵² In *Richmond*, the Court had

143. See *id.*

144. See *Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982) (finding that the granting of a permit under the Federal Water Pollution Control Act is an exercise of the government's sovereign power to protect the public interest in environmental safety and quality).

145. See *United States v. 0.5 Acre of Land, More or Less*, 228 F.Supp. 674, 675 (E.D. Tenn. 1962); See also *Utah Power*, 243 U.S. at 391.

146. See *State Lands Comm'n v. United States*, 512 F.Supp. 36, 41-42 (N.D. Calif. 1981).

147. See *Georgia-Pacific Co.*, 421 F.2d at 101.

148. See, e.g., *Wharton*, 514 F.2d 406, *Georgia-Pacific Co.*, 421 F.2d at 97, *Eaton Shale Co.*, 433 F.Supp. at 1272, and *Morton*, 370 F.Supp. at 124.

149. See *Heckler*, 467 U.S. at 60; see also *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Hibi*, 414 U.S. at 8; *Kennedy*, 366 U.S. at 314-15.

150. *Richmond*, 496 U.S. at 421-22.

151. See *id.*

152. 496 U.S. 414 (1990).

no positive remarks for application of the doctrine against the government.¹⁵³ Although the Court refrained from holding that government is absolutely immune from the doctrine, it pointed out that not only has it reversed every finding of estoppel against the government that it has reviewed, significantly, three of these decisions were summary reversals, which are highly unusual.¹⁵⁴ Furthermore, the Court went so far as to place a complete bar on the application of the doctrine against the government when the effect would be to grant a party a money remedy that Congress has not authorized.¹⁵⁵ As one commentator has stated, the *Richmond* decision sends "a strong message to the lower courts to evaluate claims of estoppel against the government with disfavor and to focus on the limits of their own power to estop the government."¹⁵⁶ The decision has indeed seemed to have had a chilling effect on the lower courts presented with estoppel post-*Richmond*, who have questioned the vitality of the defense in government cases.¹⁵⁷ Estoppel against the government has since been characterized as a defense that is nearly "impossible," with one court warning defendants who wish to assert the defense that they have an "an uphill battle."¹⁵⁸

VI. Conclusion

While recent cases may cast a dim light on the defense of estoppel, the Supreme Court's continued refusal to place a complete bar on the doctrine in government cases makes it critical to understand the contours of the defense.¹⁵⁹ In evaluating the merits of

153. *See id.*

154. *Id.* at 422.

155. *Id.* at 433.

156. Harvard Law Review Association, *The Supreme Court, 1989 Term Leading Cases*, 104 HARV. L. REV. 286, 296 (1990).

157. *See, e.g.*, *United States v. Krilich*, 126 F.3d 1035, 1037 (7th Cir. 1997) (finding it significant that the Court in *Richmond* made note of the fact that it had reversed every finding of estoppel that it has reviewed); *Marine Shale Processors*, 81 F.3d at 1348 (noting that the *Richmond* decision "cast further doubt on the proposition that equitable estoppel runs against the United States"); *In re DePaolo*, 45 F.3d 373, 376-7 (10th Cir. 1995) ("It is far from clear that the Supreme Court would ever allow an estoppel defense against the government under any set of circumstances."); *Jana, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991) (noting that after *Richmond* it is not entirely clear whether the defense of estoppel is still available against the government).

158. *Krilich*, 126 F.3d at 1037.

159. Even so, administrative law judges have not been averse to estopping the improper cases. *See, e.g.*, *Floyd Higgins*, *supra* note 120.

an estoppel defense, a practitioner should consider the following questions:

- (1) Would the application of estoppel compel an action not authorized by Congress?
- (2) Would the application of estoppel require the government to make a monetary payment not authorized by Congress?
- (3) Was the act or information upon which your client relied within the scope of the authority of the government agent?
- (4) Does the private interest at stake outweigh the damage to the public interest of estopping the government?
- (5) Did your client rely on oral representations of government officials?
- (6) Did your client have a duty to inquire based on other facts within the client's knowledge?
- (7) Did the government engage in affirmative misconduct with an ill intent to do so?
- (8) Was the government acting in its sovereign or proprietary capacity?

OTHER COMMON LAW EQUITABLE DEFENSES: LACHES, WAIVER AND UNCLEAN HANDS

I. Laches

A. Introduction

Like estoppel, the defense of laches is based on notions of fairness.¹⁶⁰ It is a doctrine "by which relief is denied to one who has unreasonably and inexcusably delayed in the assertion of a claim."¹⁶¹ It is derived from the equitable principle that courts will not assist one who has slept on his or her rights where the failure to act is to the detriment of another.¹⁶² The doctrine also recognizes society's need for "speedy vindication or enforcement of rights, so that courts may arrive at safe conclusions as to the truth."¹⁶³

160. See, e.g., *Equal Employment Opportunity Comm'n v. Dresser Indus., Inc.*, 668 F.2d 1199, 1202 (11th Cir. 1982).

161. *Brundage v. United States*, 504 F.2d 1382, 1384 (Ct. Cl. 1974). The defense of laches can be intertwined with the defense of estoppel, as some courts are of the view that the "essence of laches is estoppel." *Id.*; See also *United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 565 F.Supp. 788, 798 (1983). The *Gates* court stated that a party's failure to establish the requirements for estoppel eliminates the foundation for a laches defense. See *id.*

162. See *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259 (Fed. Cir. 1999).

163. *Id.*

B. Elements of Laches

To assert the defense of laches, one must show (i) an unreasonable and unexcused delay by the party against whom the defense is asserted, and (ii) prejudice to the party asserting the defense.¹⁶⁴ With respect to the first element, it is important to note that the mere fact that time has elapsed from the date a cause of action first accrued is not sufficient to bar a suit under the doctrine of laches.¹⁶⁵ Rather, the delay must be unreasonable and unexcused.¹⁶⁶ Furthermore, the prejudice element of this test includes either economic prejudice or defense prejudice, which is an "impairment of the ability to mount a defense due to circumstances such as loss of records, destruction of evidence or witness unavailability."¹⁶⁷

C. Policy Considerations

It is well-settled that the defense of laches is generally inapplicable against the government when the government is enforcing its rights.¹⁶⁸ The policy behind prohibiting the defense of laches to be asserted against the government is to protect the "public rights, revenues and property"¹⁶⁹ from being lost for the sole reason that the agencies of the government were negligent in protecting those rights.¹⁷⁰ The prohibition against application of the defense of laches against the government is particularly adhered to in environmental cases, where the government "is acting in its sovereign capacity to enforce and protect the public interest in a clean environment."¹⁷¹ Accordingly, many courts have refused to consider the defense of laches when asserted against the government.¹⁷² For example, courts have held that the doctrine of laches does not bar the Environmental Protection Agency from recovering for violations of pretreatment regulations and violation of

164. See *Costello v. United States*, 365 U.S. 265, 282 (1961); see also *United States v. Marolf*, 173 F.3d 1213 (9th Cir. 1999).

165. See, e.g., *Costello*, 365 U.S. at 282.

166. See *Melrose Assoc., L.P. v. United States*, 43 Fed. Cl. 124 (Fed. Cl. 1999).

167. *Jana*, 936 F.2d at 1269-70.

168. See, e.g., *Costello*, 365 U.S. 265, 282 (1961); *United States v. Summerlin*, 310 U.S. 414, 416-17 (1940); *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir. 1979).

169. *Costello*, 365 U.S. at 281 (citations omitted).

170. See *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); See also, Mary Lynn Kelly, *Preventing Trial by Ambush: The Laches Defense in Title VII Suits*, 8 REV. LITIG. 227 (1989).

171. *Louisiana-Pacific Corp.*, 682 F.Supp. at 1138.

172. See *id.*

a permit under the National Pollutant Discharge Elimination System¹⁷³ or from recovering for violations of the Clean Air Act.¹⁷⁴ The doctrine of laches will also not bar the Bureau of Reclamation of the Department of Interior from charging districts for expenses incurred by the Army Corps of Engineers for the operation and maintenance of a dam and reservoir, which supply districts with water.¹⁷⁵ In addition, laches will not bar the government from enforcing its rights concerning public lands.¹⁷⁶

Other courts, however, have not interpreted the Supreme Court and other precedent as a *per se* rule against asserting laches against the government in all circumstances.¹⁷⁷ For example, in *United States v. Eaton Shale Co.*,¹⁷⁸ the United States brought an action against successors in interest of a land patent to invalidate and cancel the patent on the ground that six oil placer mining claims upon which the patent was premised were not in existence at the time the patent was issued.¹⁷⁹ The court found that laches was a "viable and persuasive defense" against the government in light of the fact that at the time the patent was issued, the government had full knowledge of the facts necessary to cancel the patent at the time of its issuance.¹⁸⁰ The court noted that the government waited twenty-one years to attack the patent, during which time the defendant had expended a substantial amount of money for the use and maintenance of the land.¹⁸¹ The court also noted that the lapse in time had further disadvantaged the defendant due to the unavailability of witnesses, the difficulty in locating documents and the inability to reconstruct the facts.¹⁸²

173. See *Menominee*, 727 F.Supp. at 1122.

174. See *Louisiana-Pacific Corp.*, 682 F.Supp. at 1138.

175. See *Bostwick Irrigation District v. United States*, 900 F.2d 1285, 1291-92 (8th Cir. 1990).

176. See *California*, 332 U.S. at 40.

177. See, e.g., *United States v. Martell*, 844 F. Supp. 454, 459 (1994) (Seventh Circuit has held that laches may be asserted against the government); *Jana*, 936 F.2d at 1269 (stating that it is not clear whether the defense of laches may be asserted against the government but not deciding the question definitively); *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 3 (Fed. Cir. 1985) (the court considered the application of the doctrine against the government by assuming without deciding that such a defense may be brought against the government); *United States v. Rhodes*, 788 F.Supp. 339 (E.D. Mich. 1992) (finding that an exception lies where the government brings an action in contract where the defense of laches is applicable to the government's predecessor in interest).

178. 433 F.Supp. 1256 (D. Colo. 1977).

179. See *id.*

180. See *id.*

181. See *id.*

182. See *id.*

II. Waiver

A. Introduction

Waiver is often applied as a defense against the government in conjunction with estoppel.¹⁸³ Courts disfavor the use of waiver as a defense against the government for the same public policy reasons that estoppel is disfavored.¹⁸⁴ Courts have held that, generally, "public officials have no power or authority to waive the enforcement of the law on behalf of the public."¹⁸⁵

B. Elements of Waiver

A party asserting the defense of waiver must establish either an "intentional relinquishment or abandonment of a known right or privilege,"¹⁸⁶ or, if alleging implied waiver, "a clear, unequivocal and decisive act . . . showing a purpose to abandon or waive the legal right."¹⁸⁷ Regardless of whether a waiver is express or implied, it must be intentional.¹⁸⁸ Mere negligence will not create a waiver.¹⁸⁹ In addition, rights or privileges may only be waived by the person for whose benefit they were intended,¹⁹⁰ by his agent¹⁹¹ or by someone else whom the law empowers to act on his behalf.¹⁹² The question of whether the government has waived its claims is one of fact,¹⁹³ and is usually a highly fact-specific inquiry to each individual case. Whether a particular right may be waived depends on the right at stake.¹⁹⁴ It is important to note, however

183. See, e.g., *United States v. Kramer*, 757 F.Supp. 397 (1991); *United States v. Walerko Tool and Eng'g Corp.*, 784 F.Supp. 1385 (1992); *Hatco Corp. v. W.R. Grace & Co.*, 801 F.Supp. 1309 (1992).

184. See *Mottolo*, 695 F.Supp. at 628 (citing *Albrechtson v. Andrus*, 570 F.Supp. 906, 909-10 (10th Cir. 1970)).

185. *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1050 (W.D. Mich. 1984). See also *Atlantic Richfield v. Hickel*, 432 F.2d 587, 591-92 (10th Cir. 1970).

186. *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir. 1970). For an application, see e.g. *Mottolo*, 695 F.Supp. at 628 (finding that the government had not waived its right to pursue an action for the recovery of cleanup costs under CERCLA because at the time the government representation was made CERCLA had not yet been enacted).

187. *United States v. Chichester*, 312 F.2d 275, 282 (9th Cir. 1963).

188. See *Alsens Am. Portland Cement Works v. Degnon Contracting Co.*, 118 N.E. 210 (N.Y. 1917).

189. See *id.*

190. See *United States Fidelity & Guarantee Co. v. Miller*, 34 S.W.2d 938 (1931).

191. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (1905).

192. See *Black Diamond Coal Mining Co. v. Rankin*, 98 S.W.2d (1936).

193. See *Walerko Tool*, 784 F.Supp. at 1389.

194. See *United States v. Olano*, 507 U.S. 725, 733 (1993).

that, in general, a statutory right cannot be waived if such waiver would violate public policy.¹⁹⁵

III. Unclean Hands

A. Introduction

Like the other defenses at common law, the doctrine of unclean hands is based on conscience and good faith.¹⁹⁶ The principle underlying the doctrine of unclean hands is that "since equity tries to enforce good faith in defendants, it no less stringently demands the same good faith from the plaintiff."¹⁹⁷ Thus, the maxim guiding the doctrine of unclean hands is "he who comes into equity must come with clean hands."¹⁹⁸ The Supreme Court has characterized the doctrine as "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."¹⁹⁹ Although unlike the doctrines of estoppel and laches, there is no general prohibition against asserting this defense in government actions, it has been held that the doctrine should not be applied to frustrate the purpose of a federal statute or to thwart public policy.²⁰⁰

B. Elements of Unclean Hands

The only requirement for asserting an unclean hands defense is to show that the alleged inequitable conduct has some relationship to the matters before the court in the present case.²⁰¹ Thus, "[w]hile equity does not demand that its suitors shall have led blameless lives, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue."²⁰² As with the other common law defenses, the determination of

195. See *Haghighi v. Russian-American Broad. Co.*, 173 F.3d 1086, 1088 (8th Cir. 1999) (citations omitted).

196. See *Georgia-Pacific Co.*, 421 F.2d at 103.

197. 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D* § 2946 at 108 (1995).

198. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814-15 (1945) (quotation marks and citation omitted).

199. *Id.*

200. See *Martell*, 844 F.Supp. at 459.

201. See *In re New Valley Corp. v. Corporate Property Ass'n 2 and 3*, 181 F.3d 517 (3d Cir. 1999).

202. *Precision*, 324 U.S. at 814-15 (citation omitted).

whether relief is barred by the doctrine of unclean hands is within the discretion of the trial court.²⁰³

An example of the application of this doctrine in a government case may be found in *United States v. Georgia-Pacific Co.*²⁰⁴ There, the government brought an action for declaratory judgment and specific performance of a contract, which had been entered into over thirty years earlier.²⁰⁵ Under the contract, the owner of certain timberlands was required to donate part of the land if the boundaries of an adjacent national forest were extended to include the land.²⁰⁶ The boundaries were extended.²⁰⁷ However, a subsequent public land order was issued retracting this initial extension.²⁰⁸ The government made no assertion of ownership for several years and, in the meantime, the defendant made considerable improvements upon the land.²⁰⁹ When the government finally made its claim of ownership to the retracted lands, the court found, in addition to other defenses, that defendant had established unclean hands by the government based on the government's failure to inform the defendant that the boundaries set forth in the order were invalid or, alternatively, by not informing the defendant that it would repudiate the changes effected by the order.²¹⁰

ASSERTING THE STATUTE OF LIMITATIONS AGAINST THE GOVERNMENT

I. Introduction

Statutory limitation provisions are enacted by Congress based upon the same policy considerations which underlie the common law equitable defenses.²¹¹ Statutes of limitations are, in fact, very similar to the doctrine of laches. Both are designed to promote fairness by precluding the revival of claims "that have been allowed to slumber until evidence has been lost, memories

203. See *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 245-46 (1933) ("when assessing whether to invoke the doctrine of unclean hands, courts of equity must not be bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion."). See also *New Valley Corp.*, 181 F.3d at 525.

204. 421 F.2d 92 (9th Cir. 1970).

205. See *id.*

206. See *id.*

207. See *id.*

208. See *id.*

209. See *id.* at 103.

210. See *id.* at 104.

211. See *United States v. Laneman*, 1998 WL 315346, at *4 (D. Minn. 1998).

have faded, and witnesses have disappeared.”²¹² In the context of government cases, the general rule is that the government is not subject to any time constraints in bringing its actions.²¹³ However, in the 1960’s Congress narrowed the application of this rule by enacting general statutory limitation provisions that apply to government actions.²¹⁴ By placing limits on the government’s ability to litigate, Congress has expressed a policy of protecting a party’s right to be free of stale claims in certain circumstances, even where the government is acting on behalf of the public.²¹⁵

The statutory nature of the defense mandates a different analysis than the analysis required for asserting common law defenses against the government. In these cases the court does not engage in a balancing of competing interests because, in enacting the statute, Congress has already struck such a balance. Rather, application of a particular statute of limitation usually depends upon the court’s interpretation of the express provisions of the statute. The discussion set forth below explores the contours of the application of the statutes of limitations when asserted against the government, including issues such as accrual and tolling, that a practitioner must consider when evaluating this defense. The focus of this section is on statute of limitations against the federal government. However, many of the same statutory construction principles will apply in the state and local government context.²¹⁶

II. The General Rule

When considering whether a statute of limitations defense is viable against the government for your particular facts, it is important to remember that the general rule is that the government, when acting in its sovereign capacity, is not subject to any time limitations for bringing a claim, absent a congressional enactment to the contrary.²¹⁷ This rule derives from the historic prerogative

212. *Order of R. Tel. v. Ry. E. Agency*, 321 U.S. 342, 348-49 (1944).

213. *See Flake v. United States*, 1996 WL 437509, at *3

214. *See e.g.* 28 U.S.C. § 2415.

215. *See Guaranty Trust*, 304 U.S. at 136.

216. *See, e.g., Town of Cyril v. Mobil Oil Corp.*, 11 F.3d 996 (10th Cir. 1993); *Gibbs v. Colorado Mined Land Reclamation Bd.*, 883 P.2d 592 (Colo. App. 1994) (both holding that the general rule against applicability of statutes of limitation to the government applies to state).

217. *See E.I. Du Pont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924); *United States v. Ward*, 985 F.2d 500, 502 (10th Cir. 1993). This rule applies whether the government brings an action in federal or state court. *Summerlin*, 310 U.S. at 416.

of the Crown.²¹⁸ Like the common law defense of laches, the rule's continuing vitality is attributed to the public policy of preserving "the public rights, revenues, and property from injury and loss [from] the negligence of public officers."²¹⁹

In light of the Congressional enactment of limitation periods which are applicable against the government, however, the general rule now applies only in the narrow circumstances where (i) the statute under which the government brings its action does not provide an express time limitation for filing suit; and (ii) the court determines that no general statute of limitations is applicable.²²⁰ An illustration of the type of case in which the general rule still applies is in actions brought by the government under the Surface Mining Control and Reclamation Act ("SMCRA").²²¹ In such cases, courts have consistently held that the government is not constrained by time limitations in bringing its actions because the act does not provide a limitation provision and the actions do not fall within the scope of the general statute of limitations provisions applicable to the government.²²²

The general rule has been severely limited by Congress' enactment of specific limitation provisions in individual acts and its enactment of general statutes of limitation applicable to the government.²²³ One of these provisions will potentially apply in most cases. Yet, as discussed below, these provisions can be narrowly construed so as to not apply in certain cases, leaving the government with no time limits within which it must seek recovery.

It is important to begin a discussion of these two types of situations with a review of a few rules of construction that apply to any statute of limitations which governs actions brought by the government. First, and perhaps most importantly, all statute of limitations will be strictly construed in favor of the government.²²⁴ This rule encourages courts to interpret statutes of limi-

218. See *Guaranty Trust*, 304 U.S. at 132.

219. *Id.*; See also *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981) (explaining the doctrine of limitation immunity by the government as being based on the "public policy objective of protecting rights vested in the government for the benefit of all from the inadvertence of the agents upon which the government must rely.").

220. See *United States v. Tri-No Enterprises, Inc.*, 819 F.2d 154 (7th Cir. 1987).

221. 30 U.S.C. § 1232(a) (1994).

222. See, e.g., *Tri-No Enterprises*, 819 F.2d at 159; *United States v. E. & C. Coal Co., Inc.*, 647 F.Supp. 268, 274 (W.D. Va. 1986); *United States v. Hawk Contracting, Inc.*, 649 F.Supp. 1, 3 (W.D. Pa. 1985).

223. See *Guaranty*, 304 U.S. at 136.

224. See *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 391 (1984).

tations in a manner which favors inapplicability to a claim brought by the government.²²⁵ Another rule of construction is that a court will look to the substance of the claim, rather than its trappings, to determine whether and which statute of limitations provision is applicable.²²⁶ Therefore, a defendant's efforts to characterize the facts as within the scope of a general statutes of limitations provisions will often be rejected by the court.²²⁷ Finally, on a narrower note, in some jurisdictions, citizen groups are considered to stand in the shoes of the government when the group brings an action as a private attorney general, and therefore, the group will be treated like the government for purposes of statute of limitations.²²⁸

III. Statute of Limitations Expressly Set Forth in Individual Acts

When a party is being sued by the government, one of the first things that the party must do is consider the Act which has authorized the government suit. In some cases, the Act under which the government has asserted a claim includes its own express limitation provisions which may affect the government's ability to bring the claim.

225. See *id.*

226. See *United States v. Neidorf*, 522 F.2d 916, 920 (9th Cir. 1975).

227. See, e.g., *Tri-No Enterprises*, 819 F.2d at 158. In *Tri-No Enterprises*, the court rejected the argument that an action brought to collect fees under SMCRA was an action for civil penalties, and therefore subject to the statute of limitations in 28 U.S.C. § 2462, on the basis that the fees under SMCRA are not penalties. This case also illustrates a court's narrow interpretation of statute of limitations in favor of the government.

228. See *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F.Supp. 440 (D. Md. 1985). In that case the court found that a citizen suit instituted under § 505 of the Clean Water Act was subject to the five year limitations period in 28 U.S.C. § 2462, which applies to government actions for civil penalties. The rationale stated by the court would be applicable to citizen suits initiated under other environmental statutes as well. The court stated:

[T]he plaintiffs are suing as private attorneys general, and they seek enforcement of federal law. Although the [Clean Water Act] provides that a citizen 'sues on his own behalf,' any penalties recovered from such an action are paid into the United States Treasury Any benefit from the lawsuit, whether injunctive or monetary, inures to the public or to the United States. The citizen suit provision was designed to supplement administrative enforcement, not to prove a private remedy. Under these circumstances it seems most appropriate that the same statute of limitations applies to a civil action as to a federal administrative action.

Id. at 449-50.

A. Examples of Acts that Include Statute of Limitations Provisions

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is one example of such an Act.²²⁹ When CERCLA was originally enacted, it was not clear whether actions brought by the government under § 107 of the act for the recovery of cleanup costs were subject to a statute of limitations.²³⁰ In 1987, Congress resolved the uncertainty with amendments that imposed a three-year period for bringing removal actions and a six year period for bringing remedial actions.²³¹ Pursuant to these provisions, claims brought by the government under § 107 of CERCLA that fall outside these time limitations will be barred.²³²

Another example of Congressional intent to limit the government in particular actions may be found in the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (FOGRSFA).²³³ These amendments to the Federal Oil and Gas Royalty Management Act of 1982,²³⁴ imposed upon the government a seven-year deadline in which it may bring a claim for collection of royalty payments.²³⁵ The drafters made clear their intent for this to be the sole limitation period to be applied in such cases by providing that "[t]he limitations set forth in sections 2401, 2415, 2416, and 2462 of [28 U.S.C.] and section 42 of the Mineral Leasing Act²³⁶ shall not apply to any obligation to which this Act applies."²³⁷ Enactment of FOGRSFA was driven, in part, by the inconsistency among judicial and administrative decisions inter-

229. For an in-depth discussion of the limitation provisions set forth in CERCLA, see Johnson, *Application of Statute of Limitations (42 U.S.C.S. § 9613(g)(2)) in Action Under § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)(42 U.S.C.S. § 9607) for Recovery of Costs for Removal of Remedial Action*, 142 A.L.R. Fed. 115 (1997).

230. See *United States v. Fairchild Indus., Inc.*, 766 F.Supp. 405, 415 (D. Md. 1991).

231. See 42 U.S.C. § 9613(g) (1994).

232. See *id.*

233. Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, Pub. L. No. 97-451, 110 Stat. 1700 (1996).

234. 30 U.S.C. §§ 1701-1757 (1994).

235. 30 U.S.C. § 1724(b)(1) provides, in relevant part, that "A judicial proceeding or demand which arises from, or relates to an obligation, shall be commenced within seven years from the date on which the obligation becomes due and if no so commenced shall be barred."

236. 30 U.S.C. § 226-2 (1994).

237. 30 U.S.C. § 1724(b)(3) (1996).

preting whether the general statute of limitations for contracts under 28 USC § 2415(a) applied.²³⁸

B. Accrual of Actions under Statute of Limitations in Specific Acts

The practitioner should be aware that determining when the government claim accrued under these specific statutory provisions can be critical to the success of this defense. In some cases, the Act includes provisions addressing the accrual date.²³⁹ For example, FOGRSFA provides that the royalty obligation becomes due "for any given production month for a lease . . . on the last day of the calendar month following the month in which oil and gas is produced."²⁴⁰ This definition provides for certainty as to the actual accrual date for each monthly royalty payment in line with judicial precedent.²⁴¹

In other cases, the court must determine the date the cause of action accrued.²⁴² Depending upon the accrual date applied by the court, the government's claim may not be time-barred. For example, in *United States v. United Nuclear Corp.*,²⁴³ the court found the EPA's action under CERCLA for clean-up costs timely under the three year limitation in 42 U.S.C. § 9613(g), because the EPA's cause of action did not accrue (and therefore the three year limitation period began to run) until the EPA issued its record of decision signing off on the final clean-up.²⁴⁴ The court rejected the defendant's argument that the three year period began to run much earlier when the EPA commenced its clean-up activities.²⁴⁵ In finding the latest possible accrual date applicable, the court relied upon "sound public policies"²⁴⁶ and the rule that CERCLA

238. See Section IV.B.2., *infra*.

239. See 30 U.S.C. § 1724(c) (1996).

240. *Id.*

241. See, e.g., *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 861 (10th Cir. 1993) ("Phillips III") (rejecting the government's contention that the royalty claim did not accrue under § 2415 (a) until after the government conducted an audit); *Atlantic Richfield Co. v. Lujan*, 811 F. Supp. 1520 (N.D. Okla. 1992).

242. See *United States v. United Nuclear Corp.*, 814 F.Supp. 1552 (D. N.M. 1992).

243. See *id.*

244. See *id.*

245. See *id.* The earliest possible accrual date is the enactment of § 9613(a) because courts have ruled that the statute of limitations in § 9613(g) has prospective application only. See *United States v. Moore*, 698 F. Supp. 622, 625-26 (E.D. Va. 1988); *United States v. Kramer*, 757 F. Supp. 397, 437 (D. N.J. 1991).

246. *United Nuclear Corp.*, 814 F. Supp. at 1552.

limitations periods “must be construed strictly in favor of the government.”²⁴⁷

IV. The General Statutes of Limitation Applicable Against the Government

Where the particular Act that forms the basis for the government's claim does not contain a specific limitation period, one of the general statutes of limitation may be applicable. There are three significant general limitations statutes applicable against claims by the government: 28 U.S.C. § 2415(a) (providing a six year limit for government claims for money damages under contracts); 28 U.S.C. § 2415(b) (providing a three year limit for government claims for money damages based on torts); and 28 U.S.C. § 2462 (providing a five year limit for government claims for fines and civil penalties).

Congress enacted § 2462 in 1948 and § 2415 in 1966.²⁴⁸ The purpose of § 2415 was “to provide a more balanced and fair treatment of litigants in civil actions involving the government.”²⁴⁹ As expressed by the Comptroller General in his supporting statement accompanying the Senate report, “[p]ersons dealing with the Government should have some protection against an action by the Government when the act occurred many years previously.”²⁵⁰ Congress enacted § 2415 “to promote fairness. . . notwithstanding whatever prejudice might accrue thereby to the Government as a result of the negligence of its officers.”²⁵¹ Congress believed that “modern standards of fairness and equity” demanded “equality of treatment” for private litigants defending government claims.²⁵²

In recent years, courts have been increasingly willing to find, for certain categories of claims, that in the absence of a specific statutory time bar, the general limitation statutes against the

247. *Id.*

248. See 28 U.S.C. § 2642 (1994); 28 U.S.C. § 2415 (1994).

249. S. Rep. No. 1328 at 7 (1966) *reprinted in* 1966 U.S.C.C.A.N. 2502, 2503 (“[T]he Government litigation covered by the bill arises out of activity which is very similar to that commercial activity. Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government.”).

250. *Id.* at 2508.

251. *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1055 (Fed. Cir. 1996) *quoting S.E.R. Jobs for Progress*, 759 F.2d at 18.

252. The legislative history indicates that the same equitable notions driving statutes of limitation in other contexts, such as requiring claimants to assert their claims when memories of witnesses were fresh and documents and other evidence still available, were driving Congress to pass these bills. See 1966 U.S.C.C.A.N. at 2503.

government applies.²⁵³ For example, where the government brings an action for recovery of cleanup costs under the Clean Water Act, which, unlike CERCLA, does not contain an express limitations period for cost-recovery actions, the government is still required to bring the action within six years pursuant to § 2415(a).²⁵⁴

As discussed more fully below, however the statutory interpretation of the language of these general statutes can often constitute difficult or impossible hurdles for the practitioner attempting to apply the limitations defense to a particular government claim.

A. Application of the General Statutes of Limitation to Natural Resources and Environmental Claims

When promulgated, none of these general statutes contemplated the many types of natural resources and environmental claims being raised today. Nor did these statutes anticipate the intricate administrative processes now in place for such agencies as the Department of Interior. Therefore, the statutory language of these general limitation statutes is often problematic or ambiguous in these contexts. In the authors' view, these uncertainties permit courts to construe statutory language so as to weigh in favor of the agency depending, in part, upon the equities of the situation. In some contexts, seemingly inconsistent decisions among courts must also be reconciled in order to prevail with the defense.

As a threshold matter, determining the nature of the government's claim may derail a limitations based defense if the court declines to find that the particular claim falls within the intended scope of the general statute. For example, in § 2415(a) contract cases, the practitioner must first persuade the court that the particular monies being claimed by the government are based in contract or quasi-contract within the meaning of § 2415 before that limitations period applies.²⁵⁵ If that threshold test is met, the limitations period may still not apply if, for example, the claim is brought in an administrative rather than judicial forum²⁵⁶ or if

253. See 28 U.S.C. § 2415(a), (b); 28 U.S.C. § 2462 (1994).

254. See 28 U.S.C. § 2416(a) (1994).

255. Both express and implied contracts are within the scope of § 2415(a). The six year limitation period applies to "any contract express or implied in law or fact. . ." See also *Neidorf*, 522 F.2d at 919.

256. See, e.g., *Woods Research and Dev. Corp.*, 148 IBLA 121, GFS(O&G) 16 (1999).

the monetary remedy is sought with other relief such as an injunction.²⁵⁷ Furthermore, even if the limitations period does apply, it may not have run to bar the government's claim if the accrual date of the claim is disputed²⁵⁸ or if the limitations period is "tolled" by certain circumstances such as a government audit.²⁵⁹ In order to actually prevail with a statute of limitations defense, the practitioner must overcome all of these hurdles.²⁶⁰

B. 28 U.S.C. § 2415 Contract or Tort Actions for Money Damages

Determining whether a particular claim is within the scope of the statute of limitations found in § 2415(a) or § 2415(b) can be difficult. Likewise, construction of the terms "action" and "money damages" utilized in both subparts, can cause rejection of the otherwise viable defense.

28 U.S.C. § 2415 provides in pertinent part:

(a) . . . every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or law, whichever is later. . . .

(b) . . . every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action accrues. . . .

In addition to the above, § 2415 contains a number of other subparts, many of which contain exceptions to the general rules.²⁶¹ These should be carefully evaluated by the practitioner at the time of analyzing these defenses. All of these subsections must also be read in conjunction with the tolling provisions set forth in § 2416 for a complete analysis.

257. See Part IV.C.3., *infra*.

258. See *United Nuclear Corp.*, 814 F.Supp. 1552.

259. See *Phillips III*, 4 F.3d at 861-64.

260. See *id.*

261. See 28 U.S.C. § 2415 (1998).

1. Whether the Government's Claim is Based In Tort or Contract

Whether the federal government's claim is based in contract or in tort theories is not always readily determinable. For example, in *United States v. Dae Rim Fishery Co., Ltd.*,²⁶² the government's claim against the company was brought under the Clean Water Act, 33 U.S.C. § 1321(c), for reimbursement of remediation costs, necessitated by a fuel spill off the coast of Alaska.²⁶³ The company argued that the three-year tort limitation period applied because the claim was based upon polluting the sea.²⁶⁴ The government argued that since the Act was silent, no limitations period applied.²⁶⁵ In the alternative, the government argued for the six-year limitation period under a theory of quasi-contract.²⁶⁶ At the district court level, the company prevailed on its theory and the complaint was dismissed.²⁶⁷ In overturning the district court, the Ninth Circuit first rejected the contention that no statute of limitations applied.²⁶⁸ It also disagreed that the government's claim was based in tort.²⁶⁹ Instead, the Court held the six-year limitations period applicable, because a contract impliedly existed between the company and the government under § 1321(c) of the Act to reimburse the government for clean up costs.²⁷⁰ In the Appellate Court's view, any other result would be inequitable and unjustly enrich the company for failing its duty to remediate the spill.²⁷¹ Thus, the longer six-year period applied and the claim was not barred.²⁷²

262. 794 F.2d 1392 (9th Cir. 1986).

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.*

267. *See id.*

268. The court relied upon its earlier rulings where it held that "whenever the United States sues for damages, the substance of the claims must be characterized for purposes of section 2415 as sounding in either tort, contract or quasi-contract." *United States v. Limbs*, 524 F.2d 799, 901 (9th Cir.1975).

269. *See Dae Rim Fishery Co.*, 794 F.2d 1392.

270. In doing so, the Ninth Circuit followed the Fifth Circuit in *United States v. P/B STCO* 213, 756 F.2d 364 (5th Cir. 1985); *see also United States v. C.&R. Trucking Co.*, 537 F.Supp. 1080 (N.D. W.Va. 1982).

271. *See Dae Rim Fishery Co.*, 794 F.2d 1392.

272. The Ninth Circuit went on to hold, in the alternative, that the 3-year limitations period would also not have run, because the government's claim accrued on the date when the clean up was completed, not on the date the polluting activities occurred. *Dae Rim Fishery Co.*, 794 F.2d at 1395. This case is a good example of how frustrating it can be to successfully assert a statute of limitations defense against the federal government.

In other natural resources contexts, courts have refused to apply § 2415 at all.²⁷³ Under SMCRA, coal miners must pay a reclamation fee upon each ton of coal produced.²⁷⁴ While the Act provides for civil actions to recover delinquent fees, it does not place any restrictions on such actions.²⁷⁵ In considering actions brought by the government under SMCRA for recovery of delinquent fees, the courts have followed the general rule that the government is exempt from statutes of limitations.²⁷⁶ The courts reached this conclusion after determining that SMCRA provides no explicit limitation period for bringing an action and rejecting arguments that any other general statute of limitations applied.²⁷⁷ The reclamation fees were held to not be fines, penalties or forfeitures under 28 U.S.C. § 2462, but rather simple assessments on coal produced for sale by mining.²⁷⁸ Nor were the claims for delinquent fees based in contract or quasi-contract under § 2415(a).²⁷⁹ Finally, courts have also rejected the argument that the SMCRA fee is a tax, subject to the limitations period set forth in the Internal Revenue Code.²⁸⁰ However, to the extent that the government sought civil penalties in addition to the delinquent fees, the five year statute of limitations at § 2462 would be applicable to that portion of the claim.²⁸¹

2. Application of Section 2415 to Administrative Proceedings: Whether the Government's Claim is an "Action for Money Damages"

One of the most significant statutory construction hurdles facing a practitioner trying to enforce the general statutes of limita-

273. See *Dae Rim Fishery Co.*, 794 F.2d at 1392.

274. See 30 U.S.C. § 1232(a) (1994).

275. See *id.*

276. See, e.g., *Tri-No Enterprises, Inc.*, 819 F.2d at 159; *Hawk Contracting, Inc.*, 649 F.Supp. at 3.

277. See *id.*

278. See *id.*

279. See *id.* However, in one case a district court found that 28 U.S.C. § 2415(a) did apply based again upon equitable principles of quasi-contract. See *United States v. Gary Bridges Logging & Coal Co.*, 570 F.Supp. 531, 532-33 (E.D. Tenn. 1983). In this case the defendant had acknowledged owing the fees and entered into an installment contract with the government to repay the debt. The court found that installment contract triggered the application of 28 U.S.C. § 2415(a). The application of § 2415(a) did not alter the outcome of the case, however, because the court found that the action was not time-barred. *Id.*

280. See, e.g., *Tri-No Enterprises, Inc.*, 819 F.2d at 159; *Hawk Contracting, Inc.*, 649 F.Supp. at 3.

281. See *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 668 (4th Cir. 1997).

tion, is their application to agency proceedings outside of the judicial context. In other words, do the general statutes of limitation apply against agency claims in administrative proceedings as well as judicial? Where the government raises its claim in a court, it is readily determinable whether the "action"²⁸² is one for "money damages."²⁸³ Likewise, that the government commenced the action by filing a "complaint."²⁸⁴ However, under administrative schemes permitting the agency to make claims for monies owed through administrative orders, and requiring defendants to appeal those orders through an administrative review process, a significant question arises concerning whether those claims are within the scope of § 2415 as "actions for money damages."²⁸⁵

An example of this sort of agency scheme is, of course, the United States Department of the Interior. One of Interior's sub-agencies, the Minerals Management Service (MMS), is charged with the Secretary's authority to enforce the royalty payment terms of federal oil and gas leases.²⁸⁶ Thus, the MMS routinely issues administrative orders to lessees to pay additional royalties on production from past periods. Under MMS regulations, the lessee must first exhaust a two-tier administrative appeals process, prior to challenging the order in district court.²⁸⁷ Given this regulatory scheme, the issue of whether the six-year time bar in § 2415(a) applies to administrative as well as judicial proceedings concerning federal oil and gas leases, has been vigorously litigated in the royalties context.²⁸⁸ The resulting decisions have been inconsistent and unworkable with a number of courts holding § 2415(a) applicable to MMS royalty orders,²⁸⁹ while others have flatly rejected that result.²⁹⁰ Further complicating the situation,

282. 28 U.S.C. § 2415 (1994).

283. *Id.*

284. *Id.*

285. *Id.*

286. 30 U.S.C. § 1711 (1994).

287. See 30 C.F.R. §§ 243, 290 (1998).

288. The holding that federal oil and gas leases are contracts within the meaning of § 2415(a) is well-settled. *United States v. Essley*, 284 F.2d 518 (10th Cir. 1960).

289. See *Phillips III*, 4 F.3d at 860; *Marathon Oil Co. v. Babbitt*, 938 F.Supp. 575 (D. Alaska 1996); cf. *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380 (10th Cir. 1992); *Mesa Operating Ltd. Partnership v. United States Dep't of the Interior*, 17 F.2d 1288 (10th Cir. 1994); *Atlantic Richfield Co.*, 811 F.Supp. at 1522.

290. *Phillips Petroleum Co. v. Johnson*, No. 93-1377, WL 484506 (5th Cir. 1994). In a short, unpublished decision modifying an earlier royalties case, the Fifth Circuit held that the plain meaning of the language of § 2415(a) was that it was limited to judicial actions for money damages not MMS royalty orders, citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

the Interior Board of Land Appeals has consistently refused to find § 2415(a) applicable against Interior Department administrative proceedings, including MMS orders to pay royalties.²⁹¹ Given the fact that statutes of limitation are strictly construed in favor of the government,²⁹² these results are not that surprising.

The passage of FOGRSFA to provide a seven-year limitation specifically on both administrative and judicial MMS claims has resolved this conflict prospectively.²⁹³ Absent such a legislative fix, however, the practitioner is faced with reconciling the terms "complaint" and "action for money damages" with the particular agency administrative scheme at issue.²⁹⁴ This can be an uphill battle and can lead to patently illogical results where, for the same claim, the administrative law judge refuses to apply a limitation period, but a court in a judicial context imposes one. The result may also be unfair, since in the absence of § 2415, the agency's ability to assert claims, at least administratively, is virtually unlimited.²⁹⁵

There is also authority to support application of § 2415 in administrative proceedings outside of the royalties context. In *United States v. Hanover Ins. Co.*,²⁹⁶ the Federal Circuit Court of Appeals affirmed the district court's conclusion that § 2415(a) applied to administrative proceedings. In making this determination, the Court looked at the structure of the statute as a whole and held that to carve out administrative proceedings would permit the agency to unfairly avoid the statute of limitations "by threat of administrative action based exclusively on nonpayment

291. See, e.g., *Woods Research and Dev. Corp.*, 148 IBLA 121, GFS(O&G) 16 (1999).

292. See *supra*, n. 229.

293. As yet there are no reported administrative or judicial decisions construing FOGRSFA. The Act is comprehensive and attempts to anticipate the many pitfalls of a statute of limitations defense in a royalties context by addressing not only when the cause of action accrues, but also the specific circumstances under which the 7 year period may be tolled or the amounts claimed as administrative offset. The authors are certain, however, that over time creative attorneys will raise new and unanticipated ambiguities in the language of FOGRSFA for courts to grapple with. See *id.*

294. The legislative history of § 2415 also contains problematic references to "suits by the government" that are against "private litigants." S. REP. NO. 1328, 89th Cong., 2d Sess. 7 (1966), reprinted in 1966 U.S.C.C.A.N. 2502, 2503.

295. Royalty claim defendants are quick to note that claims for overpaid royalties which must be brought in the Court of Claims under the Tucker Act are subject to a six year statute of limitations set forth in 28 U.S.C. § 2401. *Amoco Prod. Co. v. Hodel*, 815 F.2d 352 (5th Cir. 1987).

296. 82 F.3d 1052 (Fed. Cir. 1996).

of the time-barred claim.”²⁹⁷ A rigorous dissent accompanies the decision.

3. Accrual of the Cause of Action

The general rule in a contract action is that the cause of action accrues at the time of the breach.²⁹⁸ Consistent with that rule, prior to the enactment of FOGRSFA, royalty payments were held to accrue one month following the month of production.²⁹⁹ Where the government claim involves a sequence of payments, the practitioner should be careful to assert that each monthly payment accrues separately, in order to avoid a finding that the defendant has waived the defense for the entire period. In other contexts, courts often construe environmental claims so that the later possible accrual date under § 2415 applies.³⁰⁰ As is now abundantly clear, many courts will find a limitations period applicable, but under the accrual or tolling analysis, ultimately determine that the statutory period has not yet run.³⁰¹

4. Tolling

The tolling provision set forth in 28 U.S.C. § 2416(c) provides:

For the purpose of computing the limitations periods established in § 2415, there shall be excluded all periods during which . . . facts material to the right of action are not known and reasonably could not have been known by an official of the United States charged with the responsibility to act in the circumstances . . .

Thus, as long as “facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances,” the limitations period is tolled.³⁰² In the royalty payment context, this provision has been interpreted to mean that in

297. *Id.* at 1055.; *See also* 3M (Minnesota Min. & Manufacturing.) Co. v. Browner, 17 F.3d 1453, 1457 (D.C. Cir. 1994); *United States v. Suntip*, 82 F.3d 1468 (9th Cir. 1996); *Reading v. Koons*, 271 U.S. 58, 65 (1926) (“An interpretation of a statute purporting to set a definite limitation upon the time of bringing action. . .which would nevertheless leave defendant subject indefinitely to action for the wrong done, would. . .defeat its obvious purpose.”).

298. *See United States v. Kass*, 740 F.2d 1493, 1496 (11th Cir. 1984).

299. *See Phillips III*, 4 F.3d 861.

300. *See* discussion of Clean Water Act remediation cases, Section IV.B.1, *infra*.

301. *See* discussion of Clean Water Act remediation cases, Section IV.B.1, *infra*.

302. *See Kass*, 740 F.2d at 1497.

most instances, the MMS has a “reasonable” period of time to audit the payor’s accounts in order to determine that an underpayment exists.³⁰³ In *Phillips III*, the Tenth Circuit found that an evidentiary hearing must be held in each case in order to determine when the MMS knew or should have known about the deficient royalty payments.³⁰⁴ So long as an audit was commenced within the FOGSMA six year records retention period, the six year statute of limitations would be tolled during a reasonably conducted audit.³⁰⁵ The difficulty with this scheme is that it is unworkable, causing a royalty payor to anticipate the specific fact based inquiry necessary for each particular underpayment. Again, FOGSFA attempted to address this issue with more certainty.³⁰⁶

5. One Year Savings Clause

28 U.S.C. § 2415(a) contains a further complication, providing that government claims under contracts must be filed within six years after the right of action accrues “or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.”³⁰⁷ Government counsel have used this language to argue that the agency has one year after the conclusion of any administrative proceedings in which to file its claims.³⁰⁸ This “revival” argument has been largely rejected, however, with courts limiting application of the one year “savings clause” to mandatory administrative proceedings.³⁰⁹ In one case, the reverse was argued.³¹⁰ A royalty payor asserted the clause to bar an otherwise timely MMS claim

303. *But see* United States v. Gavilan Joint Community College Dist., 849 F.2d 1246 (9th Cir. 1988) (holding that the legislative history of the tolling provision in § 2416 indicates that it was intended to be limited to circumstances involving fraud).

304. *See Phillips III*, 4 F.3d at 861.

305. *See id.*

306. 30 U.S.C. § 1724(d) (1996).

307. 28 U.S.C. § 2415(a) (1994).

308. *See Kass*, 740 F.2d at 1497.

309. The legislative history provides the example of mandatory administrative proceedings as “those which involve appeals under the ‘disputes’ clause of government contracts.” S. Rep. No. 89-1328 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2504. “Tolling the statute for the myriad of permissive administrative proceedings which are available under current law would offend the statute’s goals of barring the government from asserting stale claims. . .” *United States v. Cocoa Berkau, Inc.*, 789 F.Supp. 1160 (Ct. Int. Trade 1992) *aff’d* 990 F.2d 610 (Fed. Cir. 1993); *accord Suntip*, 82 F.3d at 1475; *Mitsubishi Elec. Am. Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994).

310. *Mesa Operating*, 17 F.3d at 1291.

after exhaustion of the administrative appeals process.³¹¹ The Tenth Circuit rejected the defense on the grounds that the statute of limitations defense had never been raised by the plaintiff and was therefore waived.³¹² However, the Court stated further that "it would be unjust in the extreme to permit the delay through litigation initiated by plaintiff" to bar an otherwise timely claim.³¹³ The message here is that practitioners must review § 2415 as a whole when seeking to prevail on the six year time bar and be prepared to rebut these various subsections to the extent practicable.

6. Administrative Offset

It is well-settled that the running of a statute of limitation merely bars the assertion of a particular remedy outlined in the statute and does not extinguish the underlying claim.³¹⁴ Because the debt itself is not extinguished, other avenues may be available for its enforcement, such as administrative offset.³¹⁵ Section 2415(i) states that "the provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31."³¹⁶ This obscure subsection is also fertile ground for confusion and counter arguments. In the royalties context the topic of administrative offset has now been amended in FOGRSFA.³¹⁷

C. 28 U.S.C. § 2462 Actions for Civil Penalties

The statute of limitations provision set forth at 28 U.S.C. § 2462 is much narrower in the scope of its application than § 2415. This provision applies only to actions in which the government is seeking "civil fines, penalties or forfeiture."³¹⁸ It requires the government to bring such actions within five years after the cause of action has accrued. This statute states in pertinent part:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or

311. *See id.*

312. *See id.*

313. *Id.*

314. *See Thomas v. Bennett*, 856 F.2d 1165 (8th Cir. 1988).

315. *See Roberts v. Bennett*, 709 F. Supp. 222 (N.D. Ga. 1989).

316. 28 U.S.C. § 2415(i) (1994).

317. *See* 30 U.S.C. § 1721(b)(4) (1996).

318. 28 U.S.C. § 2462 (1994).

forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

As with § 2415, there are a number of issues which may arise in the application of this limitations period. Whether the particular facts of the government's claim falls within the scope of § 2462 is again paramount.³¹⁹ Additionally, three issues which are common to many cases warrant particular focus. First, the applicability of section 2462 to agency administrative proceedings as well as judicial proceedings is far more certain under this section than under § 2415.³²⁰ Second, an understanding of when an action accrues under this section is key to successfully prevailing on the defense. Finally, there is a split of authority in the courts as to whether § 2462 applies to government claims which request a relief other than money damages.³²¹

1. Application of § 2462 in Administrative Proceedings

In contrast to cases which involve actions for money damages under § 2415, a party who is defending an action for civil penalties or fines brought by the government has a good chance of being able to assert a statute of limitations defense in administrative actions.³²² The reason is primarily due to the broad language in § 2462, which expressly encompasses any "action, suit or proceeding" for civil penalties rather than just an "action" for money damages.³²³ Consequently, prior to 1994, courts generally have assumed that § 2462 is applicable in administrative actions and

319. See, e.g., *National Mining Ass'n. v. United States Dep't of Interior*, 177 F.3d 1 (D.C. Cir. 1999) (holding that so-called "permit blocking" regulations under SMCRA, permitting the agency to withhold future permits to operators with past uncorrected violations, were not subject to the five year limitations period in § 2462). This holding creates a split of authority on the issue. See *Arch Mineral Corp.*, 104 F.3d at 669.

320. Compare 28 U.S.C. § 2462 (1994) with 28 U.S.C. § 2415 (1994).

321. Compare *United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) (statute of limitations for government civil enforcement actions does not apply to non-monetary injunctive relief) with *Johnson v. Sec. & Exch. Comm'n*, 87 F.3d 484 (D.C. Cir. 1996) (statute applies equally to pecuniary and nonpecuniary penalties).

322. See *United States v. Incorporated Village of Island Park*, 791 F.Supp. 354 (E.D.N.Y. 1992).

323. 28 U.S.C. § 2462 (1994).

applied the statute without comment.³²⁴ The court in *3M Co. (Minnesota Min. & Manufacturing.) v. Browner*,³²⁵ comprehensively considered this issue, however, and its rationale has been consistently relied upon by later courts that have also faced this issue.

In *3M*, the government brought an action for civil penalties under the Toxic Substances Control Act against 3M Company for violations under the act.³²⁶ One of the primary issues in the case was whether § 2462 applied to administrative proceedings.³²⁷ The issue arose because the Administrative Law Judge ("ALJ") had ruled in an earlier proceeding that § 2462 did not apply to administrative proceedings.³²⁸ The ALJ instead concluded that § 2462 applied only to *judicial* "actions, suits or proceedings,"³²⁹ because Congress had not intended, through its revision of the statute, to change the substance of the original language "suit or prosecution."³³⁰ Therefore, the ALJ concluded that even if the EPA's assessment of a civil penalty was a "proceeding," it could not be considered a "suit or prosecution."³³¹

The appeals court rejected the ALJ's distinction between these terms, however, noting that the Supreme Court has not made a distinction between "the function performed by agency attorneys 'presenting evidence in an agency hearing and the function of a prosecutor who brings evidence before a court.'"³³² Instead, the court held that there was no justification for making a distinction in the application of § 2462 depending on whether the penalty action was brought in a court or in an administrative agency.³³³ The court reasoned:

Given the reasons why we have statute of limitations, there is no discernable rationale for applying § 2462 when the penalty action or proceeding is brought in court, but not when it is brought in an administrative agency. The concern that after the

324. See, e.g., *Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n. 8 (11th Cir. 1986); *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819, 822 (1st Cir. 1965); *The A/S Glittre v. Dill*, 152 F. Supp. 934, 940 (S.D.N.Y. 1957).

325. 17 F.3d 1453 (D.C. Cir. 1994).

326. See *id.*

327. See *id.*

328. See *id.* at 1455.

329. *Id.* at 1456.

330. *Id.*

331. See *3M*, 17 F.3d at 1456.

332. *3M*, 17 F.3d at 1456 (quoting *Butz v. Economou*, 438 U.S. 478, 516 (1978)).

333. *3M*, 17 F.3d at 1456.

passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared' pertains equally to factfinding by a court and factfinding by an agency.³³⁴

This rationale has been widely accepted by courts that have since considered the issue.³³⁵ Consequently, a party defending an action for civil penalties in an administrative proceeding should be able to assert the defense of statute of limitations if applicable.

2. When a Cause of Action Accrues Under § 2462

The issue of accrual concerns the interpretation of the § 2462's phrase "commenced within five years from the date when the claim first accrued."³³⁶ Traditionally, courts have held that a claim accrues for statute of limitations purposes at the moment when the plaintiff's rights are violated.³³⁷ However, in the application of § 2462 in environmental cases, an argument may be made that the "discovery rule" of accrual should be applied.³³⁸ The theory behind the discovery rule is that in circumstances where the injuries are latent or difficult to detect, the cause of action should not begin to accrue until the injury has been discovered.³³⁹

This argument has been well-received in Clean Water Act cases.³⁴⁰ In actions brought under the Clean Water Act, the

334. *Id.* at 1457 (quoting *Order of R.R. Telegraphers*, 321 U.S. at 349). The court also relied on the Supreme Court maxim that "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture." *Id.* (citing *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805)(Marshall, C.J.)).

335. See, e.g., *Arch Mineral*, 104 F.3d at 669; *Ballmer v. Babbitt*, 926 F.Supp. 575 (S.D. W. Va. 1996); *In re Britton Constr. Co.*, 29 Env'tl. L. Rptr. 41107 (1999); *In re Harmon Electronics, Inc.*, 25 Env'tl. L. Rptr. 47009, 47013 (1994); *In the Matter of Bethlehem Steel Corp.*, 24 Env'tl. L. Rptr. 40009 (1992).

336. 28 U.S.C. § 2462 (1994).

337. See *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971); see also *Sawtell v. E.I. Du Pont de Nemours & Co.*, 22 F.3d 248, 250 (10th Cir. 1994).

338. For an excellent discussion advocating the application of this rule in environmental cases, see James R. MacAyeal, *The Discovery Rule and The Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589 (1996).

339. See *Connors v. Hallmark & Son Coal, Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991).

340. See *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 75 (3d Cir. 1990); *United States v. Material Serv. Corp.*, 1996 WL 563462 (No. 95 C 3550) (N.D. Ill. Sept. 30, 1996); *United States v. Tennessee Gas Pipeline Co.*, 1993 WL 54155 (Civ. A. No. 91-1428) (W.D. La. April 14, 1993); *United States v. Windward Properties, Inc.*, 821 F.Supp. 690, 693-94 (N.D. Ga. 1993); *Natural Resources Defense Council, v. United States E.P.A.*, 806 F.Supp. 1263, 1277 (E.D. Va. 1992); *United States v. Hobbs*, 736 F.Supp. 1406, 1409 (E.D. Va. 1990); *Atlantic*

courts are generally agreed that the cause of action does not accrue until the reports documenting the violation are filed with the E.P.A.³⁴¹ The application of the discovery rule in these cases is based on a concern regarding the difficulty in detecting violations and a need to further the remedial goals of the Act, as articulated by the court in *Atlantic States Legal Found. v. Al Tech Specialty*.³⁴² In that case, the court stated:

The plaintiff's first point is that the statute of limitations did not begin to run when the violations actually occurred, but when the reports that documented those violations were filed with the E.P.A. It would have been practically impossible for the plaintiff to have discovered the alleged violations of the defendant on its own. It is only when reports are filed with the E.P.A. that the public becomes aware that violations have occurred. To hold that the statute begins to run when violations actually occur, as opposed to when they are discovered, would impede, if not foreclose, the remedial benefits of the statute.³⁴³

The success of a discovery rule argument in the context of Clean Water Act cases is not necessarily indicative of whether a court will accept the argument in any environmental case. At least one circuit has rejected this argument with respect to application of the rule under the Toxic Substances Control Act.³⁴⁴ The 3M court also considered this issue in addition to the injunctive relief issue.³⁴⁵ It rejected the application of the discovery rule in government penalty actions, finding that the rule was only appropriate for cases which involved latent injuries or injuries difficult to detect.³⁴⁶ The court concluded that the issue of injuries was irrelevant to penalty actions because the government is authorized to bring suit immediately upon a violation, regardless of any resulting injuries.³⁴⁷ The court also found that:

An agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades af-

States Legal Found. v. Al Tech Specialty Steel Corp., 635 F.Supp. 284, 287-88 (N.D.N.Y. 1986).

341. *Al Tech*, 635 F.Supp. 284.

342. 635 F.Supp. 284, 287 (N.D.N.Y. 1986).

343. *Id.*

344. 15 U.S.C. §§ 2601-2629 (1994).

345. *See 3M*, 17 F.3d 1453.

346. *See id.*

347. *See id.*

ter alleged violations are finally discovered. Most importantly, nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.³⁴⁸

The *3M* court instead followed other cases in holding that actions under § 2462 must be commenced within five years of the date of the violation giving rise to the penalty.³⁴⁹

The lack of precedent for the application of the discovery rule under other environmental acts indicates that this is still an open issue for suits which involve other acts. A defendant involved in such an act, therefore, will benefit from relying on the *3M* case in asserting an argument against the application of the discovery rule.

3. The Application of § 2462 to Government Actions Requesting Relief Other than Money Damages

When the government brings an action for civil penalties under § 2462, it often requests injunctive relief in addition to money damages.³⁵⁰ When the money damages claim is found to be barred by the statute of limitations in § 2462, the issue of the statute's application to the equitable claim for relief may arise. Defendants have raised two arguments in support of the theory that § 2462 applies to government actions in equity.³⁵¹ First, a defendant may argue that an injunction or other equitable relief requested constitutes a "penalty" under the statute because of the detrimental consequences the relief will have on the defendant.³⁵² The Tenth Circuit recently dealt with this issue in *United States v. Telluride Co.*³⁵³ In a lengthy discussion rejecting several arguments in support of defendant's construction of the word "penalty" as used in § 2462, the court found that a sanction is only a penalty if it "seeks compensation unrelated to, or in excess, of the damages caused by defendant."³⁵⁴ In that case the court concluded that the equitable relief requested did not amount to a penalty under

348. *Id.* at 1461.

349. *See id.* at 1462; For other cases applying a similar rule, *see* *United States v. Core Lab*, 759 F.2d 480, 482 (5th Cir. 1985); *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944); *United States v. Appling*, 239 F.Supp. 185, 194-95 (S.D. Tex. 1965).

350. *See, e.g., United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998).

351. *See id.*

352. *See id.*

353. *Id.*

354. *Id.* at 1246.

§ 2462 because the relief sought only to restore the property damaged by defendant's actions rather than compensation unrelated to or in excess of the damages caused by defendant.³⁵⁵

The court's construction of the word "penalty" as used in § 2462 is consistent with the general theory that relief in equity is remedial, not penal, and therefore § 2462 is inapplicable.³⁵⁶ The majority of the courts considering this issue have also concluded that a sanction that seeks only to remedy the damage caused by the defendant is not a penalty under § 2462.³⁵⁷ Therefore, as long as the relief requested by the government is directly tied to the damage caused by the defendant and is aimed at making the injured party whole, the statute of limitations requirements of § 2462 will not apply.

An alternative argument that a defendant might assert in support of the application of § 2462 to a government's claim in equity is based on the "concurrent remedy rule."³⁵⁸ This rule provides that "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy."³⁵⁹ The court in *United States v. Windward Properties, Inc.*³⁶⁰ relied upon this rule to bar the government's claims for equitable relief because the government's claims for civil penalties for violations of the Clean Water Act were barred by § 2462.³⁶¹ The *Windward* case, however, has been criticized for failing to take into account the general immunity of the government from statute of limitations claims and for not strictly construing the statute in favor of the government.³⁶² Two recent decisions have rejected the holding in *Windward* and concluded that the concurrent remedy rule cannot be invoked against the government when it seeks equitable relief.³⁶³

355. See *Telluride Co.*, 146 F.3d 1241.

356. See *Hartford-Empire Co. v. United States*, 323 U.S. 386, 435 (1945). See also *United States v. Hobbs*, 736 F.Supp. at 1410 (Court found that § 2462 did not apply to government claims for injunctive relief because that statute "has no bearing on suits in equity" *Id.*).

357. See *Telluride Co.*, 146 F.3d at 1246.

358. See, e.g., *United States v. Windward Properties, Inc.*, 821 F.Supp. 690 (N.D. Ga. 1993).

359. *Cope v. Anderson*, 331 U.S. 461, 464 (1947).

360. See *Windward*, 821 F.Supp. 690.

361. See *id.*

362. *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997).

363. See *Telluride Co.*, 146 F.3d at 1248-49; *Banks*, 115 F.3d at 919.

V. Conclusion

Litigants defending against a government action have a good chance of successfully asserting the defense of the statute of limitations in a number of natural resources and environmental contexts. While the general rule is that the government is not subject to any time limitations in asserting its claims, Congress' enactment of both specific and general statutes of limitation against the government results in the application of this rule in only a limited number of cases. Rather, it is more likely that the government will be subject to some limitations provision, either a provision under the governing act or one of the general statute of limitations. However, there are a number of issues that may arise which can preclude application of the limitations period or severely limit its applicability to the facts of your case. In evaluating the merits of a statute of limitations defense, a practitioner should ask the following questions:

- (1) Is there a specific statute of limitations applicable to the action?
- (2) If not, do one of the general statutes of limitation apply?
- (3) Will the forum the agency's claim is brought in affect application of the limitations period?
- (4) When did the cause of action accrue?
- (5) Has the limitations period been tolled?
- (6) Is the government seeking an equitable remedy?
- (7) If the administrative proceedings are "mandatory" does the one year savings clause apply?
- (8) Are there administrative offset or recoupment provisions affecting the claim?