

Client Alert

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Court of Federal Claims Limits Discovery in Section 1603 Case

In *Bishop Hill Energy LLC et al. v. United States*, No. 14-251C, the U.S. Court of Federal Claims (J. Bush) denied the plaintiffs' motion to compel discovery against the Government. The plaintiff's motion sought answers to interrogatories from the Government relating to its administrative review of plaintiffs' Section 1603 grant application for certain wind energy property. Specifically, the information sought included the Government's data for unrelated wind power projects. The Court of Federal Claims agreed with the Government that this information was not discoverable in what it described as a *de novo* proceeding. A copy of the opinion (unpublished) may be found [here](#).

In *W.E. Partners II, LLC v. United States*, No. 13-54, Judge Thomas Wheeler of the Court of Federal Claims concluded that the court's review of Section 1603 cases involves a *de novo* review. Judge Wheeler observed that Section 1603 cases should be treated in the same manner as tax refund cases because Section 1603 follows the Internal Revenue Code tax credit provisions and the grant is intended to apply in lieu of such credits. Judge Wheeler stated: "In tax refund suits, the Court reviews claims *de novo*, and the plaintiff bears the burden of proof for each claim." *W.E. Partners* involved a question of the proper standard of review for resolving the substantive issue in the case. A copy of our prior client alert on *W.E. Partners* may be found [here](#). Recently, in an opinion in *Alta Wind I Owner-Lessor C et al. v. United States*, No. 13-402T et al. (Feb. 8, 2016), Judge Wheeler reiterated: "The Court must determine *de novo* the proper cost basis for the wind power facilities, regardless of whether the 30 percent cash grant is more or less than the amount Treasury previously paid to Plaintiffs."

In *Bishop Hill Energy*, Judge Bush applied *W.E. Partners* to a discovery dispute. Judge Bush noted that "[w]hen this court adjudicates a tax dispute, past treatment of similarly situated taxpayers by Treasury is not, as a general rule, relevant to the court's resolution of the tax dispute before it." Judge Bush analyzed Treasury's whitepaper on the cost basis for solar energy property, "Evaluating Cost Basis for Solar Photovoltaic Properties," observing that the whitepaper addresses "the issue of whether in examining the cost basis of an applicant's property there were any related party or arms-length transaction concerns." This analysis is focused on the fair market value of the "*property concerned*" and *not* "a meta-analysis of other Section 1603 applicants' development fee request information in order to determine the fair market value of a particular energy property." The judge further explained:

The court notes, too, that the mass of data regarding development fees which Treasury has accepted as proper for use in establishing cost basis is irrelevant to the court's analysis here. This is a *de novo* proceeding – the rationality of Treasury's ruling on plaintiff's Section 1603 application, as well as the rationality of its rulings on other unrelated Section 1603 applications, are beyond the scope of plaintiff's burden of proof or the government's obligations as defendant in this suit. Plaintiff, for example, cannot rely on these rulings as a measure of its proper cost basis. . . . Nor can the government claim that Treasury's practice of accepting a certain level of development fees as reasonable should guide the court's interpretation of the statute in this case. The parties' arguments on cost basis must rely on facts relevant to plaintiff's Section 1603 application to be persuasive. Plaintiff has failed to show how Treasury's files regarding other Section 1603 applications are relevant or even potentially relevant to this inquiry.

Thus, the opinion indicates that neither the applicant nor Treasury may rely on “a meta-analysis” of third-party data compiled by Treasury to establish the fair market value of a particular property for Section 1603 purposes. Of course, this conclusion runs counter to what most applicants in the Section 1603 program have experienced when fair market value is in issue and in other contexts. Treasury often looks to its Section 1603 database and often uses a comparative analysis at the administrative level. At least one judge (and perhaps two judges) on the Court of Federal Claims has signaled a different approach in an unpublished disposition for purposes of litigation.

More importantly, it is clear that the Government is drawing a line on discovery of Treasury and agency information – and, *at least for now*, the Court of Federal Claims has abided. After the opinion in *Bishop Hill Energy* was issued, the Government filed a request for publication of the opinion, stating: “Defendant believes that the Court’s analysis of the issues in its December 21 opinion in this case may provide guidance to litigants and counsel in cases raising similar issues.” The Court denied the Government’s request but it is likely that the Government will argue the same *de novo* principles in other Section 1603 cases.

Bishop Hill Energy did not address the question whether discovery of information that was actually considered by Treasury in the administrative process in evaluating an applicant’s application is discoverable. However, an October 6, 2014 Order (Bruggink, J.) from the Court of Federal Claims in *Sequoia Pacific Solar I, LLC v. United States*, No. 13-139C, suggested a more flexible view of discovery on the Government – allowing discovery of all documents and information upon which Treasury or NREL relied in reviewing or evaluating those plaintiffs’ Section 1603 applications. This discovery order included documents and information relating to third parties that was relied upon by Treasury or NREL.

There are two takeaways here. One, as long as the Government is relying upon a *de novo* standard of review, it is almost impossible for the Government also to claim any administrative deference. Rather, the Government’s position assumes the development of a new factual record written from a blank slate. Two, the Government is drawing its line against discovery of Treasury’s and NREL’s Section 1603 data and files. Stay tuned.

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