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Tenth Circuit Clarifies Application of the 'Continuing-Violation' and 'Repeated-Violations' Doctrines

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In *Wyo-Ben Inc. v. Haaland*, the U.S. Court of Appeals for the Tenth Circuit took up a case involving a broadly applicable federal statute of limitations. Its decision offers guidance on how district courts should apply the “continuing-violation” and “repeated-violations” doctrines in cases involving governmental inaction.

This month, the Tenth Circuit took up the federal statute of limitations that applies to all claims made against the United States. It then considered—and substantially clarified—how the continuing-violation and repeated-violations doctrines apply to a case involving longstanding inaction by a governmental official.

Case background.

In 1993, Plaintiff-Appellant Wyo-Ben, Inc. filed a mineral patent application with the Bureau of Land Management covering approximately 290 placer mining claims in Big Horn County, Wyoming. *Wyo-Ben Inc. v. Haaland*, No. 20-8065, 2023 U.S. App. LEXIS 6491, at *2, 6 (10th Cir. March 20, 2023). While that application was pending, Congress passed a moratorium on processing mineral patent applications like Wyo-Ben's. *Id.* at *2. But Congress also enacted an exemption for pending applications that met certain conditions. If a pending application qualified, the secretary of the Department of the Interior was required to process the application. *Id.* The next year, the BLM—but not the Secretary—concluded that Wyo-Ben's application did not qualify for the exemption. Congress reenacted the original acting, including the moratorium and exemption, every year through 2019. *Id.*

Twenty-five years after the BLM's determination, Wyo-Ben brought an action against the Secretary and the BLM alleging a violation of the Administrative Procedure Act because the Secretary “unlawfully withheld” and “unreasonably delayed” agency action by failing to review Wyo-Ben's application to determine whether it was exempt from the moratorium. *Id.* at *2–3. The government filed a motion to dismiss arguing that the complaint was barred by the statute of limitations that applies to claims against the United States, which provides that “every civil action commenced against the United States shall be barred unless the complaint is filed within six

years after the right of action first accrues.” 28 U.S.C. § 2401(a).

In response, Wyo-Ben argued that the either continuing-violation or the repeated-violation doctrine brought the claim within the six-year limitations period. *Id.* at *3. The continuing-violation doctrine “tethers conduct from both inside and outside the limitations period into one single violation that, taken as a whole, satisfies the applicable statute of limitations.” *Hamer v. City of Trinidad*, 924 F.3d 1093, 1100 (10th Cir. 2019). The repeated-violations doctrine “divides what might otherwise represent a single, time-barred cause of action into several separate claims, at least one of which accrues within the limitations period prior to suit.” *Id.* (quotation omitted).

The district court sided with the government. It held that Wyo-Ben's claim first accrued on the date the BLM determined that the application wasn't exempt, and therefore the limitations period expired in 2000. *Id.* at *3–4. In doing so, the court refused to apply either doctrine, concluding that the only allegedly unlawful conduct was the BLM's determination that the application didn't qualify for the exemption. *Id.*

Wyo-Ben appealed, contending that it challenged not the BLM's agency action, but the Secretary's inaction on its application. In Wyo-Ben's view, the Secretary's failure to review the application constituted a continuing and repeated violation of the APA. *Id.* at *4.

The Tenth Circuit's decision.

In a 3–0 decision, the Tenth Circuit reversed. It agreed with Wyo-Ben that the district court misconstrued the complaint and that Wyo-Ben's pleading alleged inaction by the Secretary rather than an unlawful action by the BLM. *Id.* at *14–15. The appellate court emphasized the “critical difference between a claim that the Secretary withheld or unreasonably delayed in taking an action ... and a claim that BLM incorrectly determined that the application was subject to the moratorium.” *Id.* at *17.

Next, the appellate court turned to the question of “whether [Wyo-Ben's] claim—construed properly—was timely.” *Id.* On this issue, the court first noted “that there is a more-than-colorable question concerning whether § 2401(a) [the six-year statute of limitations] applies at all in these circumstances.” *Id.* While the court has previously applied the statute of limitations to agency action, it has “never explicitly applied” the statute “to claims challenging agency inaction under § 706(1).” *Id.* at *18. But the court did not need to decide that question “because the parties have litigated this case” under the assumption that the statute applies and “the district court followed suit and rested its holding” on that assumption. *Id.*

The appellate panel then took up the continuing-violation doctrine. It determined that Wyo-Ben did not preserve the argument because it “conceded before the district court that the doctrine did not apply to its action” and did not “advance[] a continuing violation argument under the plain-error rubric before us” *Id.* at *22–23. But the court reached a different result as to the repeated-violations doctrine. It held, consistent with its previous decisions, that “the relevant appropriations statutes at issue here create ‘an affirmative duty’ to act” because the statute adoption

the moratorium and the exemption imposes “an affirmative duty to determine whether an application qualifies for the exemption.” Id. at *30. Likewise, “the broader statutory context” underlying the acts “demonstrates that they impose a continuing duty to determine whether pending applications are exempt from the moratorium.” Id. That is, “[b]y reenacting the exemption annually and requiring reports on progress toward completing a plan that the Secretary first submitted in 1997, Congress evidently imposed an ongoing duty to review pending applications.” Id. at *31. Thus, “if the actor under the affirmative duty keeps failing to act while the underlying problem remains unremedied, then the repeated instances of inaction constitute new violations.” Id. (quotation omitted). As a result, “[t]he repeated violations doctrine fits the circumstances that Wyo-Ben alleges in its complaint.” Id.

That finding didn't resolve the appeal. The court also had to decide when “the initial violation” alleged in the complaint occurred so that it could “determine the period during which the violations repeated and for which Wyo-Ben may recover.” Id. at *33. As to the allegation of agency action “unlawfully withheld,” the panel “reasonably construe[d] the complaint as alleging that the Secretary first 'unlawfully withheld' action when the 1995 Act expired.” Id. at *34. Because Congress reenacted the moratorium and the exemption annually, Wyo-Ben reasonably alleges that the Secretary's failure to make the exemption determination under each year's appropriations act. Moreover, the failure to act each constituted a “separate and discrete” violation. Id. As for the “unreasonably withheld” allegations, the court “infer[red] Wyo-Ben's position to be that, at the latest, the delay became unreasonable by the time the 2019 Act went into effect.” Id. at *36.

Having resolved that issue, the court “examine[d] the temporal unit by which repeated violations are measured under the circumstances here.” Id. at *37. There were two options: either “the Secretary allegedly committed a new and discrete violation each day” that she failed to act, or she “committed a new and discrete violation at the end of each fiscal year” that she failed to act. Id. at *37–38. The court did not resolve that issue because “under either approach,” Wyo-Ben's allegations were sufficient to defeat the motion to dismiss. Id. at *38.

Finally, the court “address[ed] the applicable recovery period.” Id. at *40. In a repeated-violations case, the plaintiff can recover “for only that part of the injury the plaintiff suffered during the limitations period, stretching back in time from the date the plaintiff filed suit.” Id. (quotation omitted). The court recognized that this principle may not apply to this case because Wyo-Ben wasn't seeking damages, but rather an injunction requiring the Secretary to act on its application. The court nevertheless “le[ft] open the possibility that a recovery period will become relevant on remand.” Id. at *41–42. It then remanded the case to the district court to consider Wyo-Ben's claim on the merits.

Conclusion.

The Tenth Circuit's decision in Wyo-Ben clarifies how district courts should apply the continuing-violation and repeated-violations doctrines in

adjudicating a statute-of-limitations defense. Notably, while this case involved a rather narrow legal claim, the statute on which the court relied applies to any civil action “commenced against the United States.” The Tenth Circuit’s decision, therefore, broadly applies to claims against the federal government.

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