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COURT REPORTS

FEDERAL COURTS

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States v. Donovan, 661 F.3d 174 (3rd Cir. 2011) (holding the U.S. Army Corps of Engineers had jurisdiction to compel Donovan to remove material used to fill wetlands on his property based on two jurisdictional tests developed in federal case law interpreting the Clean Water Act).

In 1987, the U.S. Army Corps of Engineers (“Corps”) inspected land belonging to David H. Donovan and determined that Donovan had filled three-quarters of an acre of wetlands on his four-acre parcel of land in New Castle County, Delaware. The wetlands were connected by rain-water channels to the Sawmill Branch of the Smyrna River, which flows into the Delaware Estuary on the Delaware Bay.

After Donovan refused to remove the fill material from his land, the Corps issued a cease-and-desist letter to Donovan, ordering him to remove the fill material or submit a pre-discharge notification. After Donovan ignored this and subsequent similar notices, the U.S. sued Donovan, alleging he violated the Clean Water Act (“CWA”), which requires a landowner to obtain a permit from the Corps prior to filling any wetlands.

In March 2002, the United States District Court for the District of Delaware (“district court”) held that Donovan violated the CWA, and Donovan appealed to the U.S. District Court for the Third Circuit (“court”). The court dismissed Donovan’s appeal because the district court’s judgment had not yet been finalized. In December 2006, the district court entered its final judgment, fining Donovan \$250,000 and requiring him to remove the fill material from his wetlands. Donovan again appealed the district court’s judgment to the court. On his second appeal, Donovan argued the Corps did not have jurisdiction over his land under the CWA. The court remanded the case in order to develop the record on the issue of the Corps’ jurisdiction over Donovan’s land.

On remand, the district court appointed a Magistrate Judge for all pretrial matters. Donovan moved for judgment on the pleadings, and the U.S. moved for summary judgment. The U.S. presented testimony and reports from two expert witnesses to show it did have jurisdiction over Donovan’s land based on federal case law interpreting the CWA. Donovan did not present any expert testimony and instead relied on his own

affidavit that expressed familiarity with his property, concluding it was not subject to the CWA. He argued that during periods of no rain, the channels on his property were completely dry, and that during rainy periods, the rain channels were easy to differentiate from neighboring land, which was subject to the CWA. The Magistrate Judge concluded Donovan's land would be subject to CWA jurisdiction if it met either test articulated in *Rapanos v. United States*.

Rapanos, a United States Supreme Court case decided in 2006, resulted in a plurality decision in which the Justices voted 4-1-4 on which test to apply to determine whether certain waters are subject to the CWA. The plurality held that wetlands fall under CWA jurisdiction if they have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." The concurring Justice argued CWA jurisdiction extended to wetlands with a "significant nexus" with "waters of the United States." This test would consider the "chemical, physical, and biological" relationship between navigable waters and similarly situated wetlands. The dissenting Justices took the broadest stance and argued that if wetlands met *either* the plurality or concurrence's test, they would be subject to the CWA.

The district court concluded, based on the United States' expert testimony and reports, that Donovan's land was subject to federal jurisdiction under both tests articulated in *Rapanos*; the "continuous surface connection test" and the "significant nexus test." Donovan again appealed to the 3rd Circuit, arguing *Rapanos* does not provide a clear legal standard to determine whether the Corps had jurisdiction over Donovan's wetlands.

Along with the First and Eighth circuits, the court held that if a wetland meets either test articulated in *Rapanos* it is subject to the CWA. The court reasoned applying either test was proper because the dissent in *Rapanos* would have found federal jurisdiction under both tests. Furthermore, the dissent stated in future cases, the U.S. may prove jurisdiction under either test.

Donovan made two factual arguments on appeal, again supported by his own affidavit. Donovan first stated that the amount of water flowing through his property is dependant on the amount of rainfall and can be completely dry at times. He also claimed that when water is flowing through his property the rainwater channels are easy to distinguish from the wetlands.

However, the court found that the expert reports established Donovan's wetlands had a "relatively permanent" connection to waters that were navigable-in-fact starting with the rain channels on Donovan's land, meeting the criteria for a "continuous surface connection." The court further held the expert reports established the government's burden of proof to meet the "significant nexus test." This holding was based on an extensive analysis of the area's ecosystem, as well as chemical testing conducted by the experts.

Because Donovan did not present any evidence showing a genuine issue of material fact, the court affirmed the district court's grant of summary judgment in favor of the Government and denied Donovan's motion for judgment on the pleadings.

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Keating v. Neb. Pub. Power Dist., 660 F.3d 1014 (8th Cir. 2011) (holding that junior permit holders did not have a property right in watershed entitling them to a predeprivation hearing where the officials authorized to administer water use determined that the supply was insufficient and the use permits provided notice of discontinuation under such circumstances).

When water levels in the Niobrara River fell in 2006, the Nebraska Department of Natural Resources ("officials") issued Closing Notices to hundreds of holders of junior surface water appropriation permits, ordering them to discontinue the drawing of water from the Watershed. However, the officials did not first grant the permit holders a hearing on the matter. A group of farmers who had received the Notices ("farmers") filed a § 1983 suit against the state officials, claiming that the order deprived them of their property without procedural due process. The United States District Court for the District of Nebraska ("district court") held that, while the farmers possessed a property right that entitled them to use of the water, it was subject to administration by the officials. Furthermore, the district court concluded that the issuance of the Closing Notices was an administrative act that did not constitute a property deprivation. Accordingly, the district court entered summary judgment in favor of the officials.

Applying a *de novo* standard of review, the Eighth Circuit Court of Appeals ("court") first considered the existence of the farmers' property rights. The parties agreed that the farmers had property rights to surface water appropriation, which according to the court, allowed only for use of the water subject to restrictions set forth by the permit. The permits belonging to the farmers provided that they could use specified amounts of surface water where supply allowed.

The farmers argued that, when water levels were insufficient and required discontinuation of use, they were entitled to a predeprivation hearing during which they could challenge: (1) the validity of the Nebraska Public Power District's senior appropriation permits that entitled it to surface water rights before the farmers; and (2) the purported insufficiency of water levels in the Niobrara River.

The court rejected these arguments holding that, once the officials identified a water shortage, the farmers and other junior permit holders