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# COURT REPORTS

## FEDERAL COURTS

### UNITED STATES COURT OF APPEALS

**Nw. L.A. Fish & Game Pres. Comm'n v. United States, 574 F.3d 1386, (Fed. Cir. 2009)** (holding that a state agency's alleged property interest in lake and contiguous lands were subservient to navigational servitude.)

Prior to 1968, the Northwest Louisiana Fish & Game Preserve Commission ("Commission") released large amounts of water from the Black/Clear Lake into the Red River through the Saline Bayou in order to control the growth of unwanted aquatic vegetation. In 1968, the United States Congress authorized the Red River Navigational Project with the intent to improve navigation of the Red River by installing various locks and a dam along the river. The locks and dam operate to ensure that each pool is sufficiently deep to allow for year-round navigation. As a result, the Navigational Project prevented the Commission from lowering the level of the Black/Clear lake to a level and causing significant damage to the lake.

The Commission filed an administrative tort claim in the United States Court of Federal Claims against the Government to determine whether the Commission had a protected property right. The court dismissed the claim because it determined that the Commission's property interest arose from access to and use of a navigable waterway. The Commission appealed to the United States Court of Appeals for the Federal Circuit from a judgment in favor of the Government.

On appeal, the court began its analysis by noting that the Fifth Amendment and the Commerce Clause govern property interest in waterways. The Fifth Amendment states that private property "shall not be taken for public use without just compensation." In order to prove a compensable taking, a party must prove that the Government has taken a legally protected property right. Additionally, the Commerce Clause grants the power to regulate navigable waterways to the Government. Thus, the Government has a "dominant servitude" and any private riparian interest is subservient. This dominant servitude encompasses the power to regulate the actual waterway, as well as land below the ordinary high-water mark ("OHWM"). Therefore, the Government only compensates a private interest for any taking of property above the OHWM.

Next, the court addressed the Commission's assertion that an illegal

taking occurred when the Commission was unable to lower the level of the Black/Clear Lake. The Commission argued that (1) the Saline Bayou is not a navigable waterway, and (2) Black/Clear Lake does not fall within the Government's dominant servitude because the lake falls well outside the physical OHWM. First, the court found that while lowering the lake not only depends on the level of the Saline Bayou, the lake level is more importantly directly dependent on the level of the Red River. In other words, the court determined that the determination of whether the Saline Bayou was navigable was irrelevant because the Red River is a navigable waterway. Thus, any lowering that requires the Commission to access and use a navigable waterway through any channel is an unauthorized use of a navigable waterway. Second, the court held that the Commission's interest was subservient to the Government's dominant servitude. The court concluded that the issue of whether the taking occurred beyond the OHWM was irrelevant because the Commission's only interest was from access to and use of navigable waters. And because the Commerce Clause specifically designated that Government as the only power to regulate navigable waterways, the Commission is prohibited from using the waterway without the authorization of the Government. Therefore, navigational servitude bars the Commission's taking claim.

Accordingly the United States Court of Appeals for the Federal Circuit affirmed the United States Court of Federal Claims' dismissal of the Commission's taking claim.

*Jennifer Berg*

## STATE COURTS

### ARIZONA

**Davis v. Agua Sierra Res., L.L.C., 203 P.3d 506 (Ariz. 2009)** (holding that landowners outside of active management areas do not have a real property interest in potential future groundwater use that may be severed from the overlying land).

In 1981, Red Deer Cattle, Inc. ("Red Deer") bought CF Ranch from Chino Ranch, Inc. ("Chino Ranch"). Chino Ranch reserved all mineral and commercial water rights in the land. In 1984, Red Deer conveyed the CF Ranch to Merwyn C. Davis ("Davis"). In the transfer, Red Deer purportedly reserved "all commercial water rights and waters incident and appurtenant to and within the real property." When Chino Ranch merged with Red Deer, their claims to CF Ranch's water merged. Subsequently, Chino Ranch and Red Deer conveyed portions of the interest to various third parties, and in 1998 Red Deer and CJ Partners each conveyed half an interest in CF Ranch's commercial water rights to Agua Sierra Resources, L.L.C. ("Agua Sierra").

In 2003, Davis granted the City of Prescott, Arizona (the "City") an option to buy CF Ranch and Davis' water rights. The City asked Davis to purchase the commercial water rights from Agua Sierra, but he was