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United States v. Donovan, 466 F. Supp. 2d 590 (D. Del. 2006)

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vested property interest in the first instance. Colvin's first theory asserted that the government's revocation of Colvin's grazing lease affected a taking of its vested water rights. Colvin argued that the grazing right was "inherent," or appurtenant, to its water right. Initially, then, the court considered whether any such "grazing right" had vested in Colvin. The court noted that as the TGA explicitly denied conveying rights in federal land, any property interest must have vested prior to 1934. However, prior to that time the Property Clause of the United States Constitution governed the Allotment and, according to case law, allowed grazing at the sufferance of the government. Further, the government could retract the grazing right at any time. Therefore, any "implied license" in grazing prior to 1934 did not convey any vested rights in the land appurtenant to the water rights obtained by Colvin or its predecessors. Alternately, Colvin argued that the Nevada Stockwatering Act of 1925 conveyed grazing rights inherent to its vested water rights. The court found no indication in the language of that Act, or in prior case law, which indicated the Act intended anything other than to assert police powers over the water rights vested under Nevada law. It followed that because Colvin had no vested rights in grazing inherent to its water rights, no takings of the water right occurred when the government revoked Colvin's grazing license. This finding also defeated Colvin's claims that the government affected a taking by rendering its water rights, or the ranch itself, valueless as a result of the grazing revocation.

The court quickly rejected Colvin's final takings argument which alleged that the government's failure to prevent its successor to the grazing license and wild horse from infringing Colvin's water rights affected a taking. The court noted that the government could not be held responsible for the infringing acts of private parties or of animals outside of its control. Finally, Colvin's breach of contract claim was barred by a six-year statute of limitations and the claim for compensation was not ripe for review because Colvin had not exhausted administrative remedies on that issue.

The Court of Appeals for the Federal Circuit affirmed the ruling of the Court of Federal Claims, holding that Colvin did not have a vested property interest in grazing and, as a result, revocation of its grazing lease did not affect a taking of either its water rights or of its property interests in adjacent land.

Kathleen Ott

UNITED STATES DISTRICT COURTS

United States v. Donovan, 466 F. Supp. 2d 590 (D. Del. 2006) (holding that the United States Army Corps of Engineers had jurisdiction to regulate all navigable waterways of the United States under the

Clean Water Act, and that government regulation of filled wetlands pursuant to the Act did not constitute a government taking).

In 1982, David H. Donovan ("Donovan") purchased land adjacent to a tributary of Sawmill Branch, which flowed into the Smyrna River. The tributary, Sawmill Branch, and the Smyrna River were all navigable waterways. Donovan's parcel was a designated wetlands area subject to the Clean Water Act ("CWA").

In 1987, the United States Army Corps of Engineers ("Corps") discovered that Donovan filled a .74 acre piece of his wetland. The Corps warned him that pursuant to the Clean Water Act ("CWA") and Nationwide Permit 26, he could only fill up to one acre of wetland without prior Corps approval. In 1993, the Corps discovered that Donovan had filled 1.771 acres of wetland.

Donovan refused to comply with the Corps' orders to remove the fill material, and maintained the Corps lacked authority to regulate his activities. He declared himself a foreign nation and threatened that if the Corps continued to interfere, there would be "no choice but for the [D]elaware militia (the peoples[']] militia) to defend by whatever means necessary." In 1996, the United States filed suit in the United States District Court for the District of Delaware, seeking injunctive relief and civil penalties for violations of the CWA.

Donovan filed a motion for summary judgment and a petition requesting damages for the taking of his private property without just compensation. He claimed that his land was outside the scope of the CWA, and therefore the government's attempt to regulate his land constituted a regulatory taking. The court upheld a previous holding that the Corps has jurisdiction over all navigable waters of the United States - including Donovan's parcel. The court denied Donovan's motion for summary judgment because he did not introduce any new evidence to justify a change in the court's previous holding.

Donovan also contended that the government's action amounted to an unconstitutional taking under the Fifth Amendment. The court held that a physical taking occurs where the government authorizes a physical occupation of the property or takes the property. Furthermore, the government is only required to compensate the landowner under a regulatory taking if the purpose of the regulation, or the extent to which it deprives the landowner of the economic use of his property, suggests that the regulation unfairly singled out the landowner to bear a burden that should be borne by the public as a whole.

Because the parties agreed that the government did not physically occupy the land, the court held that a physical taking did not occur. The court also held a regulatory taking did not occur because the CWA and the Corps did not target Donovan's land in particular. Therefore, the court held that Donovan failed to establish a taking under the Fifth Amendment.

The court denied Donovan's motion for summary judgment, his petition for injunctive relief, and his claim for damages for the taking of his private property without just compensation.

Jacob J. Schlesinger

Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171 (M.D. Fla. 2006) (holding that the United States Army Corps of Engineers' issuance of a general permit for a development project encompassing 48,150 acres of wetlands in the Florida panhandle, though extraordinary, did not go beyond the scope of Corps' authority and correctly followed all necessary Clean Water Act, National Environmental Policy Act, and United States Environmental Protection Agency standards).

During the Spring of 2005, the Sierra Club and the Natural Resources Defense Council filed suit against the United States Corps of Engineers ("Corps") in the United States District Court for the Middle District of Florida on six grounds: (1) that the extensive amount of land covered in the general permit was beyond the scope of the Clean Water Act's ("CWA") general permitting scheme; (2) that the authorized activities were not "similar in nature"; (3) that the permit would cause more than minimal adverse impacts and that the Corps had not calculated those impacts properly; (4) that the Corps had not followed the United States Environmental Protection Agency's ("EPA") standards for applying the CWA; (5) that the Corps had not taken a "hard look" at the project under the National Environmental Policy Act ("NEPA"); and (6) that the Corps erroneously issued a Finding of No Significant Impact ("FONSI") after completion of its Environmental Assessment ("EA"). In August 2005, the Sierra Club filed a motion for preliminary injunction which the court granted on restricted grounds, halting one of five projects already approved under the general permit, and placed a moratorium on further authorizations until it resolved the instant case.

In 2000, the Corps noticed a rising number of permit applications from St. Joe Company, Inc. ("St. Joe") to dredge and fill wetlands in the Florida Panhandle. St. Joe traditionally raised pine trees in its wetlands, but the company expressed its desire to commercially and residentially develop its land. In response, the Corps sought to develop a large-scale plan for the region and entered negotiations with the company. In June 2004, the Corps granted a general permit that controlled development of 48,150 acres, or seventy-five square miles. Unlike individual project permits, the Corp may issue a general permit on a regional level, which allows dredging and filling for an "entire category of activities, provided that the activities are similar in nature and will cause only minimal adverse environmental effects, both separately and cumulatively." After the Corps issues a general permit,