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City of Gettysburg v. United States, 64 Fed. Cl. 429 (Fed. Cl. 2005)

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pect more property rights against the United States than they actually obtained and possess. This is because, despite the landowners' expectations and needs, water rights are subject to the same rules that govern all forms of property.

The court granted in part and denied in part the parties' cross-motions for partial summary judgment. On or before October 4, 2005, the parties are to file a joint status report indicating how this case should proceed.

Kathleen Potter

City of Gettysburg v. United States, 64 Fed. Cl. 429 (Fed. Cl. 2005)

(holding that damage to the City of Gettysburg's water delivery system was not a taking due to the release language in the easement and permit granted by the U.S. Corps of Engineers in spite of the absence of the city's signature on both documents).

In the 1960s, the City of Gettysburg, South Dakota ("City") contracted with the U.S. Army Corps of Engineers ("Corps") to construct a system to transport water from the Oahe Reservoir to the city. In 1972, the City requested a right-of-way easement from the Corps to build and maintain portions of the water transport system on government property. In 1973, the Corps forwarded a proposed easement to the City. That same year, the City received a Section 10 permit under the Rivers and Harbors Appropriation Act of 1899, allowing the City to maintain the water intake structure, lay an intake line, and construct a pumphouse on the Reservoir. After completing the project in 1975, the City informed the Corps that it had not yet issued the requested easement. The Corps proceeded to send four different easement proposals over the next three years, but it was not until March 7, 1978 that the Corps formally granted and issued an easement to the City. The easement contained boilerplate release language to the effect that the United States would not be liable for any damages to property or injuries to persons which arose from or were incidental to the use and occupation of the property ("hold harmless clause"). On that same date, the Corps also issued a license as a corollary to the easement, giving the City right-of-use of a nearby strip of land for a period of two years as a temporary work site. The City did not sign the easement or the license, and it contended that it therefore did not accept the terms of either document, in particular the hold harmless clause. Beginning in 1995, periodic landslides on the Reservoir's slope caused damage to the intake structure, pumphouse and underground transmission lines. By 1997, the damage had become so severe that the City had to abandon the water supply system in its entirety.

In this dispute, the City contended that the damage to the water supply system resulted from the Corps' construction, management and

operation of the Reservoir and that the damage constituted a taking of the City's property without just compensation in violation of the due process clause of the Fifth Amendment. The Corps moved for summary judgment.

The U.S. Court of Federal Claims first addressed the jurisdictional elements as to (1) whether the City had a property interest on which it could base a takings claim and (2) whether the Corps' laches defense barred the City's claim. Regarding the property interest, the Corps argued that the permit did not convey any property right and the pipe itself had no value without connection to the water source. The City countered that at minimum it had a property interest in the portions of the pipeline not located on government property and landslide damage to those sections of pipeline alone rendered the rest useless. The court found that the City did have a cognizable property interest for the purposes of a takings claim. First, the permit merely limited the transfer of an additional property interest. Second, the court found that although the City did not have a property interest in the permit itself, it did have a property interest in its damaged pipeline. The court noted the importance of the fact that the City limited its claim to the physical pipelines and did not argue a taking of water rights or a right to maintain its structures in navigable waters. The court also rejected the Corps' argument that the government's navigational servitude would preclude the City from presenting a cognizable property interest. The Corps argued that the City could not have a property interest requiring compensation because large portions of the water system were located below the mean high-water mark for the Reservoir. The court found the argument inapplicable to the facts at hand because the City was not claiming a loss of access to water or some interference based on the raising or lowering of water levels. Regarding the second jurisdictional element, the court rejected the Corps' laches claim because the Corps did not show that the City delayed unreasonably in asserting its cause of action.

The court then turned to the substantive issues of the takings claim, beginning with whether the release language in the easement and the permit barred the City's claim. The court found that the City was estopped from asserting that it did not agree to the terms of the easement and the permit. The government's silence as to its acceptance of the terms of the easement was misleading conduct. The Corps also relied upon that conduct when it allowed the City to construct its water supply system. Finally, there would be material prejudice if the City were allowed to declare the easement unenforceable decades after its issuance. Therefore, the court rejected the City's argument that it was not bound to the terms of the easement and the permit due to the absent signatures. Consequentially, the hold harmless clauses in the easement and the permit applied to the City.

The court next rejected the City's contractual argument that the easement was an unenforceable contract of adhesion, noting that if the easement had been unenforceable, the City would have been trespassing on government land. Finally, the court turned to the ultimate analysis of whether the permit's release clause was applicable to the landslide damage. The court found the language to be unambiguous in application to all damage resulting to the intake structure, the pumphouse and the intake line. Therefore, the court denied the City's takings claim with respect to all damage to those structures.

Michelle Young

Hansen v. United States, 65 Fed. Cl. 76 (Fed. Cl. 2005) (holding that a direct and substantial contamination of ground water constituted a Fifth Amendment takings claim).

James A. Hansen brought a Fifth Amendment takings claim in the Court of Federal Claims against the Department of Agriculture Forest Service ("Forest Service") for the contamination of groundwater under the Guest Nemo Ranch ("Ranch"). In the 1970s, the Forest Service used ethylene dibromide ("EBD") mixed with diesel fuel as a pesticide against a beetle infestation in the Black Hills National Forest. In 1976, the Forest Service disposed of its EBD surplus by burying large quantities of it in unsealed containers. The Environmental Protection Agency ("EPA") published several studies in the 1970s concerning the harmful effects of EBD such as increased risk of cancer, mutations, and adverse reproductive effects. In 1983, the EPA banned the use of EBD as an agricultural fumigant.

Hansen acquired the Ranch on October 29, 1998 from Dale Deverman. Prior to Hansen's ownership, the Forest Service found EBD in 10 of the 18 wells located in the town of Nemo through tests done by a commercial testing company called Envirosearch International ("Envirosearch"). Envirosearch also found EBD in one of the Ranch's wells. Both Hansen and Deverman were unaware of the well's contamination at the time of the sale. In 2000, Hansen learned that two of the Ranch's five wells were contaminated. Because three of the wells were not contaminated and the Ranch was commercial in nature, the Forest Service refused to supply the Ranch with clean water. Hansen subsequently sold the Ranch to Ron Wick via a contract for deed which set forth that Wick would receive the deed to the Ranch upon making the last payment. Furthermore, the contract required Hansen to ensure the Ranch had clean water. If the Ranch became inoperable due to contamination, the contract allowed Wick to withhold payments and even receive interest on the payments he had already made.

Hansen filed a takings claim against the Forest Service, arguing the Forest Service unconstitutionally took the Ranch by contaminating the Ranch's groundwater. Hansen sought compensation for the entire