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Hansen v. United States, 65 Fed. Cl. 76 (Fed. Cl. 2005)

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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

Ranch. In response, the Forest Service filed several motions for summary judgment, claiming in part that Hansen's claim was tortious in nature and therefore the Tucker Act prevented the Court of Claims from adjudicating Hansen's claim. The court noted that the nature of Hansen's case did not prevent him from seeking a takings claim. The court analyzed whether Hansen's claims met the requirements for a takings claim. By applying a two-prong test, the court determined that Hansen's claim could qualify as a taking.

The first prong required that the alleged taking be intentional or direct and not incidental. The court reasoned that Hansen would satisfy the first prong if a jury found that the seepage of EBD into the Ranch's groundwater directly resulted from the Forest Services burying cans of EBD.

The second prong of the test required the taking to be substantial. The court held that a jury could find the second prong satisfied due to the known effects of EBD and the fact that two of the Ranch's wells were already contaminated. The Forest Service argued that the contamination was not substantial. The Forest Service relied on Envirosearch's original opinion, which stated the Ranch was hydraulically isolated from the contaminated groundwater and therefore unlikely to become completely contaminated. Hansen's experts, however, stated that contamination of the entire Ranch's groundwater was likely. The experts further opined that it could take over 50 years for the EBD to migrate out of the Ranch's groundwater. The court held that, based on Hansen's evidence, a jury could find a valid the takings claim.

The court also considered whether Hansen had a sufficient property right to justify a takings claim. In South Dakota, unappropriated water belongs to the public through the public use doctrine. However, a landowner with a permit or a vested right to a defined amount of water can appropriate that amount. A vested right requires the water to have been put to beneficial use prior to the 1955 change in South Dakota's water laws. In asserting his right, Hansen relied on a 1946 document issued by the South Dakota Department of Environment and Natural Resources, which allowed the Ranch to appropriate 26 gallons of water per minute. The court determined that Hansen had a vested right to that amount of water and that Hansen's water right constituted a viable property interest, further justifying Hansen's takings claim.

Next, the court denied the Forest Service's motions for summary judgment, which claimed Hansen lacked standing and that the claim was not ripe for review. The Forest Service asserted that because Hansen did not own the Ranch when it became contaminated, he lacked standing. The Forest Service alternatively argued that Hansen further lacked standing because he sold his interest in the Ranch. The court rejected both of these arguments, noting that no claim can accrue until the landowner becomes aware of the taking. Because neither Han-

sen nor Deverman were aware of the contamination, Hansen's claim had not accrued. Furthermore, the court held that due to the nature of a contract for deed and the specific nature of Hansen's agreement with Wick, Hansen had a sufficient interest in the Ranch. Finally, the court rejected the Forest Service's argument that because the Ranch still had three uncontaminated wells and enough water to operate, Hansen's claim was not yet ripe. The court held that it was reasonably foreseeable that the contamination would spread to the remaining wells, and therefore Hansen's claim was ripe for adjudication.

In conclusion, the court determined a trier of fact could reach the conclusion that the Forest Service contaminated the Ranch's ground water and that such contamination may constitute a Fifth Amendment Takings claim. The court also determined that Hansen had a viable interest in the Ranch at the time of the taking. The court denied the Forest Service's motions for summary judgment on standing and ripeness and granted Hansen's partial motion for summary judgment that the taking occurred when Hansen learned about the contamination.

Brian Stewart

Colvin Cattle Co. v. United States, No. 03-1942L, 2005 U.S. Claims LEXIS 267 (Fed. Cl. 2005) (holding state water rights did not create a property right to graze cattle on federal public land and BLM's denial of an application to graze cattle on federal lands was not a taking of water rights).

In 2005, Colvin Cattle Co. ("Colvin"), the owner of 520 acres near the publicly-held Montezuma Allotment in Nevada ("Allotment"), brought suit against the Bureau of Land Management ("BLM") after BLM denied Colvin's application to graze cattle on the Allotment. Colvin had grazed cattle on the allotment since 1970. Colvin also possessed water rights, which it used to provide water to the cattle. In 1995, Colvin failed to pay grazing fees and BLM cancelled its grazing lease. Over the next few years, BLM issued numerous notices of trespass and intent to remove Colvin's cattle from the Allotment. Colvin appealed BLM's decision first to the agency and then the Interior Board of Land Appeals. BLM issued a final trespass decision in 2003 requiring Colvin to remove all cattle and range improvements, except for wells and other facilities Colvin needed to access its water rights. BLM also granted a lease to a third party, Bud Johns, to graze cattle on the Allotment.

In this suit before the United States Court of Federal Claims, Colvin claimed (1) the denial of its application to graze cattle was a taking of its water rights, and (2) the cancellation of its grazing lease was a breach of contract. Colvin based its takings claim on the belief that a right to beneficial use of water carries an attendant right to graze