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Northwest Envtl. Advocates v. EPA, No. 03-05760, 2005 U.S. Dist. LEXIS 5373, (N.D. Cal. Mar. 30, 2005)

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cattle on federal land, because grazing is the only beneficial use to which the water can be put. Further, by denying the right to use the land for grazing, the government denied Colvin its right to use its own water. Colvin based its argument on three sources: the Supreme Court decision in *Buford v. Houtz*, Nevada's 1925 Stockwatering Act, and the Mining Act of 1866.

The court in *Buford* recognized that land on the public range can only be subject to the beneficial use of grazing. Based on this case, Colvin argued that a water right carries with it an attendant right to graze cattle on federal land. Thus, Colvin argued the federal government had not created the right to graze cattle on federal land through a permitting process, but instead it was a right under Nevada's appropriation laws. However, the court did not believe the *Buford* decision altered the federal government's ownership and control of public lands.

Second, Colvin's water rights traced back to Nevada's 1925 Stockwatering Act. Colvin argued that through the Act, the state of Nevada recognized a connection between the water rights and the right to graze, and conferred a right to graze on federal lands. However, based on case precedent, the court found the state did not intend to create any right or title to public lands by passing the Act.

Third, Colvin argued its takings claim based on a valid property right, which was a water right confirmed in the Mining Act of 1866, and not on a federal permit or license to graze. However, the court rejected this argument because the Supreme Court interpreted the Mining Act to recognize only two possessory rights: the right to use water on public lands for "mining, manufacturing, or other beneficial purposes," and the right of way for improvements to carry water for those purposes. The Court never recognized grazing as creating a property right.

Finally, Colvin argued BLM had an obligation to prevent Bud Johns' cattle from infringing on Colvin's water rights. However, the court found the federal government could not be responsible for trespass of water rights by a private party.

Because Colvin's water rights did not create a property right to graze cattle on the federal Allotment, the court dismissed the suit and confirmed BLM's right to deny Colvin a grazing permit.

Kathryn Lane Garner

UNITED STATES DISTRICT COURTS

Northwest Envtl. Advocates v. EPA, No. 03-05760, 2005 U.S. Dist. LEXIS 5373, (N.D. Cal. Mar. 30, 2005) (holding that the Environmental Protection Agency exceeded its authority by promulgating a

regulation allowing ships to discharge ballast water without a permit in violation of the Clean Water Act).

Northwest Environmental Advocates ("Northwest") contested the Environment Protection Agency's ("EPA") implementation of a regulation that allowed ships to discharge waste "incidental to the normal operation of a vessel" without a National Pollutant Discharge Elimination Systems ("NPDES") permit. Northwest attempted to force the EPA to change the regulation with a petition. When the EPA refused to change the regulation, Northwest filed suit in the U.S. District Court of Northern California. At trial, Northwest argued that the regulation was inconsistent with the EPA's authority under the Clean Water Act ("CWA"). Northwest also argued that the EPA's failure to rescind the regulation was an abuse of discretion and therefore subject to judicial review. The CWA required a NPDES permit for the "addition of any pollutant to navigable waters from any point source."

Ballast water is water ships taken on to help stabilize the vessel. The amount of ballast water a ship takes on depends on the cargo of the ship. Once a ship takes on ballast water, it does not typically release it until the ship's crew unloads the cargo. Northwest argued that ships' ballast discharges pollute water and introduce invasive species to fragile environments by transporting fish and other marine species in the ballast tanks. Northwest referenced the zebra mussel invasion of the Great Lakes. Zebra mussels migrated into the Great Lakes via ballast water discharges, causing several millions of dollars of damage to businesses and local industries. Under the CWA, the term "pollutant" includes biological material such as fish and fish remains, as well as waste, sewage and garbage. The court held that ballast water's fishy mix combined with other chemicals, such as fuel residue, sediment, rust, and debris rendered it a pollutant under the CWA. The court also noted that the EPA does not contest that ships discharging ballast water meet the other requirements rendering the discharge governable by the CWA: (1) the discharge of a pollutant, (2) into navigable waters, (3) from a point source. The court ruled that ballast water discharges fall under the CWA and therefore, that ships discharging ballast water must have a NPDES permit.

The EPA asserted a congressional acquiescence theory arguing that the EPA has never interpreted the CWA to require a permit for ballast water discharges. The EPA alleged that Congress acquiesced to the EPA's interpretation of the CWA by not revising the CWA to require a different interpretation or repealing the regulation. A party who asserts a congressional acquiescence theory must support it with "overwhelming evidence of acquiescence." Mere lack of revision was not sufficient to meet the burden under congressional acquiescence theory. Holding the EPA failed to provide overwhelming evidence, the court granted Northwest's motion for summary judgment.

In conclusion, the court determined that the EPA exceeded its power by enacting the regulation. The court granted Northwest's motion for summary judgment and ordered the EPA to repeal the regulation.

Brian Stewart

Southeastern Fed. Power Customers v. Harvey, 400 F.3d 1 (D.C. Cir. 2005) (holding that the execution of a settlement agreement for contracts allotting water storage space was conditioned on vacatur of a preliminary injunction).

In 1946, Congress authorized the United States Army Corps of Engineers ("Corps") to design and construct the Buford Dam project on the Chattahoochee River. The Corps finished the dam in 1956, forming a reservoir called Lake Sidney Lanier. During the 1970s and 1980s, the Corps entered into renewable five-year contracts with various Georgia municipal and county water authorities ("Water Supply Providers"), which allowed the Water Supply Providers to withdraw water from the Chattahoochee or Lake Lanier for a fee. The last of these contracts expired in 1990; however, the Corps permitted the Water Supply Providers to continue withdrawing water under the terms of the expired contracts in increasing amounts. In October 1989, the Corps released a draft proposal to significantly increase the amount of the daily water withdrawal. In response, Alabama filed suit against the Corps in the United States District Court for the Northern District of Alabama in June 1990, alleging that the Corps violated the National Environmental Policy Act by failing to consider the potential effects of the increased withdrawals. Upon motion of the parties, the Alabama district court issued a stay order on September 19, 1990, which incorporated the parties' stipulation that they would not execute contracts or agreements that were the subject of the complaint in the action.

On December 12, 2000, Southeastern Federal Power Customers, Inc. ("Southeastern"), a non-profit association that represents rural electric cooperatives and municipal electric systems utilities that purchase hydropower from federal projects, filed this action in the United States District Court for the District of Columbia. Southeastern sought to enjoin the Corps from permitting the increased water withdrawals, which Southeastern claimed impaired the hydropower capacity of the Buford dam project to their financial detriment. Georgia and the Water Supply Providers moved to intervene in February 2001. On January 9, 2003, the parties concluded a settlement agreement which allowed for renewable interim ten-year contracts allocating water storage space in Lake Lanier to the Water Supply Providers, who were to pay higher fees for the storage to compensate Southeastern for lost hydropower. On January 16, 2003, the parties filed the settlement agreement with