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CIRCUIT COURTS

FEDERAL CIRCUIT

Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003)

(requiring analysis of whether increased storm drainage constituted a taking of a flowage easement by inverse condemnation and holding that property need not suffer an effectual destruction or a permanent and exclusive occupation by government runoff for a taking claim based on a flowage easement).

The dispute in this case arose just after the United States Postal Service completed a new facility in mountainous West Virginia in late 1993. Due to the construction of the facility, the amount of storm water runoff into South Hollow sharply increased. Ridge Line, Inc. ("Ridge Line") owned South Hollow. Ridge Line built a storm water detention pond and requested contribution from the government. The government refused to pay and Ridge Line sued in the United States Court of Federal Claims ("claims court"), claiming that the alleged taking entitled it to just compensation.

The claims court found that increased storm drainage caused by the construction of the Postal Service facility and associated parking lots and driveways did not constitute a taking of any real property interest that justified compensation. The claims court also found that the development of the Postal Service property caused seventy percent of the increased runoff; however, while the water might have "invaded" Ridge Line's property, the invasion was insufficient to constitute an exclusive and permanent occupation. Moreover, since Ridge Line added additional landfill to South Hollow and covered the original storm water detention pond, insufficient evidence existed to determine if there had been a temporary invasion of the property. The claims court also found that Ridge Line could not prove damages because it failed to appraise the property before and after the damage. The United States Court of Appeals for the Federal Circuit held that property need not suffer an effectual destruction or permanent and exclusive occupation in order to be a taking and vacated and remanded the decision back to the trial court.

On appeal, the court first addressed the takings issue. The court reasoned that a permanent occupation need not exclude the property owner or be continuous to be compensable as a taking. Furthermore, the court concluded *United States v. Dickinson* established that the government may not take an easement, or impose a flowage easement, without just compensation. Although Ridge Line had raised a claim for inverse condemnation of the water flowage easement and contended that just compensation would be a proportional cost of the building and maintenance of the flood control system, the claims

court erred in failing to address this claim.

The court next addressed whether Ridge Line, by filling and altering most of the area it complained the government eroded, had suffered any loss of use of the property. Because *Dickinson* held that a landowner's reclaiming his land does not disentitle him to compensation for the original taking by the government, the claims court was in error. The claims court also erred in finding that damages could not be demonstrated simply because Ridge Line did not provide appraisals of the land before and after the erosion. *Dickinson* held that if the land erosion caused by a taking is preventable, the cost of prevention is a proper basis for determining damages.

Finally, the court identified the appropriate inverse condemnation analysis to be used on remand. The court held that whether a compensable taking occurred in this case depended on whether Ridge Line's loss may properly be analyzed under takings law as opposed to tort law, and then on whether Ridge Line has a protected property interest under West Virginia property law that a government actor has infringed. For Ridge Line to establish that takings law analysis is appropriate, the court held it must prove the taking was the direct, natural, and probable consequence of the Postal Service development, rather than just an incidental injury. The court also held that the claims court must consider whether the government's interference with any property rights of Ridge Line was substantial and frequent enough to rise to the level of a taking. Finally, the court held that if the claims court, on remand, determines that taking analysis is proper, it must then address whether the steps taken by the government in storm water retention and the amount that invaded Ridge Line's property were reasonable under West Virginia law. Thus, because the claims court did not address Ridge Line's inverse condemnation claim, and therefore did not address whether takings or torts law analysis was proper, the Federal Circuit vacated and remanded for further analysis consistent with its opinion.

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SECOND CIRCUIT

No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2d Cir. 2003) (holding private citizens can sue under Clean Water Act regardless of whether the claimed violation also constituted a violation of Federal Insecticide, Fungicide, and Rodenticide Act, which does not provide for citizen enforcement of suits).

In August 1999, several residents of Queens, New York contracted the West Nile virus, a virus transmitted by mosquitoes. In response, New York City sprayed pesticides designed to kill the