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## Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003)

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# COURT REPORTS

## FEDERAL COURTS

### UNITED STATES CIRCUIT COURTS

#### FEDERAL CIRCUIT

##### **Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003)**

(holding the government's refusal to issue a right-of-way permit on public property did not constitute a physical taking because the government neither physically appropriated nor denied meaningful access to use of a water right; and because the refusal of the permit was an internal regulatory act, it did not effect a regulatory taking).

Washoe County, Nevada ("Washoe County") and Northwest Nevada Water Resources Limited Partnership ("Northwest Nevada") appealed the decision of the United States Court of Federal Claims granting summary judgment to the United States and denying their motion for partial summary judgment. The lower court held that the government's action did not effect a taking of the parties' water rights. The United States Court of Appeals for the Federal Circuit agreed and affirmed.

In 1988, Washoe County entered into an agreement with Northwest Nevada to acquire an option to purchase Northwest Nevada's water rights at Fish Springs Ranch ("Ranch") and the right to change the place and manner of use of the water. In 1989, Washoe County applied to the Nevada State Engineer to change the Ranch's agricultural water use to municipal and industrial use at the Reno-Sparks metropolitan area located forty miles to the south. The neighboring Pyramid Lake Tribe of Indians ("Tribe") and the United States Army Depot ("Army") both objected to the granting of the application because the change in use would divert water outside of the Honey Lake Valley and negatively affect their water rights. The State Engineer granted Washoe County's reallocation application, over these objections.

Since the only feasible way to transport the Ranch's water to the Reno-Sparks metropolitan area was by pipeline over federal land, Washoe County applied to the Bureau of Land Management ("BLM") for a right-of-way permit in 1989. The BLM distributed a draft Environmental Impact Statement ("EIS") for comment in compliance

with the requirement of issuing a right-of-way permit. Both the Army and the Tribe expressed objections to it. The BLM referred the decision whether to proceed with development of a final EIS to the Secretary of the Interior. The Secretary issued an order in 1994 directing the BLM to suspend work on the EIS until Washoe County resolved the objections to diverting the Ranch's water from the Honey Lake Valley. When Washoe County was unable to resolve these objections and proceed with the pipeline, it filed suit against the government. Washoe County claimed the denial of the right-of-way permit application constituted a taking of the Ranch water rights and sought compensation.

The appellate court first considered whether Washoe County's takings claim was ripe for review. The court concluded the claim was ripe for review because Washoe County knew with a reasonable degree of certainty that the BLM would not grant a right-of-way permit for transporting the Ranch's water to Reno-Sparks.

Next, the court reviewed whether the government's refusal to issue the right-of-way permit constituted a physical or regulatory taking of Washoe County's water rights. The court found that because the government merely denied Washoe County permission to use the government's own land to exploit the Ranch water rights, the government neither physically appropriated nor denied Washoe County meaningful access to the water. Therefore, the court held that the government did not affect a physical taking.

Finally, the court found that because government regulation of private property was not at issue, Washoe County had not established a regulatory taking. The court stated that the government applied internal regulations concerning the federal government's management of public lands, and that it did not act in its regulatory capacity when it denied Washoe County a right-of-way permit. The court also clarified the government had no obligation to assist Washoe County in putting their water rights to the most profitable use. Thus, because the government did not impose any regulations on Washoe County's water rights, its actions did not constitute a regulatory taking.

Concluding the government's actions did not affect a physical or a regulatory taking, the Court of Appeals for the Federal Circuit affirmed the decision of the Court of Federal Claims granting summary judgment to the government.

*Mark Shea*