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City of Olmstead Falls v. United States Env'tl. Prot. Agency, 233 F. Supp. 2d 890 (N.D. Ohio 2002)

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rights without allowing Hage to divert water to another beneficial use, therefore the court granted Hage the right to divert the water.

The court addressed the United States' argument that a United States Forest Service ("USFS") manual determined the scope of right-of-way easements, and that a right-of-way of fifty feet exceeded the necessary amount for reasonable maintenance. The court ruled that the USFS manual lacked the force of law and constituted only persuasive authority. In addition, the court found that the USFS lacked the authority to adjudicate rights-of-way under the Act, since that role was reserved for the judiciary. Finally, the court found that legislative intent, and common sense, supported a fifty-foot right-of-way to allow access to the ditches for maintenance.

The court next addressed Hage's claim regarding the grazing permit. The court held that the Taylor Grazing Act and several cases hold that permits are only a license to use the land for grazing, not an absolute right, and that the Secretary of the Interior may cancel or modify permits. Therefore, Hage possessed no property interest in the grazing permit, and no compensable right existed.

Finally, the court addressed Hage's claim to a 752,000-acre surface estate for grazing originating under the Ordinance of May 20, 1785; Kearney's Code and the Treaty of Guadalupe-Hidalgo; the Act of 1866; the Desert Lands Act of 1877 and the subsequent Acts of 1888 and 1890; the Creative Act of 1891; the Forest Service Organic Administration Act; the Livestock Reservoir Siting Act; the Stock Raising Homestead Act; the Taylor Grazing Act; and Nevada's Three Mile Grazing Rule. The court found that legislative intent behind these statutes did not support granting Hage a large surface estate under these acts, and that at most Hage could go on the land to access water in which he owned a vested right.

Jared Ellis

UNITED STATES DISTRICT COURTS

City of Olmstead Falls v. United States Env'tl. Prot. Agency, 233 F. Supp. 2d 890 (N.D. Ohio 2002) (holding the sovereign immunity waiver in the Clean Water Act's citizen suit provision does not apply if the citizen fails to provide notice prior to filing suit; the sovereign immunity waiver in the federal facilities pollution control provision does not apply when there is no allegation of a federal facility engaging in polluting; the Administrative Procedure Act's sovereign immunity waiver does not apply to discretionary actions; and the mandamus statute does not apply to allegations of failure to perform discretionary duties).

The City of Olmstead Falls and a city resident ("Olmstead Falls") alleged the United States Environmental Protection Agency ("EPA"), the Department of the Army Corps of Engineers ("Corps"), and various other federal and state entities and officials violated the Clean Water Act ("CWA") by failing to revoke a "dredge or fill" permit issued to the nearby City of Cleveland for an airport construction project. The Corps issued the permit to Cleveland following a waiver of authority by the Ohio Environmental Protection Agency ("OEPA") to act on the permit application. Olmstead Falls appealed the waiver to the Ohio Environmental Review Appeals Commission, which ruled that Ohio law did not permit such a waiver. Olmstead Falls requested that the Corps and the EPA revoke the permit due to the invalidity of Cleveland's application. The federal agencies refused. Olmstead Falls brought suit in the Federal District Court for the Northern District of Ohio against the EPA, the Corps, and various other federal and state entities and officials. The government agencies moved to dismiss for lack of subject matter jurisdiction based on the argument that the federal question statute, the federal mandamus statute, and the Declaratory Judgment Act did not contain statutory waivers of sovereign immunity, and the CWA and the Administrative Procedure Act contained statutory waivers of immunity that were inapplicable to this case. After considering the necessary facts and allegations, the court granted the motion to dismiss.

The court first reviewed the waiver of immunity contained in the citizen suit provision of the CWA. The court found that Olmstead Falls failed to provide the EPA with the statutory sixty days notice of intent to file suit regarding the disputed permit. This prevented the waiver of sovereign immunity on the part of the Corps and the EPA and therefore stripped the court of subject matter jurisdiction. The court then reviewed the waiver of sovereign immunity stated in the federal facilities pollution control provision and found that it provided a waiver of immunity only with respect to actions in which the government is the alleged polluter. Thus, the court held that there was no waiver of immunity and that it lacked subject matter jurisdiction over the Corps and the EPA under the CWA provisions.

Next, the court reviewed the general waiver of immunity included in the APA. The court found that the APA granted courts jurisdiction to review the actions taken by an agency of the federal government except when the action is discretionary by law. Accordingly, the court examined Olmstead Falls' complaint to find if it challenged a nondiscretionary act on the part of the Corps and the EPA. The court found that Olmstead Falls' complaint did not challenge the issuing of the permit to the City of Cleveland, but rather the Corps' and EPA's failure to revoke the permit once they knew Cleveland's application to be invalid. Because the court found that the agencies' decision not to revoke the permit was discretionary, it held that it lacked subject matter jurisdiction to review the action under the APA.

Finally, the court addressed the waiver of sovereign immunity contained in the federal mandamus statute. It found that in order for

the mandamus jurisdiction to lie, plaintiffs must show the defendant violated a clear, nondiscretionary duty owed to plaintiffs. Because the court evaluated the actions of the Corps and the EPA and concluded that their failure to revoke the “dredge or fill” permit issued to the City of Cleveland was discretionary, the court held that it lacked subject matter jurisdiction over Olmstead Falls’ mandamus claim against the Corps and the EPA.

For the reasons set forth, the court found that there was no waiver of sovereign immunity on the part of the Corps or the EPA and that the court therefore lacked subject matter jurisdiction over Olmstead Falls’ claims against the government agencies.

Mark Shea

Swartz v. Beach, 229 F. Supp. 2d 1239 (D. Wyo. 2002) (holding the Eleventh Amendment disallows monetary damages against officials acting in their official capacity; the right to seek redress via federal statutory authority for a violation of independently existing constitutional rights exists even if the same set of facts also give rise to a cause of action for a violation of statutory rights; a regulation goes “too far” if it deprives the individual of all economically beneficial use of his or her property and it does not substantially advance state interests; a regulatory taking may occur if state officials ignore their statutory and regulatory obligations; a specific Fifth Amendment takings cause of action subsumes a more general Fourteenth Amendment takings cause of action; and notice of conduct potentially in violation of the Constitution prevents the qualified immunity defense).

Edward Swartz (“Swartz”) owned and operated a 280-acre ranch in Campbell County, Wyoming. Swartz filed suit in the United States District Court for the District of Wyoming against Gary Beach and Dennis Hemmer (“Officials”) individually and in their official capacities as Administrator and Director respectively of the Wyoming Department of Environmental Quality, Water Quality Division (“WDEQ”). Swartz also named as a defendant Redstone Resources, Inc. (“RRI”), a Colorado corporation, who operated a gas company producing coal bed methane (“CBM”) in the Powder River Basin of Wyoming. Swartz’s suit alleged the taking of private property without just compensation or due process by the Officials’ failure to perform statutory and regulatory duties without due process. Furthermore, Swartz sought to enjoin defendants from allowing discharge of contaminated water in violation of his constitutional rights and federal and state environmental laws. The Officials and RRI filed independent motions to dismiss the complaint. The court granted the Officials’ motion to dismiss to the extent the complaint sought monetary damages against the Officials acting in their official capacity