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Swartz v. Beach, 229 F. Supp. 2d 1239 (D. Wyo. 2002)

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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

and to the extent the complaint sought to require the officials to comply with Wyoming state law. The court denied the motion to dismiss in all other aspects, and it denied RRI's motion to dismiss in its entirety.

This suit arose when RRI's discharge water produced by coal bed methane wells flowed through Swartz's ranch. As a result, the creek, which Swartz used for irrigation of his hay meadows, had insufficient flow to allow for irrigation during the summer months. Furthermore, the discharge water caused permanent soil damage due to its elevated salinity and sodium absorption ratios. Swartz claimed RRI and the Officials deprived him of his adjudicated water rights in 2000 and 2001. RRI and the Officials each filed independent motions to dismiss the claims.

The court denied RRI's motion to dismiss for three reasons. First, the court found that Swartz pled sufficient facts to state a claim for a violation of the Clean Water Act ("CWA"). Swartz brought his claim under the CWA's citizen suit provision alleging an ongoing violation of state-imposed "effluent standards or limitations." Secondly, the court found because Swartz issued a "Notice of Citizen Suit Under the Clean Water Act," the court maintained subject matter jurisdiction over Swartz's CWA claims. Finally, the court held Swartz did not fail to join necessary or indispensable parties because even though others produced discharge water into the creek, those parties are not indispensable.

The Officials argued several different elements in their motion to dismiss. They first argued the court lacked both personal and subject matter jurisdiction based on the Eleventh Amendment. A plaintiff may obtain relief against a state under the *ex parte Young* doctrine, which says a federal district court may retain jurisdiction over a suit against a state official in his official capacity to prevent a continuing violation of the law, notwithstanding a state's sovereign immunity. The Eleventh Amendment permits suits seeking prospective relief if the plaintiff files suit against the official rather than the sovereign state. Swartz sought prospective injunctive relief preventing a continuing violation of federal and state environmental laws, and therefore the court retained jurisdiction. Swartz also sought punitive damages, which may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct attributable to the officer himself so long as the relief sought comes from the officer personally. Therefore, the court granted the motion to dismiss to the extent Swartz sought monetary damages against the Officials while they acted in their official capacity. The court denied the motion for lack of personal jurisdiction.

The Officials moved to dismiss, in the same motion, Swartz's claim based on federal statutory authority because Swartz used it as a vehicle to bring his private takings claims, which were based on alleged violations of the CWA. The court denied the Officials' motion relying on the *National Sea Clammers* doctrine, which does not restrict a plaintiff's right to seek redress via federal statutory authority for the

violation of independently existing constitutional rights even if the same set of facts also give rise to a cause of action for a violation of statutory rights.

The Officials also moved to dismiss the cause of action for the taking of private property without just compensation. The court denied the motion because Swartz alleged sufficient facts to state a claim for a physical taking by the Officials. Similarly, Swartz alleged a regulatory taking of his land. A government regulation can constitute a taking if the regulation makes it commercially impracticable to engage in the economic activity under construction or goes "too far." 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. Here, Swartz did not allege that the Officials deprived him of all economically beneficial uses of his land. Therefore, the court conducted a fact specific inquiry. The court found the Officials' inaction failed to advance a legitimate government interest, and the Officials effectuated a regulatory taking by ignoring their statutory and regulatory obligations despite Swartz's requests that they take action.

In order for his takings claim to be ripe, Swartz had to prove the state deprived him of his property and refused to compensate him for the deprivation. The Officials argued that because Swartz did not properly file the claim, Swartz did not request compensation from the state thus making his claim not ripe. The court, however, held the claims were ripe for review because the government entity charged with implementing the regulations reached a final decision regarding the application of the regulations on the property issue, because Swartz sought compensation through state procedures for the deprivation of his property and because Swartz made a sufficient allegation of an actual and concrete injury.

The Officials claimed the more particular Fifth Amendment takings cause of action subsumed the general Fourteenth Amendment takings cause of action. The court agreed, citing a previous Tenth Circuit Court holding, "because . . . the Fifth Amendment imposes very specific obligations upon the government . . . we are reluctant in the context of a factual situation that falls squarely within that clause to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause." Therefore, the court denied the Fourteenth Amendment takings cause of action.

Finally, as another effort in their motion to dismiss the claim, the Officials claimed qualified immunity. However, the court held because Swartz brought suit against the Officials in both their official and individual capacities and Swartz adequately put the Officials on notice based on his continued efforts to have the Officials enforce their statutory and regulatory obligation, the Officials failed to meet the requirements for qualified immunity.

In summation, the court denied RRI's motion to dismiss in its entirety. With respect to the Officials' motion to dismiss, the court

granted the motion to the extent the complaint sought monetary damages against the Officials acting in their official capacity and to the extent the complaint sought to require the Officials to comply with Wyoming state law. The court denied the Officials' motion in all other respects.

Staci A. McComb

Ozark Soc'y v. Melcher, 229 F. Supp. 2d 896 (E.D. Ark. 2002) (denying defendant's motion to dismiss for lack of subject matter jurisdiction, holding that defendant's issuance of conditioned dam construction permit was a final agency action; plaintiffs had standing to bring suit against defendant; and plaintiffs' claims were ripe).

This case arose when several river advocacy groups ("Ozark Society") sued the United States Army Corps of Engineers ("Corps"). The Ozark Society claimed the Corps, in issuing a conditioned construction permit for a dam on Arkansas' Bear Creek, failed to follow certain procedural mandates. These mandates were found in the Buffalo National River enabling legislation, the National Environmental Policy Act, and the Federal Water Pollution and Control Act. The Corps filed a motion to dismiss for lack of subject matter jurisdiction, alleging that: (1) no final agency action had occurred; (2) the Ozark Society lacked standing to bring this suit; and (3) Ozark Society's claims were not yet ripe. The District Court for the Eastern District of Arkansas disagreed with each of the Corps' allegations and denied the motion to dismiss.

Under the Administrative Procedure Act ("APA"), only final agency actions are subject to judicial review. On August 3, 2001, the Corps issued a permit to the Searcy County Regional Water District ("Searcy County") for construction of a dam on Bear Creek. Generally, the issuance of such a permit is a final agency action. However, the Corps conditioned the permit given to Searcy County, requiring further action by the Corps, other federal agencies, and Searcy County before construction could begin. The conditions had not yet been met at the time of this suit. The Corps argued that a final agency action would only occur upon fulfillment of these conditions, as until then the permit could still be revoked for noncompliance. However, the court held that it is issuance of a permit, not the meeting of attached conditions, which comprises a final agency action. As the Corps issued the permit, it had taken a judicially reviewable final action.

The Corps also argued that the Ozark Society lacked standing because it had not yet suffered an injury in fact, and because its injuries were not redressable by the court. In support, the Corps noted that the proposed dam might never be built. However, the court stated that the procedural requirements ensured that any proposed dam would not have an adverse effect, either on Bear Creek