

Wetlands Inverse Condemnation Claim Kept Alive by the Appellate Court

The United States Court of Appeals for the Federal Circuit upheld the United States' right to assert a federal navigational servitude as a defense against a regulatory takings claim stemming from the denial of a dredge and fill permit, but only if the basis for the denial of the permit was to promote a navigational purpose (as opposed to an environmental purpose).

Facts

This case, *Palm Beach Isles Associates v. United States*, started as an inverse condemnation action brought by a developer in the Palm Beach, Florida area. The 312 acres in question were initially purchased in 1956. The property was later split into two parcels when part of the property was sold in 1968. The remaining 50.7 acres retained by the developer consists of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land adjacent to the wetlands. The submerged acreage lies below the ordinary high water mark of Lake Worth. Lake Worth contains only a narrow navigable section, which was created by dredging some years ago, as a segment of the Atlantic Intracoastal Waterway.

Under Section 10 of the River and Harbors Act of 1899, work that impacts the navigable waters of the United States must be preceded by permit from the U.S. Army Corps of Engineers (Corps) (in addition to a state permit, in most jurisdictions). In 1957, the developer applied for and actually received the necessary permits to fill the 50.7 acres from the Corps, but the work was never completed.

In 1988-1990, the developer sought and was denied a permit by the State of Florida to fill these same bottomlands and wetlands on "environmental" grounds (e.g., impact on wildlife, erosion, biota, etc.). Eventually, following commencement of a suit by the developer, the State of Florida granted a dredge and fill permit for the full 50.7 acres.

The Corps again denied the developer's permit application despite the prior issuance of the State of Florida permit. In what became quite important later, the Corps denial apparently was based on "environmental" issues.

The trial court, the Court of Federal Claims, found that the submerged 49.3 acres were subject to the federal navigational servitude. The trial court further ruled that navigational servitude was a pre-existing limitation upon the developer's title; therefore, the developer never had a right to use the submerged land due to the servitude. In other words, the navigational servitude was a pre-existing limitation upon the developer's title and, as a result, no "takings" could occur.

One interesting threshold issue was whether the appropriate parcel for evaluation of inverse condemnation claim was the original 312 acres or only the smaller, currently owned parcel. The Court of Claims ruled that the two parcels in dispute should be considered part of the entire original parcel purchased in 1956. This reduced the proportion of the property allegedly "taken" and, consequently, diluted the developer's claim for compensation.

As additional grounds for denial of the developer's claim, the trial court also ruled that the developer was prevented from seeking compensation from the government because it knew when it bought the property that it would need permits to develop the land (as evidenced by its 1957 and 1960 permit applications). Finally, the Court found that the 1.4 acre parcel itself was of insufficient size on which to build homes and that the Developer had not established that other potential land uses were foreclosed. The Government's motion for judgment before trial, therefore, was granted.

The Court's Decision

The Court of Appeals tackled the proper denominator question first. The Court concluded that the larger 261-acre parcel which was developed two decades earlier was physically and temporally remote from, and legally unconnected to the 50.7 acres of wetlands and submerged lake bottom in question.

Second, the Court ruled that because the relevant parcel only included the 50.7 acres, including the 1.4 acres of wetlands and the 49.3 acres of submerged land, the developer's inability to use those parcels for construction denied the developer all economically viable use of the property.

Finally, in an issue of first impression, the Court of Appeals ruled that the United States may assert a federal navigational servitude as a defense against a regulatory takings claim.

The Appeals Court ruled that the entire submerged 49.3 acres were subject to federal navigational servitude, derived from the Commerce Clause of the U.S. Constitution. This clause gives the U.S. Government a "dominant servitude," with the power to regulate and control the waters of the United States in the interest of commerce. Interestingly, the developer had argued that the water depth over the entire 49.3 acres of one to three feet was insufficient to support commercial navigation and could not trigger a judicial navigational servitude. The Court rejected this claim and ruled that, because Lake Worth as a whole was navigable, the entire body of water up to the ordinary high water mark is subject to the federal navigational servitude, regardless of depth.

Despite this ruling enforcing the U.S. Government's navigational servitude rights as a defense to a private "takings" claim, the Court of Appeals nevertheless remanded the case in order for the trial court to determine factually whether the denial of the developer's permit by the Corps was based upon the navigational servitude or, instead, as the developer had asserted, was based upon "environmental issues." The Court of Appeals ruled that "the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to 'identify background principles...that prohibit the uses [the landowner] now intends'." Citing *Lucas v. South Carolina Council*, 505 U.S. 1003 (1992).

This case is of significance, particularly in Michigan, because of the potential impact of the assertion of the federal right of navigational servitude even in non-navigable waters, especially in light of the Great Lakes' steadily declining lake levels.

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Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.