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Diamond Bar Cattle Co. v. United States, 168 F.3d 1209 (10th Cir. 1999)

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TENTH CIRCUIT

Diamond Bar Cattle Co. v. United States, 168 F.3d 1209 (10th Cir. 1999) (holding that the government's allowing private parties to use public lands is an implied license, revocable at–will by the government, and vests no private property interests in individual licensees).

Kit and Sherry Laney, owners and operators of Diamond Bar Cattle Company and Laney Cattle Company, initiated this action on April 1, 1996, seeking adjudication and validation of interests in certain public lands. The Laneys claimed they owned a vested water right and an inseparable but distinct right to graze the federal lands compromising their allotments. The Forest Service denied this interest and advised the Laneys that unpermitted grazing on Forest Service land would result in fees, penalties and civil trespass action. The district court granted summary judgment for the Forest Service and enjoined appellants from grazing livestock on national forest lands without a permit.

The Laneys claimed their water right arose from their predecessor's prior appropriation. The Laney's predecessors obtained title prior to 1899 when the United States withdrew the land from the public domain. This land later became the Gila and Apache National Forests. The Laneys asserted this pre–1899 appropriation vested in their predecessor a "possessory" property interest entitling the holder to use of the water and range for grazing purposes. The Laneys claimed that this long–standing property right, acquired under New Mexico law, obviated the need for them to obtain grazing permits from the Forest Service.

The Tenth Circuit affirmed the lower court's grant of summary judgment, finding that grazing cattle on public lands was permitted by an implied license, revocable at the will of the Forest Service. Before the federal government reserved these lands as national forests, New Mexico law permitted cattle grazing within the public domain. The law required, as a prerequisite, that individuals possess adequate water rights to meet the needs of their cattle grazing there. This appropriation gave the holder the privilege to use the public lands. The Tenth Circuit stated that the nature of this privilege was an implied license, revocable by will of the licensor.

Article IV of the United States Constitution provides Congress with plenary power when disposing of or regulating the territories and properties of the United States. Pursuant to this authority, Congress passed the Organic Administration Act of 1897, authorizing the government to reserve lands as national forests. The Act placed these lands under the direction of the Secretary of Agriculture and permitted this office to make all necessary rules and regulations concerning the management of reserved lands. Under this grant of authority, the Secretary of Agriculture, as early as 1906, began

promulgating regulations requiring permits to graze stock on national forest lands. The U.S. Supreme Court has held that historical acquiescence on the part of the federal government allowing private use of public lands was never intended to confer any vested right. This "tacit consent" by the government does not deprive it of the power to recall any implied license.

The Tenth Circuit concluded that the Laneys did not hold and never held a vested private property right to graze cattle on federal public lands. The Laneys' predecessor in title held simply an implied license to use the lands for grazing. This privilege conferred no vested rights and was revocable at the government's will. Thus, without regard to the validity of predecessor's claimed water right, the Laneys were not entitled to graze cattle on national forest lands without a permit. Additionally, the court upheld the district court's assessment of penalties and injunction for unpermitted grazing.

John B. Ridgley

ELEVENTH CIRCUIT

Driscoll v. Adams, 181 F.3d 1285 (11th Cir. 1999) (holding that the stormwater discharged during timber harvesting and land development activities fell within the Clean Water Act's ("CWA") definition of "pollutant" from a "point source" into "navigable water" and landowner's failure to make every good faith effort to comply with pollution control standards and failure to reduce discharges to a minimum precluded application of the exception to liability under CWA for discharge without a National Pollutant Discharge Elimination System ("NPDES") permit even though no permit was available to be issued by the state).

Adams owned 76 acres of land in the mountains of North Georgia. The Driscoll and Galbreath families owned land adjacent to Adams' property. Driscoll owned five acres directly abutting Adams' property, and Galbreath owned approximately two acres adjacent to Driscoll's. The Spiva Branch stream flowed downhill from Adams' property through a pond on Driscoll's property and then through another pond on Galbreath's property before merging into another river.

Adams began harvesting timber in March of 1995 in order to develop his property for vacation homes. He cut and graded roads, installed storm pipes, and removed timber. This activity caused erosion which Adams did little to prevent. This erosion caused considerable damage to Driscoll's and Galbreath's properties. Adams did not seek proper approval from any federal, state, or local government agency before starting work on his property. In September 1996, Adams filed for the required state permit after