

9-1-2008

## Utah Div. of Forestry, Fire & State Lands v. United States, 528 F.3d 712 (10th Cir. 2008)

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Nicole A. Bonham Colby, Court Report, Utah Div. of Forestry, Fire & State Lands v. United States, 528 F.3d 712 (10th Cir. 2008), 12 U. Denv. Water L. Rev. 261 (2008).

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to meet one use to exclude it from Tier II status, not both, as Alliance maintained. Finally, the court disagreed with Alliance that the EPA's approval of ninety percent of Kentucky waters for Tier II status meant that the EPA would actually grant ninety percent of the waters Tier II status; the court held that the regulations do not require a minimum threshold for the proportion of a state's waters that must earn Tier II status.

The court agreed with Alliance that the EPA's approval of six exemptions from Tier II was arbitrary and capricious, holding that five of them would result in significant water quality degradation, not *de minimus*, under Tier I status. The court held the EPA must determine whether Kentucky's regulations would result in significant degradation. The court focused on how much of the water body's assimilative capacity would decline by shifting the five sets of discharges from Tier II to Tier I status. However, instead of assessing the impact of individual exemptions on degradation, the court held that the EPA must calculate the cumulative impact of the exemptions on degradation. The court also held that the EPA must quantify and justify its assimilative capacity results and remanded the issue back to EPA to resolve these deficiencies.

Finally, the court found Kentucky's coal-mining discharge exemption invalid because the EPA unlawfully relied on a Cabinet commitment it falsely interpreted. The EPA violated federal APA approval procedure by convincing the Cabinet it could demonstrate socio-economic necessity for coal-mining discharges to exempt them from Tier II status. The court held that the existing regulations unambiguously precluded Tier II exemptions for coal-mining discharges. The EPA violated procedural rules and undermined the CWA public participation process by accepting a mere assurance from the Cabinet that it would show socio-economic necessity for the discharges instead of requiring Kentucky to amend its regulations, as the Act requires.

The court affirmed summary judgment in favor of the EPA for the EPA's approval of Kentucky's methodology for Tier II selection status and for the EPA's approval of Kentucky's application of that methodology for impaired waters. The court reversed summary judgment for the EPA on its approval of Kentucky's five *de minimus* exemptions, holding it arbitrary and capricious and remanding reconsideration of the exemptions to the EPA. The court also reversed summary judgment for the EPA on the coal-mining discharge exemption, holding the action unlawful and remanding it to the EPA for reconsideration.

*Suzanne Lieberman*

## TENTH CIRCUIT

**Utah Div. of Forestry, Fire & State Lands v. United States, 528 F.3d 712 (10th Cir. 2008)** (holding: (1) Utah had standing to litigate ownership of disputed property; (2) the district court did not abuse its discre-

tion in upholding a water mark stipulation and then vacating a resulting judgment; (3) the district court did not err in allowing the State of Utah to raise the landowners' lack of title to disputed property in an amended complaint; and (4) the district court did not err in quieting title against the landowners in light of the Color of Title Act).

To determine the boundaries separating the lakebed of Utah Lake and surrounding private land holdings, the State of Utah ("State") filed suit in United States District Court for the District of Utah ("district court") first in 1997 against the United States and a private landowner, and then again in 1999 adding 200 private landowners to the suit. The latter complaint included the Clinger Family Partnership ("Clinger Family"), whose appeal is the subject of this opinion. The appellate court's decision followed a convoluted procedural history and a decade of litigation centering on conflicting interpretations of statehood-era water marks and land patents.

As background, the State and Clinger Family each argued conflicting lakebed boundaries in the Powell Slough area, both looking to United States Geological Survey ("USGS") marks from 1856 and 1874 to determine the mean high-water elevation mark, called the "meander" line. In short, the 1856 line was eastward and higher in elevation than the line from 1874.

In its suit, the State claimed that it automatically acquired the lakebed of Utah Lake – a navigable, 150-square-mile freshwater lake west of Provo – at statehood in 1896 under the Equal Footing Doctrine. The State claimed it owned the lakebed up to the ordinary high water mark at statehood and submitted the 1856 USGS meander line as best evidence of the mark, a scenario that would negate any United States or private property rights between the mark and the water's edge. The Clinger Family owned property on the east side of the lake in the Powell Slough area and traced its title to an 1881 patent from the United States to predecessor James Clinger. The Clinger Family argued they owned the land below the 1856 mark for the following reasons: they had possessed, used and farmed the disputed property; they had paid taxes on part of the property; and they had included the property in deeds from 1887 forward, describing conveyances as stretching from its deeded ground to the water's edge.

In September 2001, the district court rejected Utah's claim that the 1856 meander line was appropriate, finding that the actual water line from the year of statehood was not discernable and the State's reasoning not persuasive. The district court instead employed a standard from a series of cases where the Utah Supreme Court held that the State had the burden to prove the location of the ordinary high water mark at statehood and, when it did not, the court quieted title to those landowners that could offer proof of historical title, use, and possession at statehood. The district court applied that standard in the instant case, but excepted the Powell Slough property.

In 2002, the State and Clinger Family agreed to a stipulation to determine the level of historic private use on the disputed property. The effort resulted in an agreed upon ordinary high water mark of 4,481 feet above sea level. The parties then filed a joint motion, granted by the court, to quiet title in the Clinger Family property claim to that designated elevation. However, in a surprise move seven months later, the State motioned to set aside the court's judgment. The State claimed that when it posed the joint motion establishing the 4,481 elevation mark, state land officials had not understood that the United States' original assignment of rights did not include property in Powell Slough. As a result, the State argued its then-counsel did not have authority to enter into an agreement with the Clinger Family. The district court denied the State's motion to set aside the 4,481 stipulation, but did set aside its earlier judgment in favor of the Clinger Family, agreeing that the State's former counsel did not have authority to make the agreement without approval of state land officials.

The State filed a separate motion for partial summary judgment against the Clinger Family and other property owners in the Powell Slough, arguing that the Clinger Family's predecessors did not receive patents to the lake, as the United States had owned parcels between the lake and the Clinger Family parcel at the time of the 1881 patent. In a cross-motion, the Clinger Family argued the State did not have an interest in the property between the two meander lines and between the 1856 line and 4,481 stipulated ordinary high water mark because the Clinger Family had occupied, used, and possessed the property since 1878. The Clinger Family also argued that the State lacked standing as it admitted in its own motion that it did not have claim to the land between the two meander lines. The district court sided with Utah on all accounts, finding first that Utah did have standing, as part of its sovereign lakebed could have been above the lower meander line, and second, that only the United States' unpatented lands were subject to the earlier Utah Supreme Court test, as the Clinger Family's "overreaching" deed did not establish claim to the United States' unpatented land separating the private landowners' land from Utah Lake.

In the present action, the Clinger Family unsuccessfully appealed four points: (1) the State lacked standing; (2) the district court abused its discretion in vacating the earlier judgment; (3) the district court erred in ruling on lack of title by the Clinger Family to the disputed property as the issue was not pled in litigation; and (4) the court erred in its interpretation of the Color of Title Act.

The court found no merit to the latter two claims, holding that the record provided sufficient evidence that the property was in dispute and that the Clinger's color of title claim against the federal government was a separate, unrelated issue. However, the court gave a greater response to the Clinger Family's first two claims, even though they were ultimately unsuccessful.

Pointing to prior court opinions and a Utah public use statute, the Clinger Family specifically claimed the State lacked standing to litigate property ownership above the second meander line established in 1874 and to assert claims as a third party on behalf of the United States. This argument did not persuade the appellate court. The State had standing because it had asserted a right to the lands above the 1874 mark throughout the prior district court proceedings. In addition, the parties' competing argument regarding the marks was sufficient to establish standing. The Utah public use statute also did not diminish the State's standing, as it did not address boundaries between a lakebed and surrounding property. Finally, the United States' interest did not diminish the separate interests of the State in the matter.

The Clinger Family's second claim regarded the district court's decision not to vacate the 4,481 stipulation itself, but then to vacate the judgment that resulted from the stipulation. The district court had offered two grounds for its decision: first, while the State's formal counsel had authority to enter into the stipulation itself, counsel lacked authority to enter into the resulting order; second, the judgment relied on an improper language construction of the stipulation. However, in its appeal, the Clinger Family had concentrated only on the court's first analysis. The appellate court denied the appeal, focusing on the fact that the Clinger Family had failed to challenge the improper language construction. The court also found the district court did not abuse its discretion in separating the stipulation from the judgment, as the stipulation did not address the Clingers' land specifically and did not set an ultimate boundary.

*Nicole A. Bonham Colby*

## FEDERAL CIRCUIT

**Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008)** (holding: (1) although the government breached its contract providing water rights to the contracting party, an agency's action to preserve an endangered species is a sovereign act that shields the agency from liability; and (2) when the federal government requires a water rights holder to divert water to comply with the Endangered Species Act, the diversion results in a compensable physical taking under the Fifth Amendment).

Casitas Municipal Water District ("Casitas") brought this action against the United States for breach of contract and a physical taking of a property interest under the Fifth Amendment when the Bureau of Reclamation ("Reclamation") executed a directive requiring Casitas to construct, operate, and divert water into a fish ladder facility to comply with the Endangered Species Act ("ESA"). Casitas and Reclamation entered into a contract to construct the Ventura River Project ("Project") in 1956. Under the terms of the contract, Reclamation would build the Project and Casitas would repay Reclamation over a