

ADMINISTRATIVE APPEAL DECISION

THOMAS CARL ROTHDEUTSCH

FILE NO. SAJ-2008-3397

JACKSONVILLE DISTRICT

21 DECEMBER 2009

Review Officer: Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

Appellant: Thomas Carl Rothdeutsch

Date on Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA): 23 July 2009

Receipt of Request for Appeal: 16 September 2009

Acceptance of Request for Appeal: 21 September 2009

Appeal Conference: 19 October 2009

Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344) and Section 10 of the Rivers and Harbors Act (RHA) of 1899 (33 U.S.C. § 403).

ACCEPTED REASONS FOR APPEAL:

Appeal Reason 1: “The Adams-deOnis Treaty of 1819 gave the Federal government jurisdiction of Florida. The Treaty of Friendship and General Relations signed with Spain in 1903 [sic] nullified the Adams-deOnis Treaty. Article XXIX states, ‘all treaties, agreements, coventions [sic] and contracts between the United States and Spain prior to the Treaty of Paris shall be expressly abrogated and annulled.’ Since the Adams-deOnis Treaty was signed prior to this treaty, it was annulled at this time. There has not been a new treaty signed with Spain that gives jurisdiction of Florida back to the Federal government. This was confirmed as recently as 1966 when President Johnson had the Attorney General review the Treaty of Friendship and General Relations. After reviewing the treaty, the Attorney General reinvigorated the treaty in full. Treaties are the Supreme Law of the land over simple acts of Congress such as the CWA.”

Appeal Reason 2: “The ACOE jurisdiction ends at the territorial Sea Limits (TSL) when Florida became a state on March 3, 1845. The TSL ends 3 miles on the East coast and 9 miles on the West coast of Long Key. Everything beyond that area is governed by international treaties as the Federal government never claimed the Sovereign [sic] Land (SSL) or the Navigable Water (NW) over it.”

SUMMARY OF DECISION: Appellant's request for appeal does not have merit. The administrative record supports the District's determination that the Appellant's site contains waters of the United States (U.S.), that are subject to jurisdiction, under Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344) and Section 10 of the Rivers and Harbors Act (RHA) of 1899 (33 U.S.C. § 403).

BACKGROUND INFORMATION: Mr. Thomas Carl Rothdeutsch is appealing the Jacksonville District's decision to take jurisdiction over waters of the U.S. on property located at 22861 John Silver Lane, Lot 6, Block 23 of the Cutthroat Harbor Estates subdivision, Section 28, Township 66 South, Range 28 East, Cudjoe Key, Monroe County, Florida.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. Regarding appeal reason 2, Appellant stated at the appeal conference that the U.S. Army Corps of Engineers (USACE) jurisdiction ends at Long Key. Appellant also stated that when Florida became a state and the borders of the state were defined, Long Key was defined as the southern border of Florida. Appellant stated that he could not find anything since that time which extended the southern border of Florida.
3. Regarding appeal reason 2, the District explained at the appeal conference that, in accordance with 33 CFR § 328.4(a), the limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction to a distance of three nautical miles. In addition, the District explained that Florida revised its constitution in 1968, to include specifying that its boundaries extended to the Dry Tortugas to the west.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT ENGINEER (DE):

Discussion – General: Both of Appellant's reasons for appeal rest on his conclusion that the Federal government and USACE lack jurisdiction over the State of Florida. Appellant does not challenge any of the District's factual determinations or the conclusion that waters of the U.S. are present on Appellant's property. As explained below in response to each appeal reason, the Federal government and USACE have jurisdiction.

Appeal Reason 1

Finding: This reason for appeal does not have merit.

Action: None required.

Discussion: Appellant challenges the authority of the USACE to make the jurisdictional determination based solely on the conclusion that the Federal government lacks

jurisdiction because the State of Florida reverted back to Spanish control under his interpretation of two treaties. Appellant bases this conclusion on the argument that the Treaty of Friendship and General Relations -- a treaty between the U.S. and Spain, which was signed in 1902 and entered into force in 1903 -- "abrogated and annulled" all previous treaties. One such previous treaty is the Adams-Onis Treaty of 1819, which set forth Spain's agreement to give the Federal government jurisdiction over Florida.

Appellant's interpretation of these treaties directly conflicts with the United States' interpretation and the conduct of the parties to the treaty during the ensuing hundred and six years. Florida's status as a State subject to the operation of the Federal Constitution and the laws of the United States was unaffected by the 1902 treaty. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (applying the U.S. Constitution to a dispute between the Seminole Tribe and State); *Skiriotes v. State of Florida*, 313 U.S. 69, 76 (1941) (discussing powers committed by the Constitution to the Union and those that the State of Florida retained as a sovereign); *Benner v. Porter*, 50 U.S. 235 (1850) (discussing effect of Florida's admission as a State on the jurisdiction of territorial courts). Furthermore, the United States' obvious interpretation of these treaties is entitled to great weight. *Medellin v. Texas*, 128 S. Ct. 1346, 1361 (2008).

In Section 404 of the CWA (33 USC § 1344), Congress gave the Secretary of the Army, acting through the Chief of Engineers, the authority to issue permits for the discharge of dredged or fill materials into the navigable waters of the United States, including the State of Florida, at specified disposal sites. Implicit in this authority is USACE's ability to issue formal determinations concerning the applicability of the CWA or the RHA to tracts of land. 33 C.F.R. § 320.1(a)(6). Consequently, the USACE properly exercised its legal authority to make the jurisdictional determination (JD), and the JD is enforceable against Appellant.

Appeal Reason 2

Finding: This reason for appeal does not have merit.

Action: None required.

Discussion: Appellant's second argument appears inconsistent with his first argument. Appellant implicitly concludes that USACE has jurisdiction over Florida, but he seems to argue that the extent of the jurisdiction is based on the boundaries of Florida as they existed when it became a state in 1845. Based on the 1845 boundaries, Appellant concludes that his property is beyond the Federal government's and USACE's jurisdiction. Instead, Appellant argues that the area within which his property is located is governed by international treaties and not federal law.

Appellant's property falls within Florida's boundaries, as specified in Article II, section 1 of the Florida Constitution. Since his property is within the state, Appellant's second reason for appeal fails for the reasons outlined above for Appeal Reason 1.

As background information, the below regulations outline the extent of USACE jurisdiction.

The limits of USACE jurisdiction are defined under 33 CFR § 328.4 as:

- a. **Territorial Seas.** The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR § 329.12)
- b. **Tidal Waters of the United States.** The landward limits of jurisdiction in tidal waters:
 1. Extends to the high tide line, or
 2. When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.
- c. **Non-Tidal Waters of the United States.** The limits of jurisdiction in non-tidal waters:
 1. In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or
 2. When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.
 3. When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

The geographic and jurisdictional limits of oceanic and tidal waters are defined under 33 CFR § 329.12 as:

a. **Ocean and coastal waters.** The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR § 322.3(b)).

1. **Baseline defined.** Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

2. **Shoreward limit of jurisdiction.** Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of

vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

b. **Bays and estuaries.** Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

33 CFR § 322.3(b) states:

Outer continental shelf. DA permits are required for the construction of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf, pursuant to Section 4(f) of the Outer Continental Shelf Lands Act as amended. (See 33 CFR § 320.2(b).)

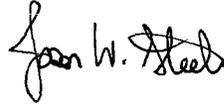
33 CFR § 320.2(b) states:

Section 10 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 403) (hereinafter referred to as section 10), prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. The authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, by section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. § 1333(e)). (See 33 CFR Part 322.)

CONCLUSION: For the reasons stated above, I find that the appeal does not have merit since the District's administrative record contains substantial evidence to support its determination that the subject property contains "waters of the United States" and, consequently, is subject to federal jurisdiction and regulation under Section 10 of the RHA and Section 404 of the CWA. Appellant's contention that the State of Florida is not a state of the United States and, therefore, not subject to the CWA is completely without merit. Since Appellant's property has been determined to include "waters of the U.S.", the USACE has properly asserted jurisdiction under its lawful authority. Consequently, the USACE determination is applicable to Appellant, and Appellant has a legal requirement to comply with all applicable requirements. The District's determination was not arbitrary, capricious or an abuse of discretion, and was not

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plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.

A handwritten signature in black ink, appearing to read "Jason W. Steele". The signature is written in a cursive style with a large initial "J" and a distinct "S" at the end.

Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division