



Koontz v. St. Johns River Water Management District

**New England Housing Network
Annual Conference
December 6, 2013**

**Dwight Merriam, FAICP
Robinson & Cole LLP**

You know the drill, these are my personal observations and not those of **[fill in the blank]**...fact is, I might not stand by some of what I have to say...

**Before we go
too far...**

**Telling the story
Building a vocabulary**

Three Types of Regulatory Takings

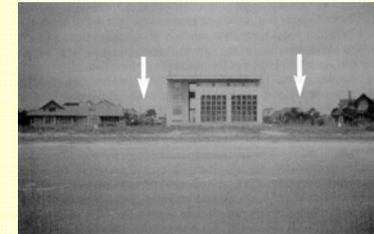
Physical invasion (*Loretto*)

- Very simple



Categorical regulatory taking (*Lucas*)

- Just like physical invasion



Partial regulatory taking (*Penn Central*)

- Three-part test
 - Diminution of value
 - Investment-backed expectations
 - Balancing of public and private interests



The Other Takings Cases

First time since 1987 that we have had three takings cases in one term...

Nollan v. California Coastal Commission

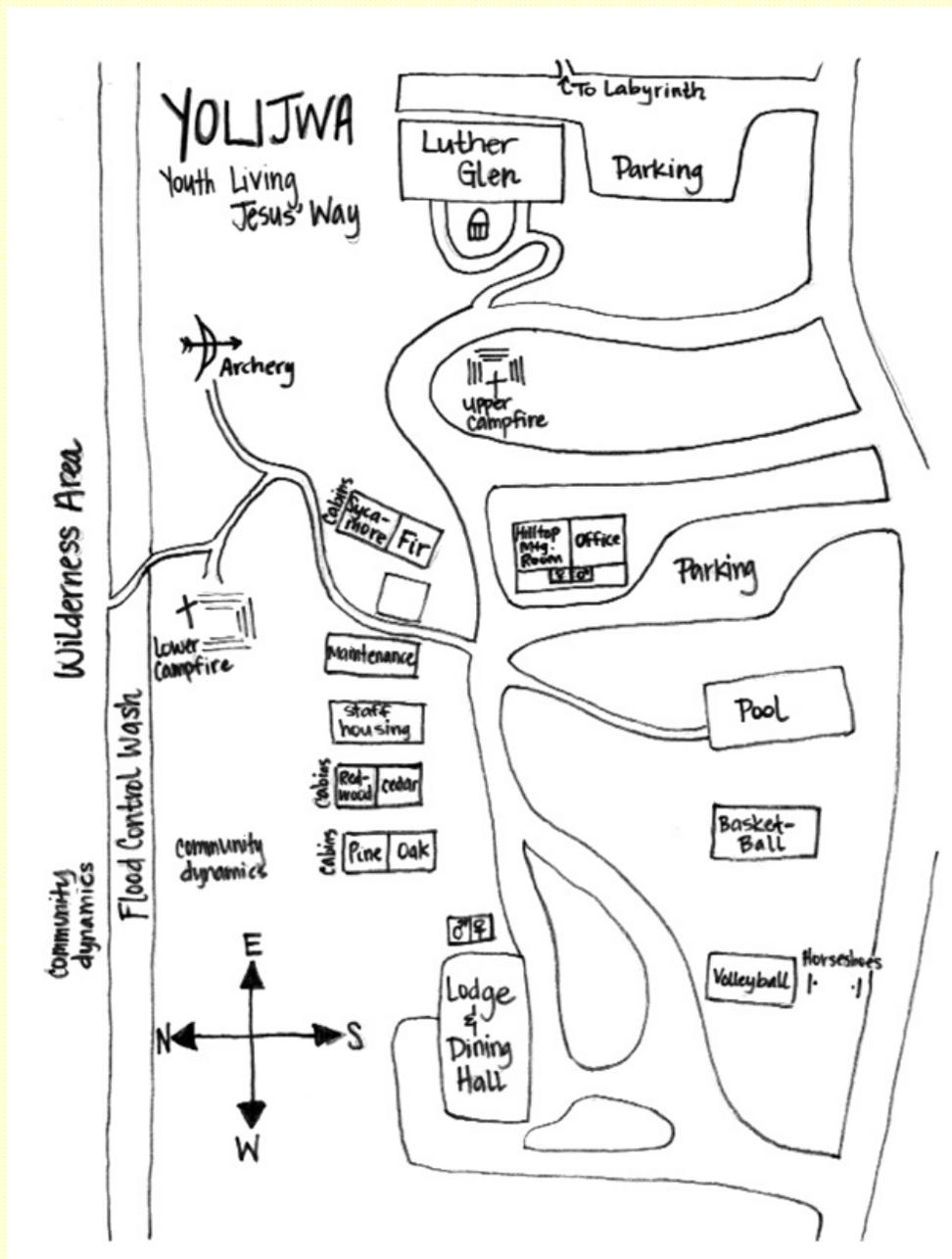




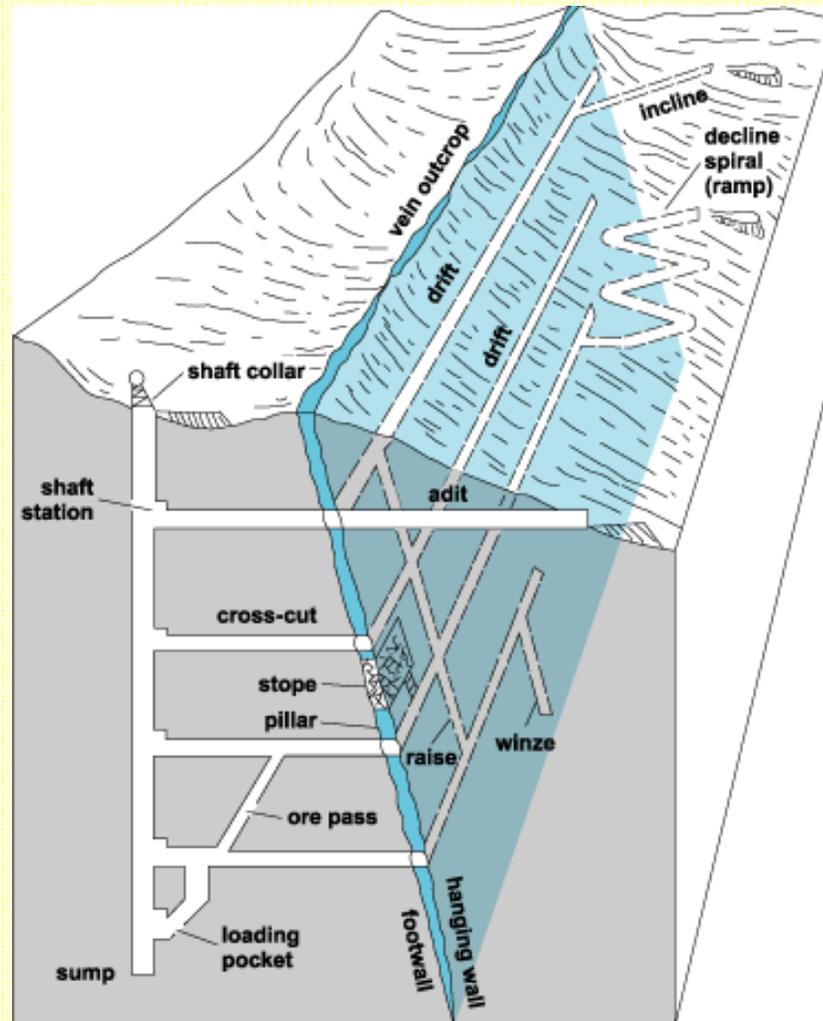


First English v. Los Angeles



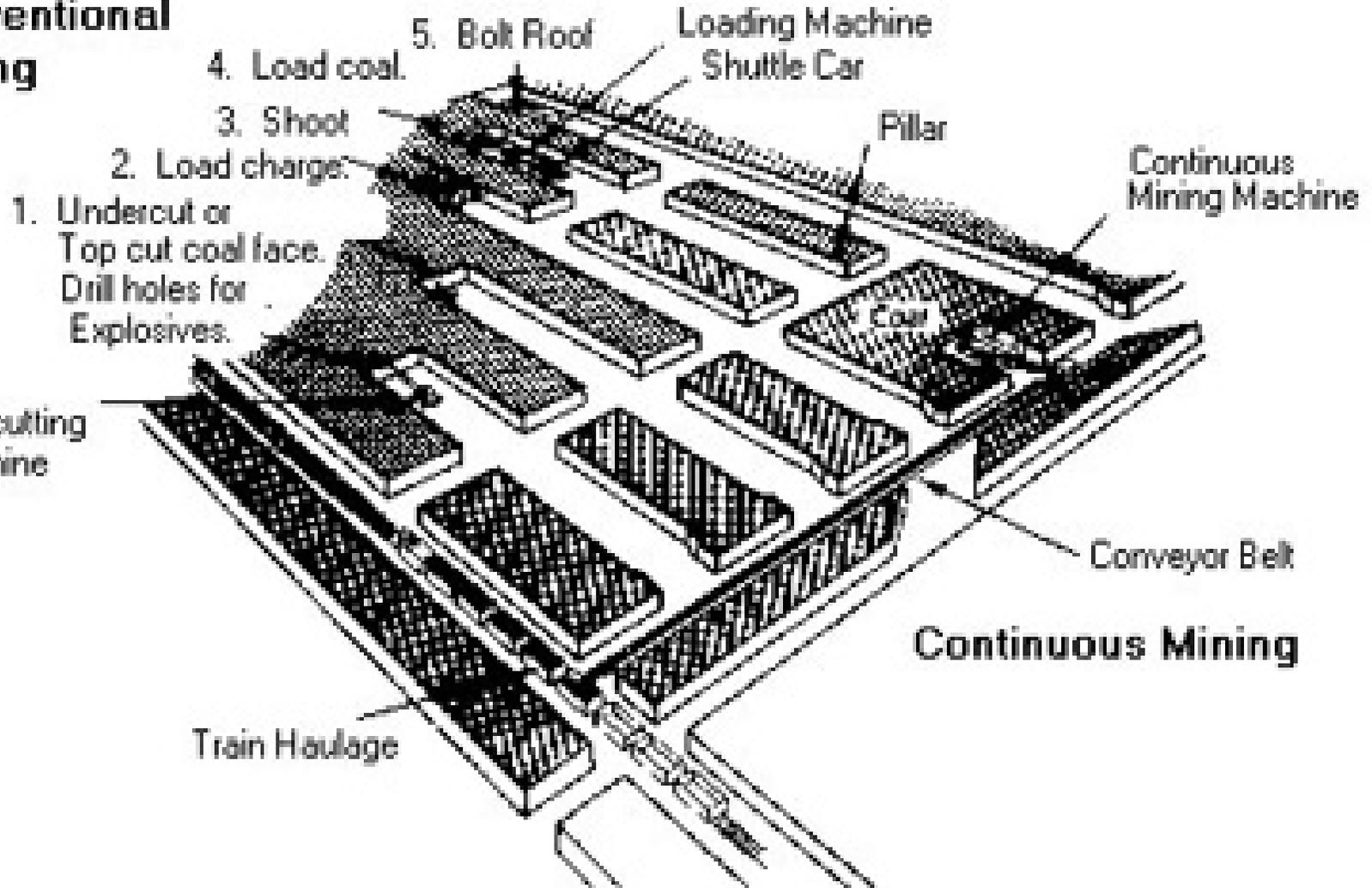


Keystone Bituminous Coal v. De Benedictus



ROOM AND PILLAR MINING

Conventional Mining



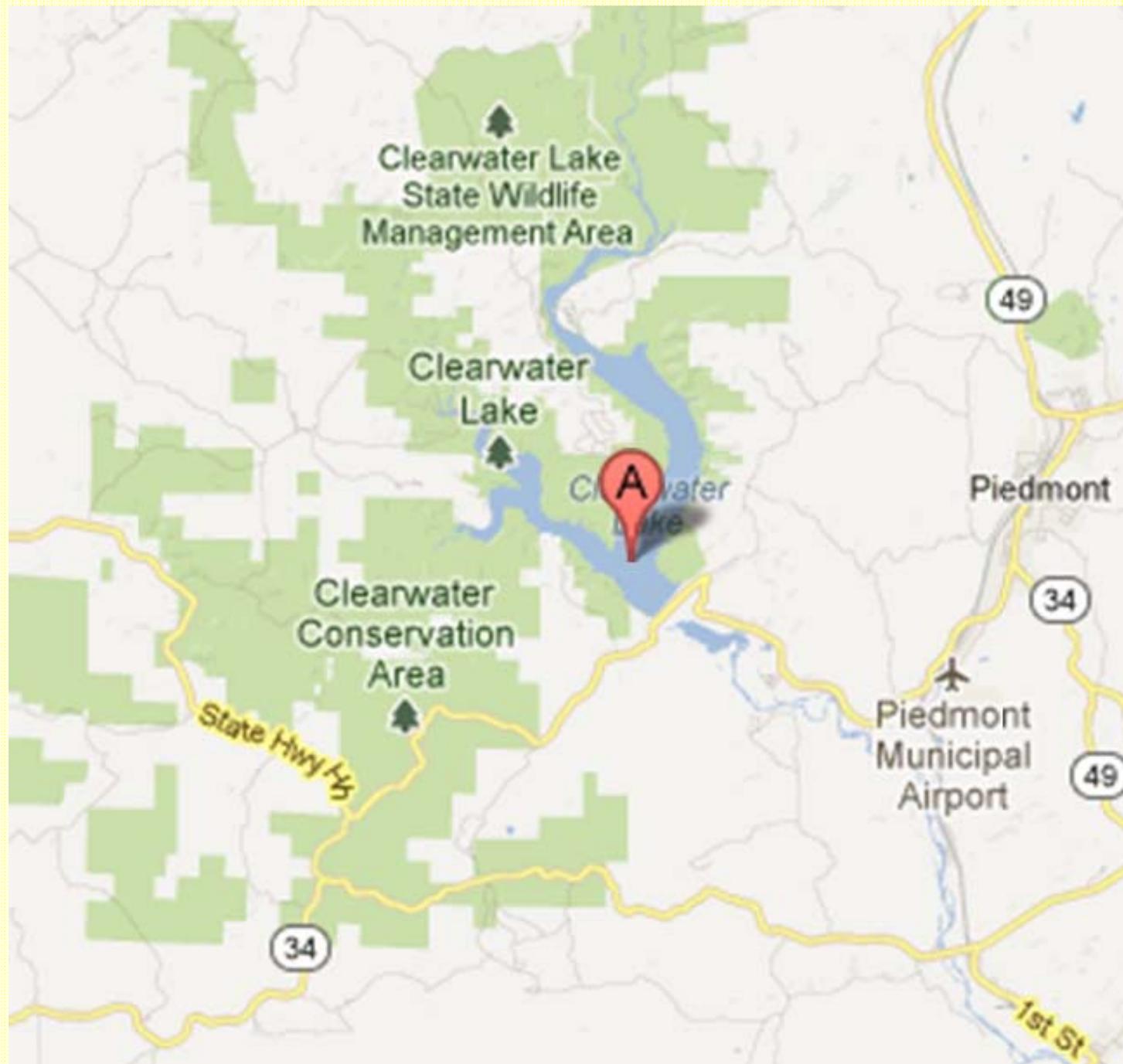
The Other Two This Year...

Arkansas Game & Fish Commission v. United States

Flooding physical taking case



Black River Wildlife Management Area



Clearwater Dam

Missouri





Little Rock Engineer District
Clearwater Dam Site, Black River
Looking southwest from Station 1+24.97 along axis of dam before construction.
October 16, 1940, 8:40 a.m.

Piedmont, Missouri
File C.D. 16

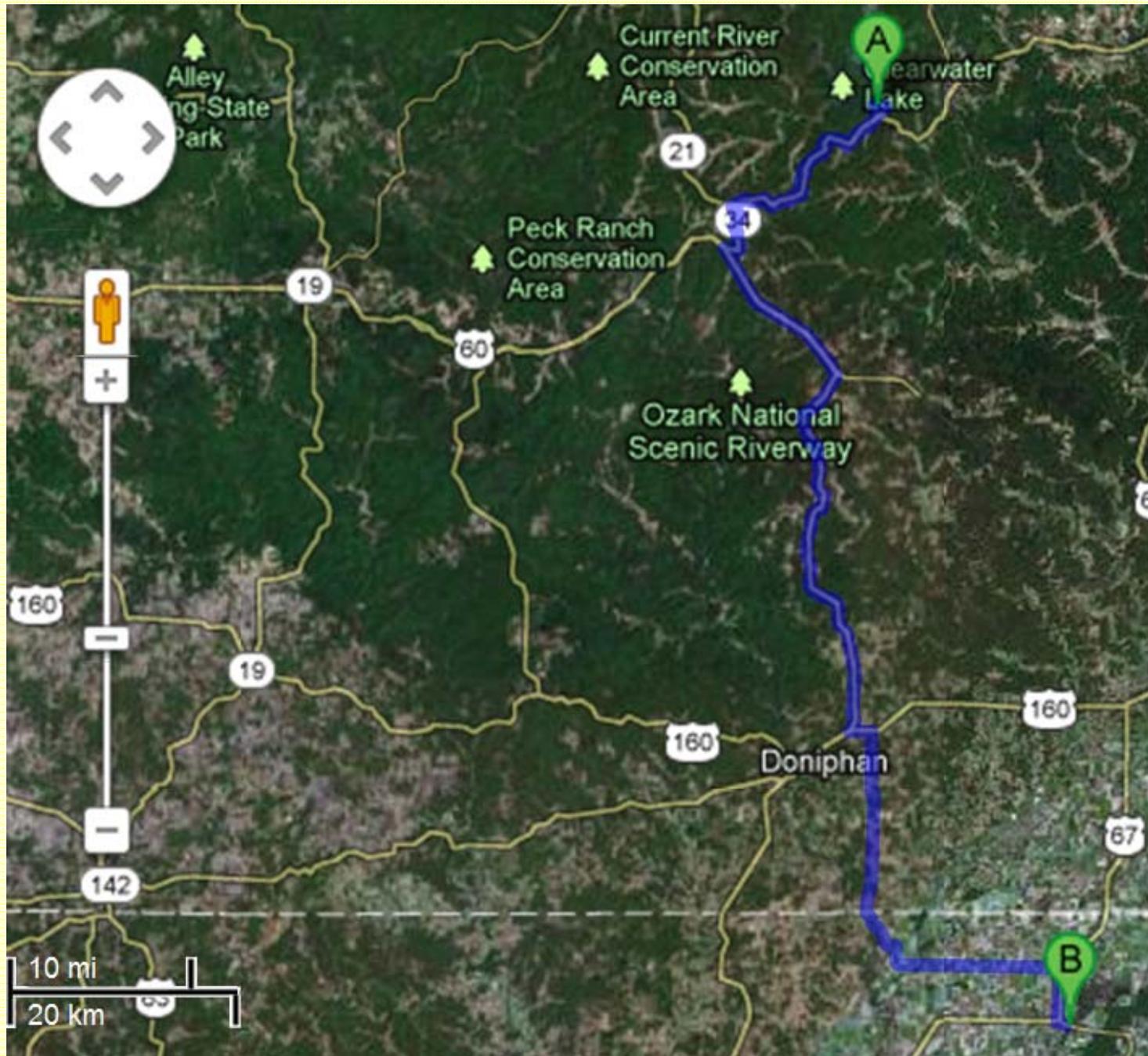


CORPS OF ENGINEERS, U. S. ARMY, LITTLE ROCK DISTRICT, LITTLE ROCK, ARKANSAS
CLEARWATER DAM, BLACK RIVER, PIEDMONT, MISSOURI

View along upstream face of dam showing tower and spillway from Piedmont Park access road.
28 May 1949

FILE: R.D. 132







DAVE DONALDSON
BLACK RIVER

WILDLIFE MANAGEMENT AREA
ARKANSAS GAME & FISH COMM.



A FEDERAL AID PROJECT
27000 ACRES

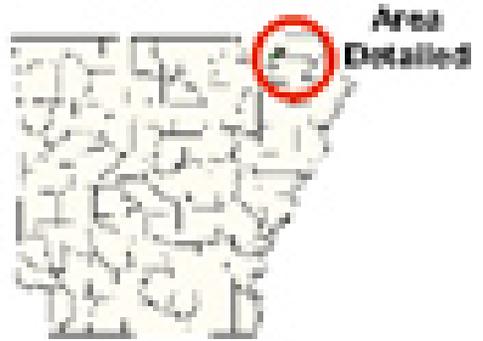
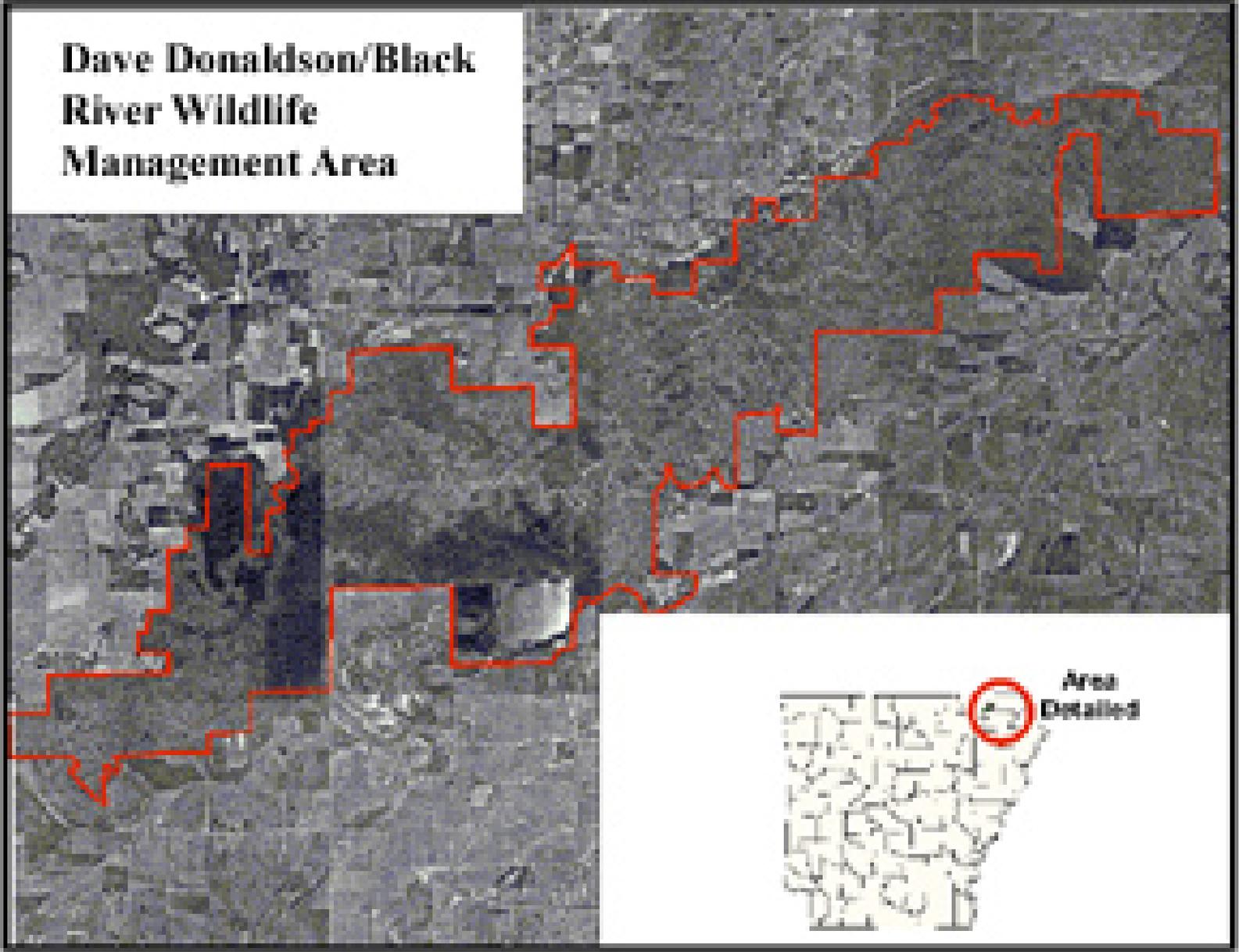
NO DAMAGING - CUTTING TREES

DEVELOPED AND MANAGED
FOR SPORTSMEN'S OF ARKANSAS

NO DAMAGING - CUTTING TREES

PLEASE DON'T LITTER

**Dave Donaldson/Black
River Wildlife
Management Area**





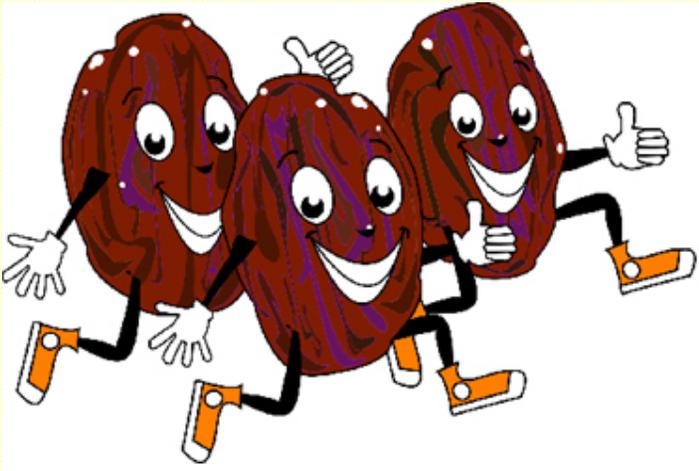






Unanimous for Arkansas, but...

“We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.”



Horne v. Department of Agriculture

- **Agricultural Marketing Agreement Act of 1937**
 - **To stabilize prices; annual reserve pools**
 - **Petitioners held to be in violation**
 - **In their defense Petitioners claimed a taking**
 - **District Court and 9th Circuit said no jurisdiction over takings claim**
- HELD: Ripe and takings defense can be raised**

Lessons Learned...

"I heard it through the grapevine..."

May have weakened ripeness defense

- Preemptive affirmative declaratory action?

**"Just compensation" may not be the only
remedy for a taking**

- Clarifies *Lingle v. Chevron*

Zoning Enforcement Officers – heads up! -

- a new defense argument

U.S. Supreme Court Decision

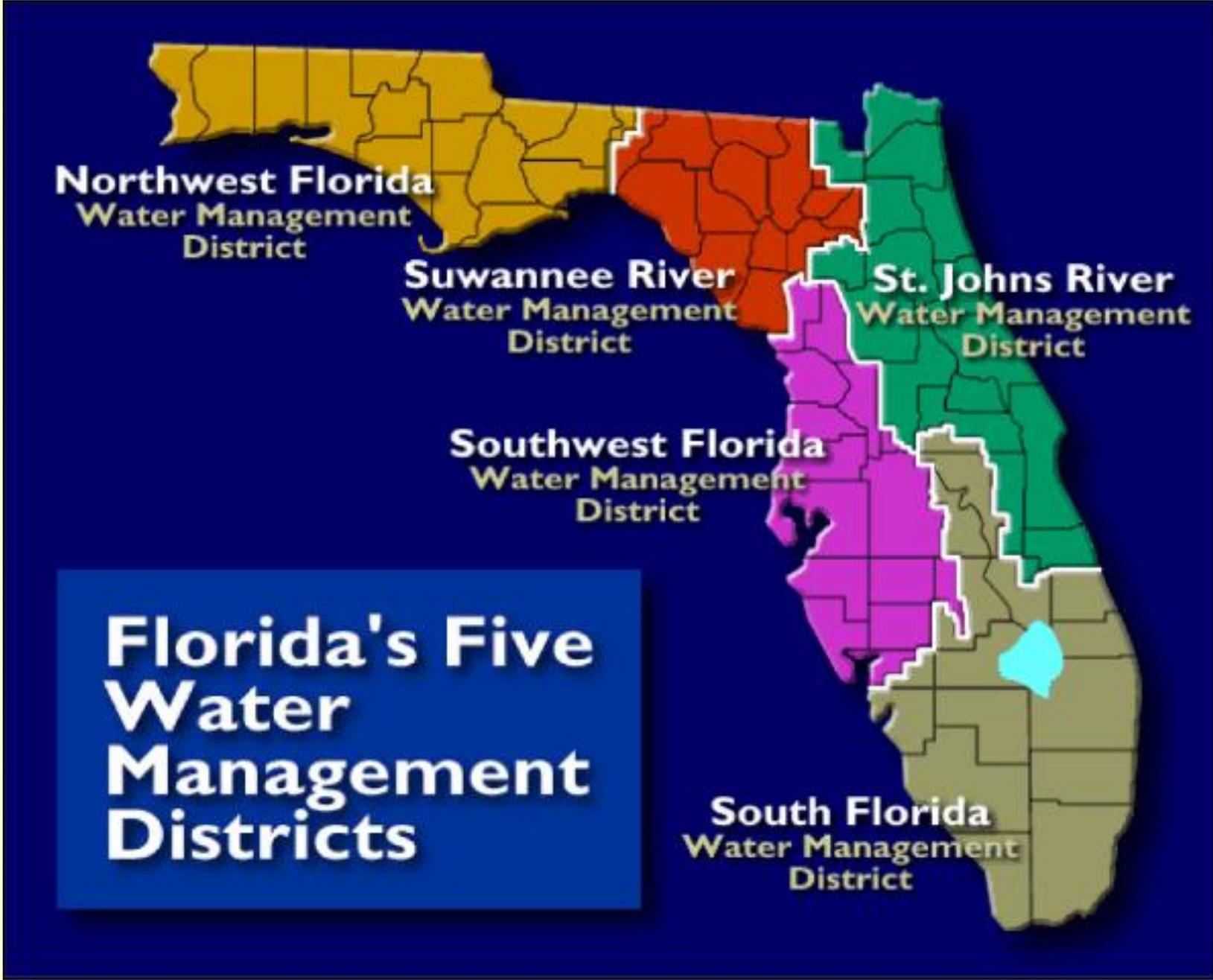
“We hold that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner’s claim that respondent’s actions here failed to comply with the principles set forth in this opinion and those two cases.

The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered."

The Story





A map of Florida divided into five water management districts, each with a different color: Northwest Florida (orange), Suwannee River (red), St. Johns River (green), Southwest Florida (purple), and South Florida (tan). A small cyan area is visible in the southern part of the state. The map is set against a dark blue background.

**Northwest Florida
Water Management
District**

**Suwannee River
Water Management
District**

**St. Johns River
Water Management
District**

**Southwest Florida
Water Management
District**

**Florida's Five
Water
Management
Districts**

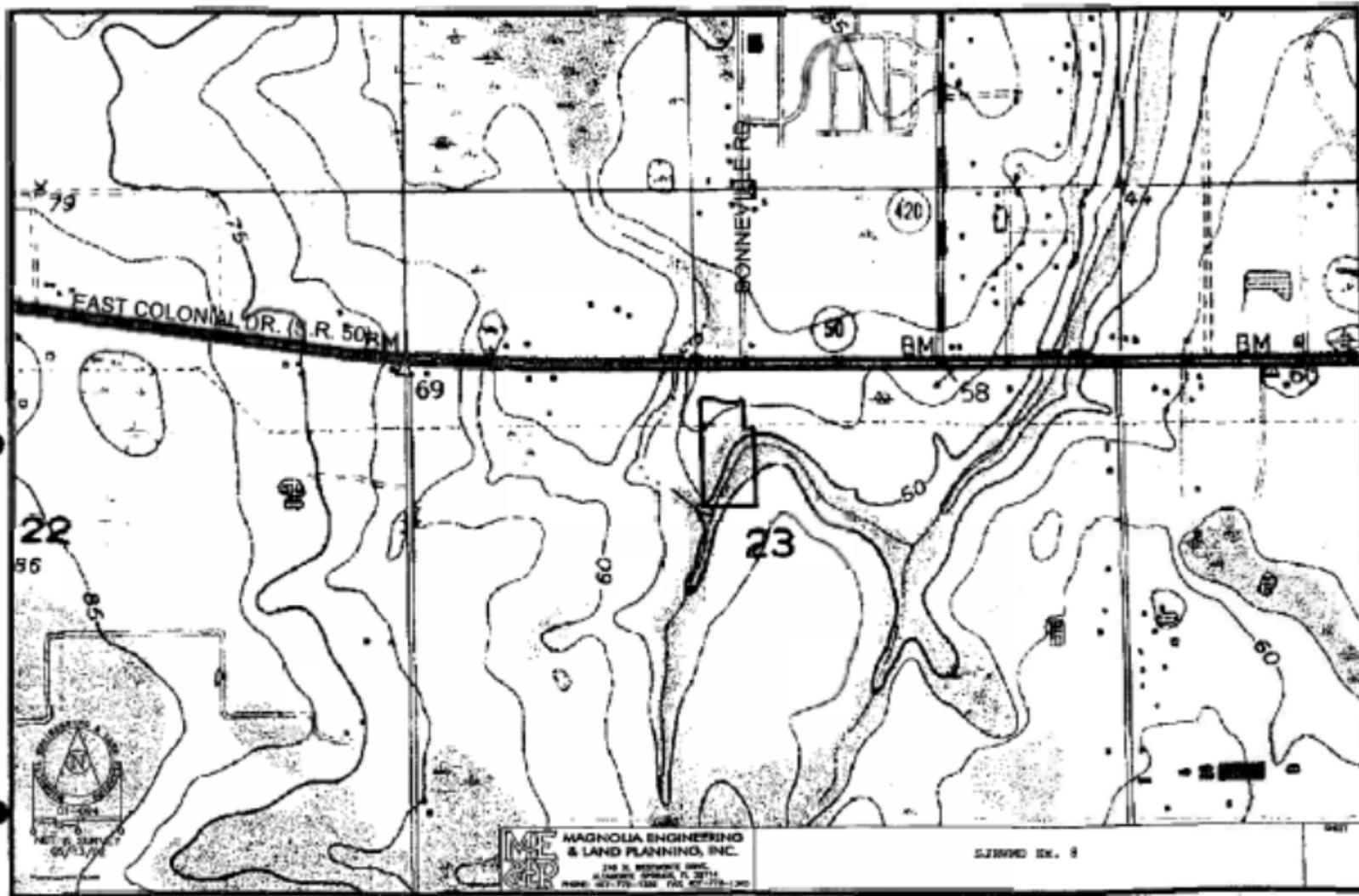
**South Florida
Water Management
District**



(Photo credit: Andrew Weinstein)







Describe, in general terms, the proposed project, system or activity.

Fill 3.75 Acres of 14.21 Acres site to reclaim the 3.75
Acres for commercial development. The remaining
10.46 Acres to be placed in conservation easement.
0.80 Acres of wetland impact.

I hereby designate and authorize the agent listed above to act on my behalf, or on behalf of my corporation, as the agent in the processing of this application for the permit and/or proprietary authorization indicated above; and to furnish, on request, supplemental information in support of the application. In addition, I designate and authorize the above-listed agent to bind me, or my corporation, to perform any requirement which may be necessary to procure the permit or authorization indicated above. I understand that knowingly making any false statement or representation in this application is a violation of Section 373.430, F.S., and 18 U.S.C. Section 1001.

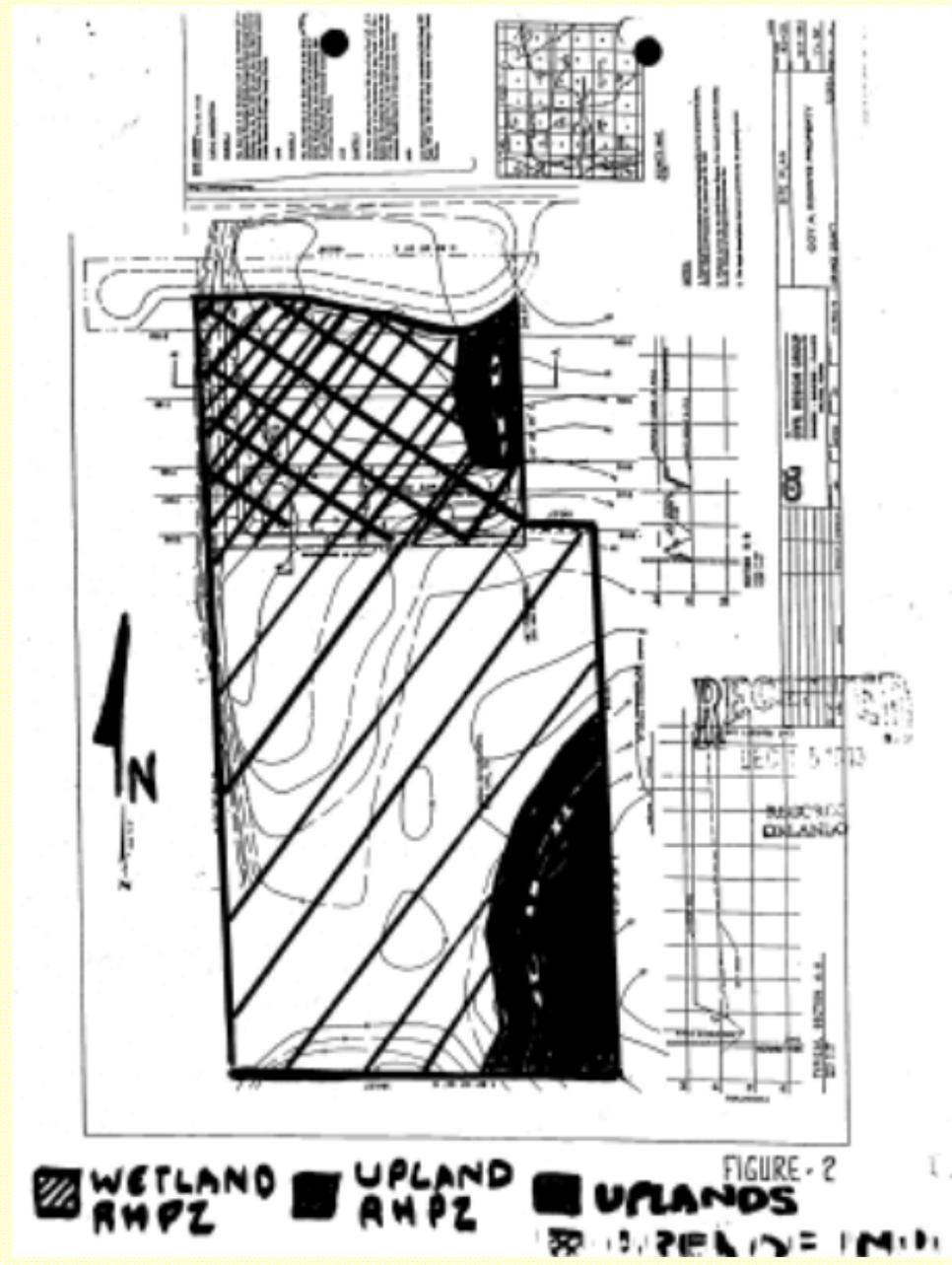
COV KOENIG, Jr.

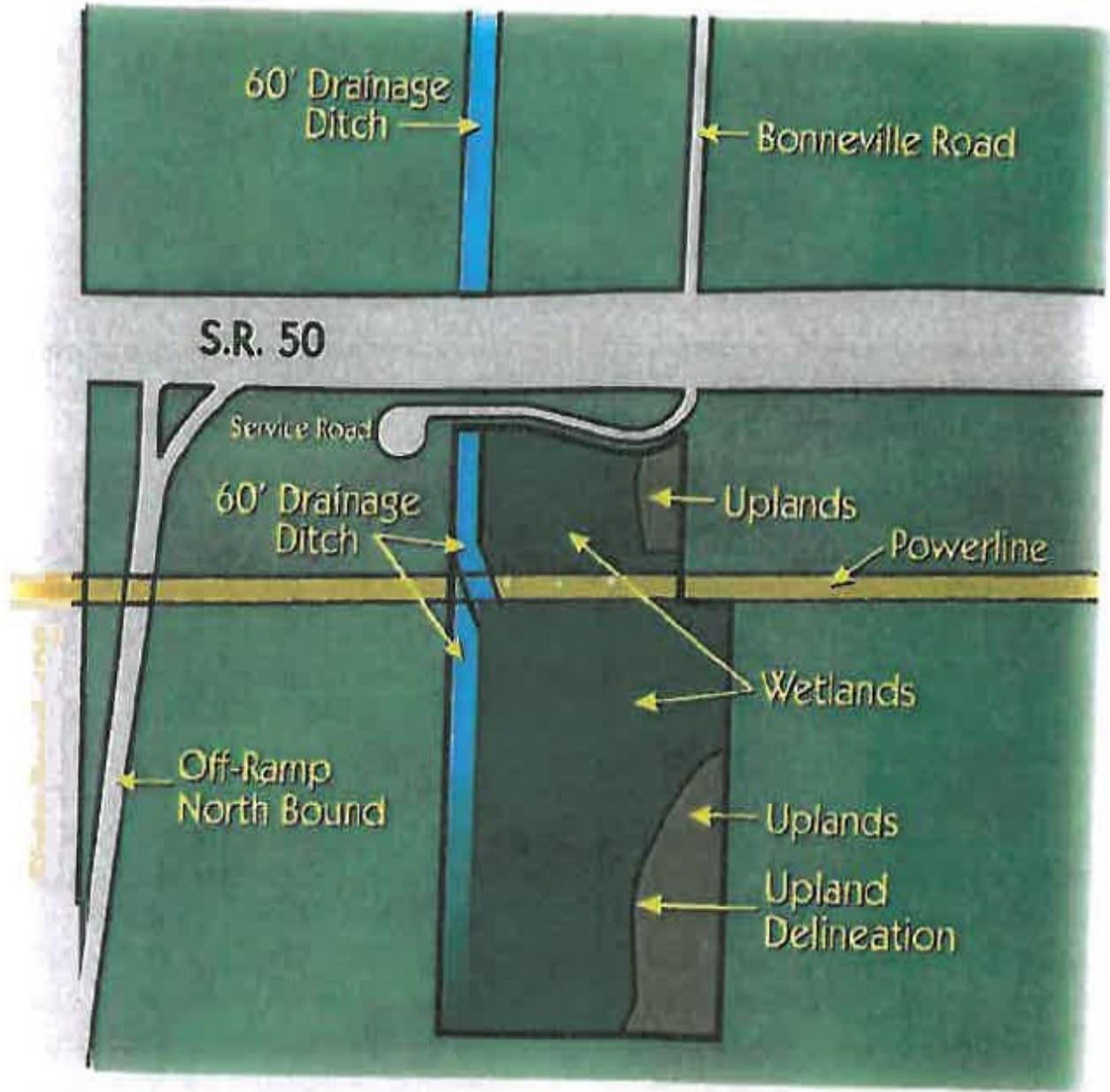
Typed/Printed Name of Applicant

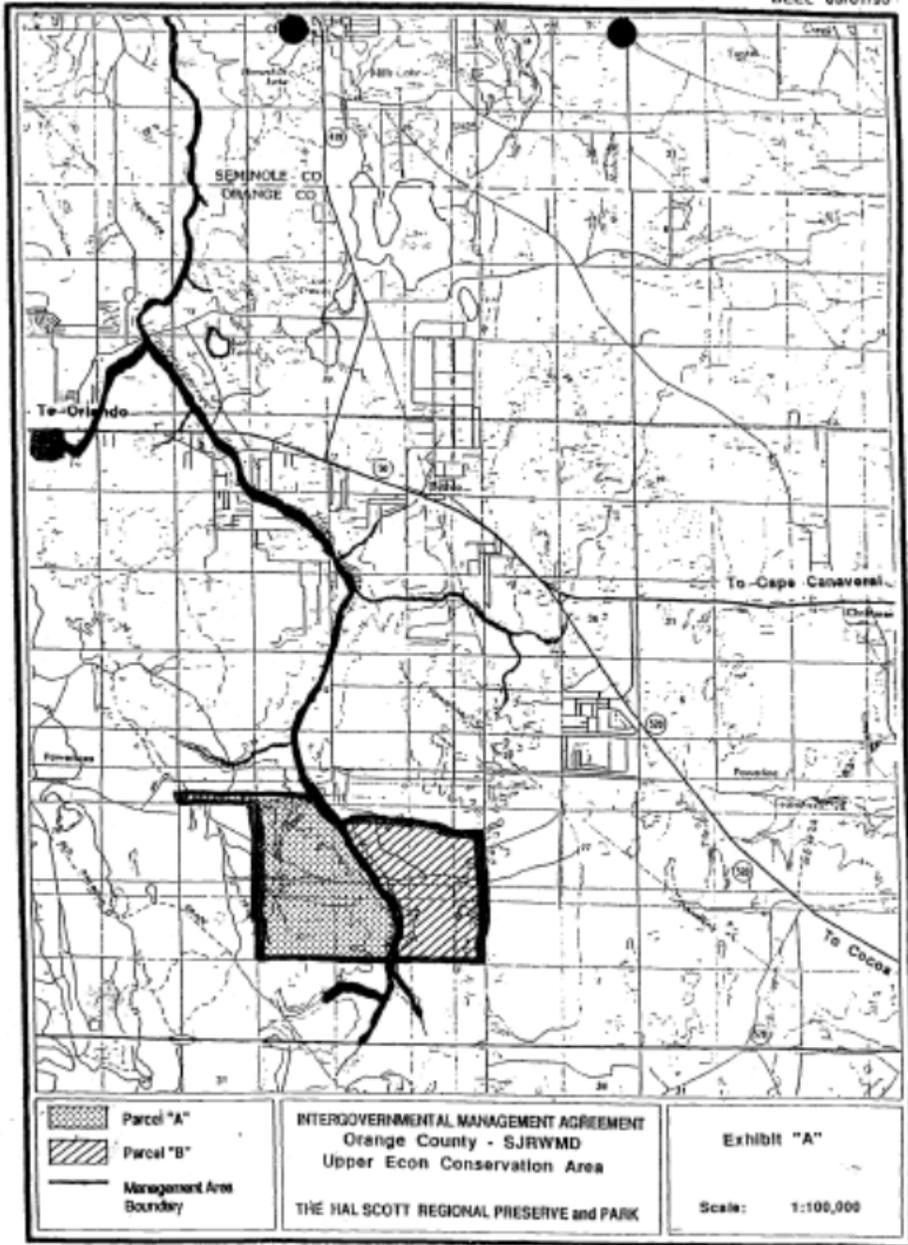
Signature of Applicant

Date

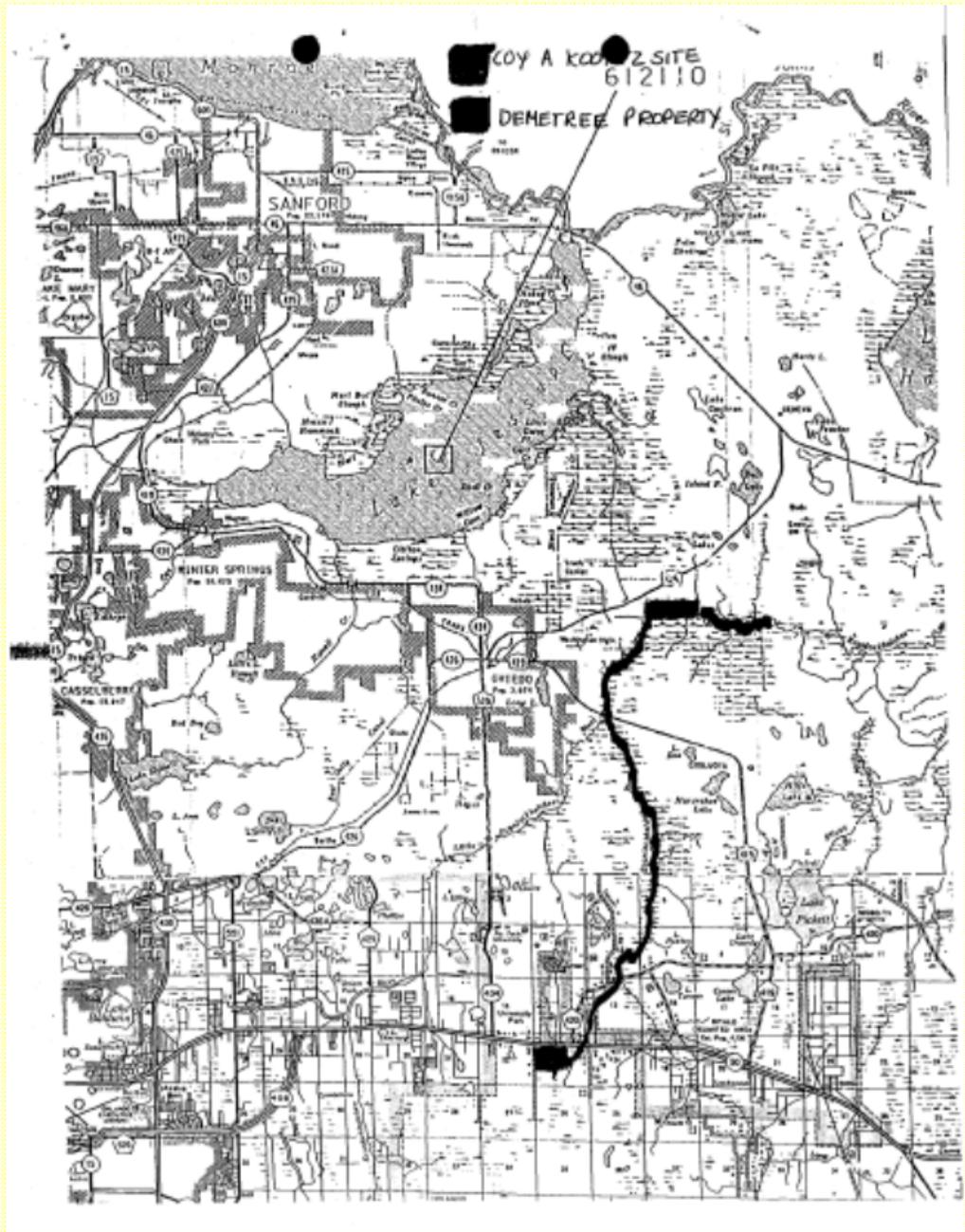
9/19/04







COY A. KOONTZ SITE HAL SCOTT PRESERVE



The Facts

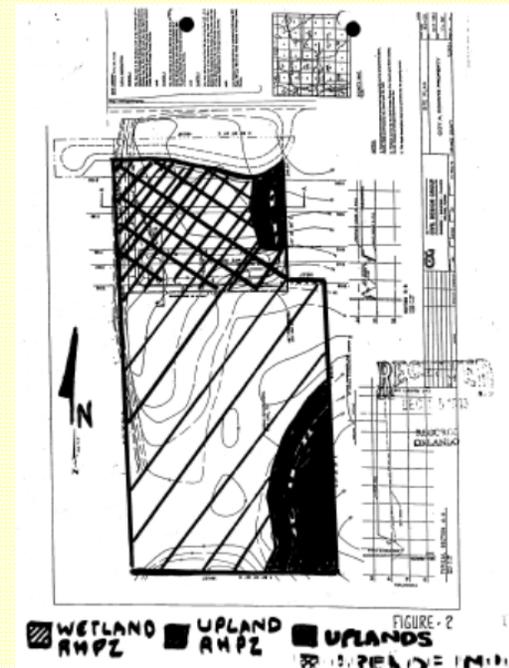
- Undeveloped 14.9 acres east of Orlando
- Near major highway
- Drainage ditch, high voltage lines
- Largely classified as wetlands



- **Management and Storage of Surface Water (MSSW) Permit**
- **Wetlands Resource Management (WRM) Permit**

Koontz offered...

...Conservation easement on 11 acres

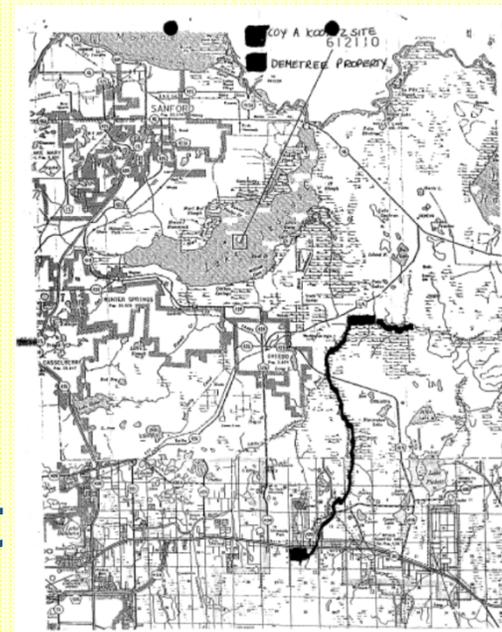


WMD counteroffers...

- Reduce development to 1 acre
- Give easement on remaining 13.9 acres

Alternatively...

- Develop 3.7 acres
- Make improvements several miles away; no particular project



Koontz responds

- Refuses counteroffers
- Sues in state court

The Decisions in Florida

- **Circuit Court (trial court)**
- **Florida District Court of Appeal for the Fifth Circuit**
- **Remand to the Circuit Court**
- **Florida Supreme Court**

Vocabulary

- Nexus
 - *Nollan v. California Coastal Commission*
- Rough proportionality
 - *Dolan v. Tigard*

Nexus

Nollan v. California Coastal Commission

- Does an “essential *nexus*” exist between a legitimate state interest and the permit condition exacted by the city?

**“[H]ere, *the lack of nexus between the condition and the original purpose of the building restriction* converts that purpose to something other than what it was.”
(*Nollan*)**

“In short, *unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’*” (*Nollan*)

Rough Proportionality

Dolan v. Tigard

- Has the city made some kind of *individualized determination* that the required dedication is related *both in nature and in extent* to the *impact* of the proposed development?





- In other words, are they roughly proportionate?
- The most important subparts of the requirement –
 - The focus is on “impact”
Specifically, the impact of the proposed development
 - The relationship of the condition to the *extent* of the impact is essential
Rough proportionality is sufficient
 - The determination must be an *individualized* one

Parsing Koontz

**What Did the Court
Clearly Decide?**

**Money exactions subject to
*Nollan/Dolan***

Nollan/Dolan
Now Apply To:

Mitigation Fees

In-Lieu Fees

Impact Fees

**Property owner/applicant can sue
over a denial**

Government can decide whether and how an applicant must mitigate

“Where the permit is denied and the condition is never imposed, nothing has been taken.”

“While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings.”

“In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.”

"...so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."

"...we ... hold that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."

“...when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a *per se* [takings] approach” is the proper mode of analysis...”

**“It is beyond dispute that
‘[t]axes and user fees . . . Are
not “takings.”’ ... This case
therefore does not affect the
ability of governments to
impose property taxes, user
fees, and similar laws and
regulations that may impose
financial burdens on property
owners.”**

**What Did the Court
Possibly Decide?**

Conditions requiring the developer perform some task at its own expense may also be considered exactions

**Whether the decision applies to
mandatory inclusionary
affordable/workforce housing set-
asides**

What Did the Court *Not* Decide?

"This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*."

Does the decision apply only to ad hoc exactions or does it reach legislative ones?

Does it reach community benefit assessments?

What is a monetary exaction?

**How high is heightened
scrutiny?**

“Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.”

**Whether the off-site mitigation
was an unconstitutional
condition**

“...to the extent that respondent suggests that the posture of this case creates some federal obstacle to adjudicating petitioner’s unconstitutional conditions claim, we remand for the Florida courts to consider that argument in the first instance.”

**Whether the WMD proposal
violated *Nollan/Dolan***

“Respondent also contends that we should affirm because petitioner sued for damages but is at most entitled to an injunction ordering that his permit issue without any conditions. But **we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law.**”

What is the measure of damages?

"² Thus, because the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking."

**Do Any of You
Know the Answers
to these
Questions?**

**Are we likely to see more
special tax districts post-
Koontz?**

**Who pays for more exact
exactions?**

Will we see more wetlands mitigation banks?

**Will there be a trend toward
impact fees?**

How much federalism is at work in this decision?

For MMLA trial lawyers, who now has the burden of going forward and who has the burden of proof when it comes to challenges to government conditions? Has it changed with *Koontz*?

What about ripeness?

After *Koontz*, what's the difference between a taking, a substantive due process violation, and an unconstitutional condition?

Am I the only one who keeps
having *First English* flashbacks?

Several states already apply *Nollan/Dolan* to monetary exactions with no real impact. Is the dissent overstating the effect of the decision?

Is there any evidence that heightened scrutiny under *Nollan/Dolan* has any practical or measurable effect on outcomes?

**Will we see more or less
negotiation?**

Will there be more pre-application meetings?

Will there be more discretionary approaches, such as special development districts?

**How Might The Land
Use Review And
Approval Process
Change?**

More Pre-application Meetings



Gaming – An Ounce of Prevention...



Impact Fees

In-kind exactions are “lumpy”

Jim Nicholas, Ph.D



Special Tax Districts



What is a special district?

A special district is a separate local government that delivers a limited number of public services to a geographically limited area (What's So Special About Special Districts?). Three special tax districts in the metro Denver area are: SCFD, RTD, and the football stadium district. The SCFD is viewed as a national model of public support for sustaining a culturally rich community.

Fees

City of Santa Clara
Municipal Fee Schedule 2012-13

Adopted



June 12, 2012

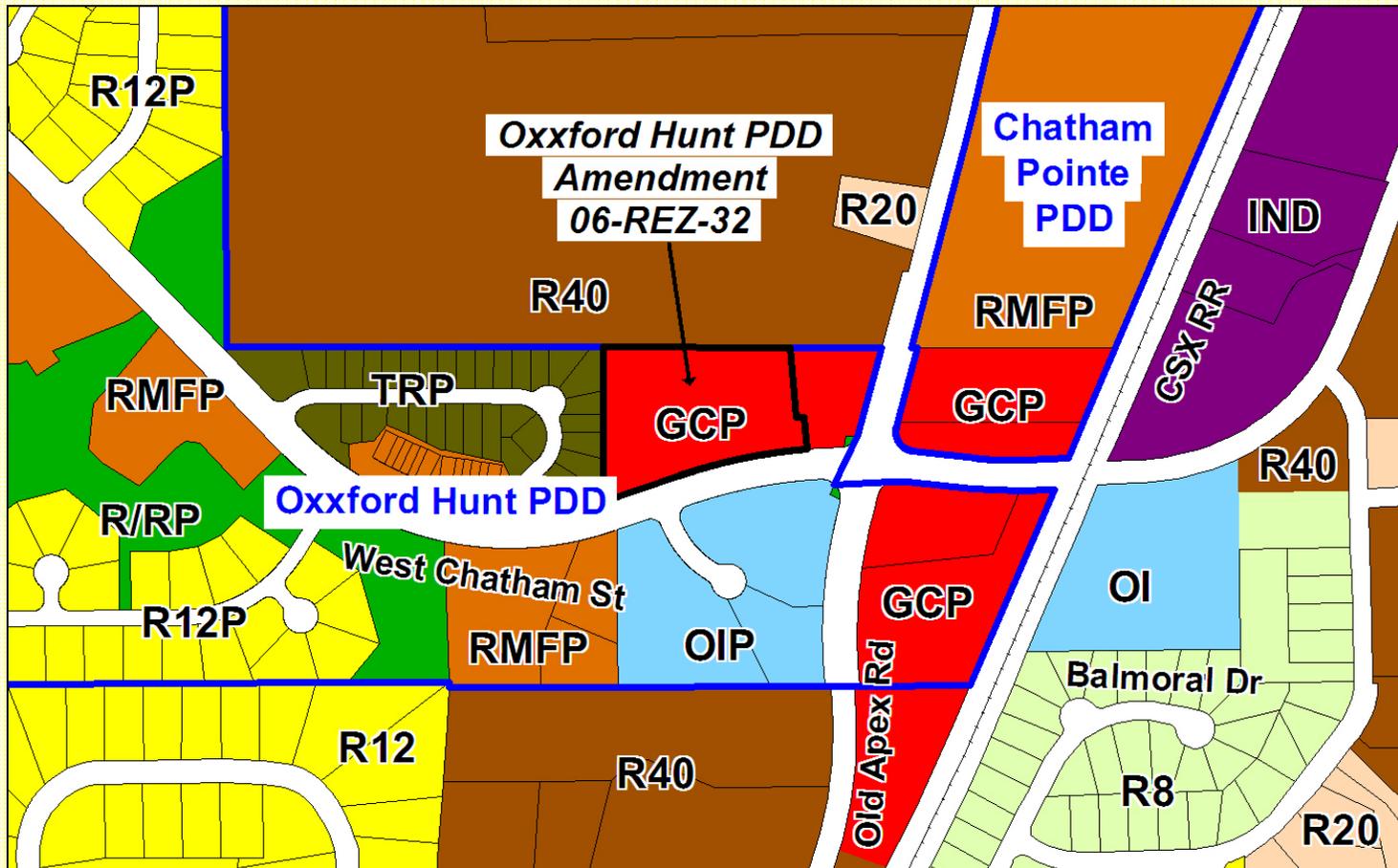
SUBMITTED BY DEPARTMENT / DIVISION:
PLANNING AND INSPECTION

RESOLUTION NUMBER: 12-7941

APPROVED: 06/12/2012

DESCRIPTION OF FEE, RATE OR CHARGE	CURRENT FEE and PERIOD	CHARGING DEPT / DIV COLLECTING DEPT / DIV	DATE FEE LAST CHANGED	FEE DETAIL OBJECTIVE	COMMENTS
			ORDINANCE NUMBER & DATE (if applicable)	PROP. 26 EXCEPTION (SEE READER'S GUIDE) FULL COST FACTOR	
Variance - single family home	\$ 730.00 per application	Charged By: P&I/Plan Collected By: Finance	Date: 06/12/12 O. No.: O. Date:	Objective: Recover Cost Prop 26 Exception: 1,2,3 Full Cost: \$ 5,769.60	
Variance - all others	\$ 3,010.00 per application	Charged By: P&I/Plan Collected By: Finance	Date: 06/12/12 O. No.: O. Date:	Objective: Recover Cost Prop 26 Exception: 1,2,3 Full Cost: \$ 3,010.85	

Discretionary Processes - Planned Development Districts



PDD Exactions

College Station, Texas

BioCorridor Planned Development District Ordinance



Unified Land Use, Project Review Processes,
and Development Standards

6.9 Appeals from Development Exaction Requirements.

A. Purpose.

The purpose of a petition for relief from a dedication or public infrastructure requirement is to ensure that the application of uniform dedication and construction standards to a proposed development does not result in a disproportionate burden on the property when considering the nature and extent of the demands created by the proposed development on the municipalities' roadways and other public infrastructure.

B. Applicability.

A petition for relief under this Section may be filed by the applicant to contest any requirement to dedicate land or pay fees or to construct or pay for public improvements as required by this Ordinance, the *Bryan/College Station Unified Design Guidelines*, or any other applicable rules or regulations when the applicant believes that same is not roughly proportionate to the proposed development as determined by an engineer licensed to practice in the state of Texas.

Appeal Process

Lexington, Kentucky



Exaction Appeals Committee

Authorizing Legislation: Article 23C of the Zoning Ord. & KRS Ch. 100, KRS Ch. 67A.070



Purpose:

The Exaction Appeals Committee reviews imposition of exactions, amount of exactions, credit exemptions, refunds or adjustments or exactions in the expansion Area.

To view LFUCG Charter & Code of Ordinances click [here](#).

Exaction Appeals Committee

Dept. of Planning
200 E. Main Street
Lexington, KY 40507



Contact: Della Horton
(859) 258-3160



dellah@lexingtonky.gov

Development Agreements

City of **Fontana, California**

<http://www.fontana.org/DocumentCenter/Home/View/666>

The Land Developer will construct or cause to be constructed at his own cost and expenses all necessary permanent improvements on streets abutting his property, all required tests, design work, equipment materials, and labor in order to complete all of the improvements set forth in the total cost estimate as stated in Exhibit “A” to the satisfaction of the City Engineer or as specifically described and shown on Drawing No. , which was approved by the City Engineer and filed in his office on , 20 , and in accordance with applicable provisions of the Standard Specifications and Standard Details of the City of Fontana in effect on the date of this Agreement.

The Take Home for Affordable Housing Developers

--- Development conditions (land and fees) should be established through **general legislation** or rules (though perhaps not necessary, findings and analysis sufficient to justify exactions under *Nollan/Dolan* could provide backstop).

-- Communities should **avoid making "demands" in *ad hoc* proceedings**; passive consideration of proffers apparently OK.

-- To the extent a community negotiates over conditions, it must **engage in detailed fact-finding and analysis** “measuring” project impacts and relating impacts to proposed conditions; communities should direct studies but consider how to have developers pay equitably.

-- **If negotiations fail, communities should deny** applications based solely on totality of unacceptable adverse impacts

Hypotheticals

You have a “no net loss of wetlands” policy. A pending application fails that standard, and offers no alternative. A decision is required in two weeks. Is “denied” the legally safest response?

Your state supreme court said *Nollan/Dolan* doesn't apply to cash exactions. Your park fee schedule wasn't the result of a *Nollan/Dolan* analysis. If you use that schedule to set the fee in a pending PUD, you fear you'll see the project but not the park fees. What should you advise?

You're a developer in the middle of a negotiation to get your permit. A half dozen ideas for mitigation and conditions are on the table. After *Koontz*, are you more likely to say "The heck with you people, I'm going to court and claim my rights under *Koontz*."?

The mayor asks you to squeeze" an applicant seeking approval of a 50-lot subdivision into making a money payment in-lieu-of an open space dedication, which payment will help purchase land for a park on the other side of town. What do you say to the mayor?