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Cases to Watch

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CASES TO WATCH

by Alyse Hakami

Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376 (8th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 22 (U.S. Nov. 10, 1994) (No. 94-841).

The Arkansas Wildlife Federation (AWF) filed a citizen's suit against ICI Americas, Inc. (ICI), a herbicide manufacturing plant, under the Clean Water Act which alleged that ICI was in violation of its pollution discharge permit. Both the United States District Court for the Eastern District of Arkansas and the Eighth Circuit Court of Appeals held that AWF's petition was jurisdictionally barred under 33 U.S.C. § 1319(g)(6)(A)(ii) which disallows a citizen suit where a state has commenced and is diligently prosecuting an action in a state administrative proceeding that is comparable to a federal proceeding. The Eighth Circuit Court of Appeals affirmed the District Court's finding that (1) the Arkansas Department of Pollution Control and Ecology (ADPC & E) "commenced" a state proceeding by issuing a consent administrative order (CAO); (2) under the facts of this case the ADPC & E was diligently prosecuting the administrative action against ICI; and (3) Arkansas law is comparable to 33 U.S.C. § 1319(g) because it contains comparable penalty provisions which the state may enforce, has the same general enforcement goals as the federal statute, allows interested parties to be involved at significant stages in the decision-making process, and adequately protects the legitimate interests of these interested parties. In addition, the Eighth Circuit held that it would be unreasonable to preclude citizens' suits for civil penalties but not to preclude claims for declaratory and injunctive relief. Therefore, AWF could not bring its claim against ICI for declaratory and injunctive relief since AWF's claims for civil penalties were jurisdictionally barred by the Arkansas state administrative action even though the federal statute only refers to the preclusion of civil penalty actions.

AWF's appeal from the Eighth Circuit decision presents two issues. The first is whether the Arkansas administrative penalty order bars AWF's claim for declaratory and injunctive relief in light of federal statutory language which states that the commencement of state law administrative proceedings only precludes civil penalty actions. The second issue on appeal is whether the Arkansas administrative penalty order precludes AWF's suit for civil damages when a state's procedures for public participation and penalty assessment are not comparable to federal procedure for

imposing administrative penalties. AWF filed a petition for certiorari with the United States Supreme Court on November 10, 1994.

Kelley v. Environmental Protection Agency, 15 F.3d 1100 (D.C. Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 21 (U.S. Oct. 26, 1994) (No. 94-752).

The State of Michigan and the Chemical Manufacturers Association filed suit against the Environmental Protection Agency (EPA) to review the EPA's regulation regarding lender liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This regulation attempts to provide a standard for determining when a lender's participation in the management of a facility causes it to lose its secured creditor exemption under 42 U.S.C. § 9601(20)(A). Petitioners claimed that the EPA lacked statutory authority to promulgate a regulation that defines lender liability, and that only the federal courts have such authority to define the scope of lender liability under CERCLA. The District of Columbia Circuit Court of Appeals held that Congress has designated the courts as the "adjudicator of the scope of CERCLA liability since Congress provided for private causes of action under CERCLA § 107." Because the court is the first body to determine liability, the EPA lacks authority to issue substantive regulations which interpret a statute establishing liability. In addition, the court held that the EPA's regulation was not interpretive in nature, which would normally entitle it to judicial deference, but rather the regulation was a quasi-legislative attempt to implement CERCLA's liability provisions regarding secured creditors. Finally, citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), the court found that under the standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), agency interpretation of statutes will be given judicial deference only when there is a congressional delegation of administrative authority. Deference is also inappropriate if Congress instead merely authorizes the agency to bring the action in federal court as prosecutor. Lastly, regardless of whether the agency has authority to interpret a statute, there will not be judicial deference if a private party is able to bring an independent private cause of action in federal court. Because the petitioners in this case are such private parties, the

court found judicial deference to the EPA's regulation defining lender liability inappropriate and vacated the regulation.

The first issue on appeal is whether the court of appeals erred in vacating the EPA regulation and disregarding EPA rulemaking authority under CERCLA when it ruled that the EPA was not allowed to issue regulations relating to CERCLA liability issues. Secondly, did the court of appeals err in its interpretation of *Chevron v. N.R.D.C.* and *Adams Fruit v. Barrett* relating to the scope of judicial deference to agency regulation.

Petition for certiorari was filed with the United States Supreme Court on October 26, 1994.

Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 23 (Nov. 10, 1994) (No. 94-859), *petition for cert. granted*, 115 S.Ct. 714 (1995).

A group of non-profit and other organizations dependent upon the forest products industry (Sweet Home) filed a petition against the Secretary of the Interior after the Fish and Wildlife Service (FWS) promulgated certain regulations under the Endangered Species Act (ESA) which prohibits the taking of an endangered species. Under the ESA, the term "take" includes causing harm or attempted harm to an endangered species. Sweet Home argued that these regulations, which define the term "harm" to include significant habitat modification or degradation, violate the ESA because there was no showing that Congress intended to include habitat modification or degradation within the context of the taking of an endangered species. The United States District Court for the District of Columbia upheld the FWS's interpretation of the scope of the term "harm" under the ESA. The District of Columbia Circuit Court of Appeals affirmed in part and reversed in part, and held that the FWS regulation defining the scope of "take" was invalid in that this interpretation was not clearly authorized by Congress. In addition, the court found that the regulation was not a reasonable interpretation of the ESA.

The issue on appeal is whether the FWS regulation promulgated by the Secretary of the Interior under the ESA which interprets the term "harm" to include significant habitat modification or degradation is valid in light of Congressional intent behind the enactment of the ESA. Petition for certiorari to the United States Supreme Court was filed on November 10, 1994. The petition was granted on January 6, 1995.

CASE SUMMARIES

CERCLA

Yellow Freight System, Inc. v. ACF Industries, Inc., No. 64779, 1994 WL 270409 (Mo. Ct. App. June 21, 1994).

Yellow Freight System, Inc. (Yellow Freight) sued ACF Industries (ACF) in federal court for violations of 42 U.S.C. § 9601 et. seq., 42 U.S.C. § 9672, and common law strict liability and contribution. Yellow Freight alleged that it had purchased a contaminated plot of land from ACF and that it was entitled to recover cleanup costs. In a related action for declaratory relief in state court, Yellow Freight claimed it had a private right of action based on the Missouri Hazardous Substance Emergency Statute (Mo. REV. STAT. §§ 260.500 through 260.550). The trial court held that the Missouri Substance Emergency Statute does not create a private cause of action, and the appellate court affirmed.

Mo. REV. STAT. § 260.530 states that a "person having control over a hazardous substance is strictly liable to the State of Missouri for the reasonable cleanup costs incurred by the state." Both parties agreed that the legislature did not expressly provide for a private cause of action, but Yellow Freight pointed out that "cleanup costs," as defined in § 260.530.1 Mo. REV. STAT. 1986, include "all costs incurred by the state ... or by any other person operating with the approval of the department of natural resources." The appellate court interpreted the language to mean only that the state can recover costs when it hires contractors to help with the cleanup.

Yellow Freight also claimed that the definition of a "person having control of a hazardous substance" applied only to ACF, and that Yellow Freight was protected as a buyer of the property. The court held that Yellow Freight was not protected because there was no indication that the statute intended protection for a defined class. The court said the statute was for the benefit of the "general public", and that Yellow Freight itself might be held liable under the statute.

The court agreed with Yellow Freight's

contention that a private right of action would promote the legislative purposes of the Substance Emergency Statute by encouraging prompt cleanup by non-labile persons, who could then expect compensation. However, the court held that when a legislative act provides for other means of enforcement, the courts will not recognize a private cause of action.

— by Kin Semsch

Key Tronic Corporation v. United States, 114 S. Ct. 1960 (1994)

In 1980 Key Tronic, a private corporation, the Air Force, and various other parties became involved in a Superfund Cleanup at the Colbert Landfill in Washington State. Key Tronic eventually settled with the EPA, agreeing to provide \$4.2 million to aid in the cleanup of the site. The Air Force also settled with the EPA for \$1.45 million. This action was brought by Key Tronic, a private corporation, to recover a portion of its \$4.2 million cleanup costs and its \$1.2 million response costs from other responsible parties. The \$4.2 million contribution claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9613(f), was dismissed by the District Court after Key Tronic conceded that it was precluded from recovering any part of its cleanup costs under the consent decree. The \$1.2 million cost recovery claim brought under CERCLA, 42 U.S.C. § 9607(a)(4)(B), included recovery of attorney's fees under three distinct theories: 1) the identification of other potentially responsible parties (PRP's) that were liable for the cleanup; 2) preparation and negotiation of its agreement with the EPA; and 3) the prosecution of this litigation.

Courts have differed over the extent to which a party can recover attorney's fees as a response cost under CERCLA. The Supreme Court, therefore, granted certiorari to put a final end to the dispute. Justice Stevens, in writing the majority opinion, held that: 1) litigation-related attorney fees were not recoverable; 2) fees pertaining to activities

performed in identifying other PRP's were recoverable; and 3) fees for legal services in connection with negotiations culminating in a consent decree with the EPA were not recoverable. Explicitly guiding the decision of the Court was the general rule that attorney's fees are unrecoverable absent express congressional authorization. Since CERCLA 42 U.S.C. § 9607 did not expressly provide for the recovery of attorney's fees, the Court was forced to look at the statute to determine whether it was Congress's intent to provide for this type of recovery.

The court examined CERCLA and the 1986 Superfund Amendments and Reauthorization Act (SARA) in making its determination. The Court noted that recovery of attorney's fees in the context of litigation expenses hinged upon whether "enforcement activities", included in the definition of "response", were within the scope of a party's ability to recover the "necessary costs of response." 42 U.S.C. § 9607(a)(4)(B). Key Tronic contended that a private action for recovery under § 9607 was one of the enforcement activities covered by that definition and that attorney's fees should therefore be recoverable. The Supreme Court disagreed.

The Court noted that § 9607 implicitly authorized an action for private parties to seek recovery costs. It held that the implicit nature of the action was not an adequate expression of Congress's intent to allow for the recovery of attorney's fees. In the 1986 SARA amendments, the Court noted that Congress specifically included two provisions for the recovery of attorney's fees. The Court believed that Congress's failure to include such a provision for § 9607 strongly suggested that it did not intend for there to be one. In addition, the Court felt that the plain meaning of the phrase "enforcement activities" did not encompass the type of recovery at issue in the case. The Court concluded that CERCLA § 107 did not provide for the recovery of attorney's fees associated with bringing a cost recovery action.

The Court emphasized that its holding with respect to litigation-related expenses was not meant to imply that all attorney's fees were unrecoverable under CERCLA § 9607. In fact, the Court went on to state that

some expenses should rightfully be included as necessary response costs under § 9607(a)(4)(B). The gist of the Courts analysis seemed to focus on the connection the lawyer's work had with the actual site cleanup and the benefit the work had to the entire cleanup effort. The Court concluded that the identification of other potentially responsible parties served as a means to benefit the entire site by assuring that the cleanup would be effectively performed and paid for. This, the Court stated, was an activity that fell outside the reallocation of costs. Thus, the Court held that Key Tronic was rightfully entitled to the costs associated with the identification of other PRP's as a recovery expense.

The Court made clear from the onset that it believed legal services performed in connection with negotiations between Key Tronic and EPA were unrecoverable. It reasoned that although studies, surveys, and documents prepared by Key Tronic could conceivably have aided the EPA in limiting the scope and type of remedy chosen, the main purpose of the materials was to aid Key Tronic in limiting its own liability at the site. The Court concluded that such materials, used and prepared primarily for the benefit of the defendant, could not be considered "necessary costs of response" under CERCLA. Therefore, the majority affirmed in part and reversed in part the judgment of the Court of Appeals, and remanded the case for further proceedings consistent with the opinion.

— by Greg Moldafsky

***Employers Insurance of Wausau v. United States*, 27 F.3d 245 (7th Cir. 1994)**

The Employers Insurance of Wausau (Wausau) filed a complaint against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1291, 1346, and 2671-80. It alleged that the United States, through the Environmental Protection Agency (EPA), committed the torts of malicious prosecution, abuse of process, and negligence after the EPA ordered Wausau to

clean up hazardous waste materials.

Wausau was the insurance carrier of property owned by Group Eight Technology (Group 8). After Group 8's property caught fire, Wausau agreed to pay for the damage caused by the fire plus the cost for the removal of the debris from the property. Included in the debris were transformers and their fluids which contained polychlorinated biphenyls (PCBs). After agreeing to a price, the plaintiff hired K & D Industries Services (K & D) to perform the removal and disposal of the transformers and their fluids. After removal of the fluids, K & D transported them to an oil recycling facility owned by CIW Company (CIW). Shortly thereafter, the EPA discovered that many of CIW's process tanks were contaminated with PCBs. After investigating the contamination, the EPA named Wausau as a "potentially responsible party" for the CIW contamination, and therefore was responsible for the clean-up of the CIW site.

The EPA made this liability determination based on its conclusion that Wausau was subject to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. Under CERCLA, the EPA issued an order demanding Wausau to clean up the CIW site. Wausau conferred with the EPA and argued that they were improperly named as a "potentially responsible party". The EPA, however, demanded clean-up and subjected Wausau to immense fines and penalties for failure to comply with the order. Wausau eventually performed the clean-up to avoid the fines imposed by the United States. Wausau then filed a petition for reimbursement of costs pursuant to CERCLA. The petition was denied by the EPA. Following this denial Wausau filed this suit under the FTCA against the EPA in an attempt to recover money for the alleged tortious conduct.

The Seventh Circuit Court of Appeals upheld the previous ruling by the district court to dismiss the case for lack of subject matter jurisdiction. The court based its ruling on the interpretation of the FTCA. This act

generally waives federal government sovereign immunity and allows the United States government to be sued by someone who is injured due to the negligence or some wrongful act by an employee of the United States while that employee was acting in the scope of employment. There are several exceptions, however, to this general rule under the FTCA.

As the Seventh Circuit recognized, one exception to the general rule is the discretionary function exception. The court held that Wausau could not sue the United States because of the discretionary function exception which protects government employees from tort liability when they make decisions that involve choice, judgment, or considerations of public policy. The court ruled that the decision by the EPA ordering Wausau to clean-up the CIW site was a decision that involved judgment and considerations of public policy. The court reasoned that the United States, under CERCLA, gave the EPA discretion in arranging for removal and disposal of hazardous waste. CERCLA allows the EPA to take any remedial action, such as court orders and penalties, that it feels necessary to protect the environment from hazardous substances. Therefore, the court held that Wausau could not bring suit against the government even if the EPA did act negligently since the EPA is immune from tort liability when it makes discretionary decisions.

— by Christy L. Fisher

***United States v. Freter*, No. 93-10285, 1994 WL 382631 (9th Cir. July 25, 1994)**

Daryl Freter (Freter) appealed his conviction of violating 42 U.S.C. § 9603(b)(3) which penalizes "any person... in charge of a facility from which a hazardous substance is released, other than a federally permitted release, ... who fails to notify immediately the appropriate agency." Freter was sentenced to two years of supervised probation and was fined \$2,000.

In the late 1980's, Freter was the manager of an enterprise established to study the

processing of minerals from ores with the eventual plan of extracting gold and other precious metals. To facilitate this enterprise, Freter subleased public lands in California where he stored approximately twenty barrels of sodium hypochlorite, which is a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In April 1990, Freter was ordered to leave the property because of unpaid rent and utilities. Freter complied with this order and vacated the premises, but he abandoned the barrels of sodium hypochlorite on the property and failed to notify the appropriate federal agency of their existence and abandonment. In October 1990, the drums of sodium hypochlorite were discovered by a company working under contract with Environmental Protection Agency.

Among the issues the court reviewed on appeal were 1) whether the government should have the burden to prove that the release of a hazardous substance is not a federally permitted release as an essential element of the crime, or alternatively 2) whether the defendant should be required to assert that the release is federally permitted as an affirmative defense. Freter argued that this burden should be on the government, and that it was plain error for the court to omit this element of the crime from the instructions given to the jury. The instant court disagreed and held that because the range of federally permitted releases is narrow, while the prohibition against releases is broad, it is much less burdensome to require the defendant to assert as an affirmative defense that the release was permitted than to require the government to prove that it was not permitted.

The court also addressed Freter's argument that there was insufficient evidence to conclude that he had voluntarily abandoned the sodium hypochlorite because of his eviction and subsequent lack of access to the site. The court held that Freter's argument was without merit as he had not attempted to contact either the owner of the property or his other investors in the enterprise to

notify them of the situation so that he could attempt to gain access to the site and remove the chemicals.

Freter argued that there was insufficient evidence to show that he had failed to report the release of the hazardous substance to the National Response Center. After examining testimony from the previous trial, the court determined that Freter was aware that the sodium hypochlorite was a hazardous material. Further, Freter had not informed the National Response Center of its abandonment because he was not aware that "abandonment" of the materials constituted a "release" under the statute. Therefore, the court held that a rational juror could find that sufficient evidence existed to prove that he did not report the release of the substance, which was an essential element of the government's claim.

— by Byron Woehlecke

Catellus Development Corporation v. United States, No. 93-16530, 1994 WL 414537 (9th Cir. Aug. 10, 1994)

General Automotive (General) operated an auto parts store which sold automotive batteries and also received used batteries on customer trade-ins. To dispose of these spent batteries, General sold them to a battery cracking plant run by Morris P. Kirk & Sons, Inc. (Kirk). After Kirk extracted and smelted all of the lead from the batteries, the left-over casings were crushed by Kirk and disposed of on the property of Catellus Development Corporation (Catellus). These casings contained lead and contaminated Catellus's property. Catellus sought reversal of the District Court decision that held General Automotive was not responsible for clean-up costs of Catellus's property.

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., a plaintiff may recover from "any person who by contract, agreement, or otherwise arranged for disposal or treatment ... of hazardous substances owned or possessed by such person, by any other party or entity, at

any facility ... owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607 (a)(3). The court defined disposal as the affirmative act of discarding the substance as waste, rather than the productive use of the substance. Therefore, not only did the court have to find that General "arranged for the disposal" of the spent batteries, but the batteries had to be considered "waste".

General first argued that the spent batteries were not waste because they were being recycled, and the lead in them would be put to further productive use. The court held "waste" to be "any discarded material which is abandoned ... recycled ... or inherently wastelike." 40 C.F.R. § 261.2(a)(2) (1993). The court followed *United States v. ILCO Inc.*, 996 F.2d 1126, 1131 (11th Cir. 1993), and concluded that lead components from the spent batteries was waste.

General then argued that it did not "arrange" to dispose of the batteries because it did not control the eventual disposition of the batteries. Part of General's argument relied on the fact that it sold the batteries to Kirk who then assumed complete ownership and control of the batteries. However, the court did not require continued ownership or control for determining liability under CERCLA. The court reasoned that if continued ownership was a requirement for liability, then parties like General who needed to dispose of a hazardous substance could simply sell the waste to someone else to evade liability. The court felt this was against the policy underlying CERCLA because parties would then just "close their eyes" to the method of disposal of their own hazardous substances.

The Ninth Circuit affirmed that General was not responsible for the clean-up costs on a different theory from the one used by the District Court. CERCLA requires that treatment of the hazardous waste take place at the facility which is subject to the clean up effort in order for there to be liability. 42 U.S.C. § 9607(a)(3). In this case, none of the treatment of the hazardous waste arranged for by General took place at Catellus. The

court thus reversed the District Court decision and remanded the case for a determination of General's liability under this theory.

— by Christy Fisher

Long Beach Unified School District v. Dorothy B. Godwin California Living Trust and Mobil Oil Corporation, Powerine Oil Co., No. 92-56562, 1994 WL 363066 (9th Cir. May 4, 1994)

The Appellant, Long Beach Unified School District (the district), purchased land from the Dorothy B. Godwin California Living Trust and the Grover Godwin California Trust (the trusts). Prior to the purchase, the land had been leased to the Schafer Bros. Transfer and Piano Moving Company (Schafer Bros.). The district received a site assessment from the trusts, prior to closing, that specified the existence of a waste pit kept on the property by The Schafer Bros. As a term of the sale, the district required the trusts to put \$250,000 in escrow to cover the cost of the cleanup.

This money proved to be insufficient for the cleanup, and the district brought an action in federal court under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to recover the remaining funds. Both of the primary defendants, the seller and the tenant who polluted the land, settled with the district, leaving only Mobil Oil Corp. and Powerine Oil Co. (collectively M & P) as parties to the suit. The district did not claim that M & P contributed to the pollution on the site. Rather the district claimed that since M & P held easements across the land they were automatically "owners" or "operators" under CERCLA, 42 U.S.C. § 9607. The court, holding for the defendants, rejected this theory.

The case centered around the issue of whether the holder of an easement crossing a hazardous waste facility can be liable for cleanup costs under CERCLA. To make such a determination, the court examined the standards for liability set out in the statute, 42 U.S.C. § 9607(a). This section specifies, among other things, that the de-

fendant must fall within one of four classes of persons in order for there to be liability under CERCLA. Of these classes, only two are contested in this case: 1) present owners and operators of a hazardous waste facility; and 2) past owners or operators of such a facility. The court, following precedent, acknowledged Congress's intent to make "owners" and "operators" two separate and distinct categories.

First, the court found that in certain circumstances the holder of an easement could be an operator under CERCLA. This is evidenced by the inclusion of pipelines in the definition of "facility." 42 U.S.C. § 9601(9). The court makes clear, however, that merely having a pipeline running across a hazardous waste site is insufficient to establish liability. To be an operator, the court explains, a party must take an active role in running the facility. In addition, the facility itself must be contributing to the hazardous nature of the site. As easement holders, M & P were simply exercising their right to have their pipeline cross over the property. In this context, the court concludes, they can not be considered operators.

Second, since the term "owner" is not specifically defined in the statutory language of CERCLA, the court was forced to apply general rules of statutory interpretation. The court points to the circular nature of CERCLA's definition of "owner or operator" as guidance in the instant decision. The court stated that circularity "strongly implied" the legislative intent to have the term retain its common law definition. The common law did not regard easement holders as owners of property. Instead, the easement holder was said to have the mere use of someone's land for a specific purpose. As such, the court concluded that M & P did not fall within the statutory meaning of the term "owner."

In summarizing its decision, the court looked at the public policy issues involved in the case. The court noted that Congress enacted CERCLA for the express purpose of making polluters pay for the damage they caused. Holding easement owners liable would therefore only serve to destroy that

legislative intent and to increase the number of future litigants. Since both these outcomes would be undesirable, the court reaffirmed its holding as correct.

— by Greg Moldafsky

RCRA

City of Chicago v. Environmental Defense Fund, 114 S.Ct. 1588 (1994)

The city of Chicago (city) owned and operated a municipal incineration facility which generated ash known as municipal waste combustion ash (MWC). The city then disposed of this ash at landfills unlicensed for the reception of hazardous waste. The Environmental Defense Fund (EDF) brought a citizen suit against the city and its mayor, alleging these actions violated the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6921(i). The city claimed that the generated ash was exempt under RCRA because the Environmental Protection Agency (EPA) excluded household waste as a hazardous waste under 40 C.F.R. § 261.4(b)(1).

The District Court agreed with the city and granted its motion for summary judgment. On appeal, the Seventh Circuit reversed, finding that the ash was subject to hazardous waste regulation under Subtitle C. While on a writ of certiorari to the United States Supreme Court, the EPA submitted a memorandum which asserted the ash was exempt under RCRA's Solid Waste Disposal Act § 3001(i). The Supreme Court vacated the lower court judgment and remanded to the Seventh Circuit, which reinstated its holding, finding that the plain language of the statute did not exempt the ash which was generated. The Supreme Court affirmed in an opinion supported by seven justices.

RCRA contains regulations governing the treatment of wastes from "cradle to grave." Subtitle C applies to owners, operators, generators and transporters of hazardous waste, whereas subtitle D governs nonhazardous waste. The EPA determines which wastes are hazardous and has specifically excluded household waste.

Although this incinerator burns household waste, it also burns nonhazardous industrial waste. Therefore, the MWC generated falls under subtitle C and must be dumped at a landfill licensed for hazardous waste. The Seventh Circuit determined that the household waste exemption only applied to the facility and not to the ash which the facility generated and dumped at unlicensed landfills. The Seventh Circuit reached its decision based on the plain meaning of the statute which does not say that "generated" wastes are exempt. Therefore, if the MWC ash generated by the facility was toxic, the facility would be subject to subtitle C regulations as a generator. However, the more stringent regulations under subtitle C for treatment, disposal and storage facilities, would not apply.

— by Jill A. Morris

United States v. New Mexico, No. 92-2275, 1994 WL 446769 (10th Cir. Aug. 18, 1994)

The Los Alamos National Laboratory (LANL), owned by the Department of Energy and operated by the Regents of the University of California, produced hazardous and radioactive waste in the course of the various research projects. LANL received permits from the New Mexico Health and Environment Department, which allowed the center to operate an incinerator for the disposal of its hazardous waste. However, LANL also attempted to use its incinerator to eliminate radioactive wastes in violation of the conditions of its hazardous waste facility permit.

In a declaratory judgment suit, the United States claimed that because of sovereign immunity, it was not bound by certain permit terms. The United States argued that although the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6961, waived sovereign immunity in many cases, New Mexico's conditions concerning radioactive waste were not "requirements" as defined by RCRA. The district court granted New Mexico's motion for summary judgment.

The Tenth Circuit Court of Appeals affirmed and held that the permit terms did fall under RCRA § 6001, thus waiving sovereign immunity. The court based its holding first on the fact that absent an express waiver, states cannot regulate the activities of the federal government. The court found that RCRA § 6001 expressly waived sovereign immunity and required federal compliance with "[s]tate, interstate, and local requirements, both substantive and procedural."

The United States tried to show that since New Mexico had not established any state guidelines for radioactive waste, either in statute or regulation, that portion of the permit did not represent a RCRA requirement. The court determined that the definition of requirement should be construed broadly to include both substantive standards and the procedural method of enforcing those standards. In this case, the court reasoned that in New Mexico's overarching goal of hazardous waste regulation, a procedural means of accomplishing that goal was issuing a permit that prevented LANL from burning its radioactive waste.

The court also examined the United States' argument that the specific conditions concerning incinerator monitoring for radioactive exhaust were unworkable. It found that the conditions were in fact workable, in that determining the maximum exhaust measurement required only a comparison between the level of radiation detected when the incinerator was operating with and without waste present.

The court also noted the minimal nature of the standard and the existence of "time-to-time" background checks on the level of radioactivity. It found that this indicated radioactive exhaust was not an area in which New Mexico was regulating by specific state guidelines, but was instead taking it into consideration in its efforts to meet standards set by the New Mexico Hazardous Waste Act, N.M.Stat. Ann §§ 74-4-1 to 74-4-14.

— by Sarah Madden

United States v. Wagner, 29 F.3d 264 (7th

Cir. 1994)

The defendants, Wolfgang Wagner and Photo-cut, Inc., were charged and convicted with two counts of violating the Resource Conservation and Recovery Act (RCRA). In particular the defendants were guilty of unlawful storage of hazardous waste without a permit and unlawful disposal of hazardous waste pursuant to 42 U.S.C. § 6298(d)(2)(A). The defendants appealed on the grounds that the government failed to prove the defendants had knowledge that a permit was required and that there was insufficient evidence for a conviction.

The defendants operated a photo etching business, a process which involves the use of ferric chloride. The business never obtained a permit to store or dispose of the spent ferric chloride which is a regulated hazardous waste. A search warrant produced more than 150 50-gallon drums of the waste material located on the premises. The defendants argued that a conviction for the violation of § 6928(d)(2)(A) requires the government to prove that the defendants had knowledge of the permit requirement. Upon a literal reading of the statute, the court found that the omission of the word "knowingly" with regard to the permit requirement language does not suggest it should apply, rather knowledge of the permit requirement is not an element of the violation. The Fourth, Sixth, Ninth and Eleventh Circuits have also so held concerning this particular statutory violation.

The court quoted a Third Circuit case, stating that "[t]he jury is free to infer knowledge on the part of a management level employee in a highly regulated area involving hazardous waste." *United States v. Johnson and Towers*, 741 F.2d 662, 668 (3rd Cir. 1984).

Regarding the sufficiency of evidence argument, the evidence is viewed in the light most favorable to the government, placing the burden on the defendant. The court upheld the decision of the lower court because the conviction must be upheld if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. The court found that the

government proved abandonment of the hazardous waste beyond a reasonable doubt in light of the fact that no arrangements were made to dispose of the waste, and that there was evidence that the defendants knew the waste remained at the facility.

— by Tracy Warren

CLEAN AIR ACT

Village of Oconomowoc Lake v. Dayton Hudson Village, 24 F.3d 962 (7th Cir. 1994)

The plaintiffs, Village of Oconomowoc Lake, sought to prevent the defendants, Dayton Hudson, from constructing a warehouse near them. Plaintiffs filed suit under the Clean Air Act (CAA) and Clean Water Act (CWA). The suit was dismissed by the United States District Court for the Eastern District and the plaintiffs appealed.

The plaintiffs were concerned that the vehicles coming to and from the warehouse would pollute the air through emissions of nitrogen oxides and other gases. Also, the plaintiffs feared their groundwater would be contaminated by oil dripping from the vehicles which would run off the pavement during storms, collect in a retention pond, and seep into the ground. The plaintiffs sued under the CAA which requires a permit for the construction of a "major emitting facility." The plaintiffs opted to avoid the general rule that persons suing under the CAA must give 60 days notice to the potential defendant. 42 U.S.C. § 7604(b). Instead, the plaintiffs sued under § 7604(a)(3) which permits a citizen to file an action against one proposing to construct a major emitting facility without a permit. This particular section does not contain the notice requirement. If they had given the proper notice, they could have used § 7604(a)(1), which permits a citizen to file an action against one in violation of an emission standard or limitation set by the Act or the State, thus avoiding the "major emitting facility" obstacle.

The Court held that the warehouse would

not be considered a "major emitting facility" pursuant to the CAA because the building itself does not emit pollutants. In addition, the court held that motor vehicles were not considered "stationary sources" under the CAA, and further that emissions from motor vehicles are not attributable to the stationary sources which serve as points of origin or distribution.

With respect to the retention pond on the defendant's premises, the court held that neither the regulations of the Environmental Protection Agency (EPA) nor the provisions of the CWA apply to ground waters. At this time the definition of "waters of the United States" does not include ground waters. Although the EPA's definition of such waters includes "natural ponds," in this case the defendants retention pond was an artificial pond. Therefore, the federal government does not have authority over artificial ponds, such as the one in this case, that ultimately drain into ground waters.

— by Tracy Warren

Madison Gas & Electric Company v. Environmental Protection Agency, 25 F.3d 526 (7th Cir. 1994)

Title IV of the Clean Air Act (CAA) deals with the problem of acid rain. Pursuant to the CAA, the Environmental Protection Agency (EPA) must allocate emission allowances to each of the nation's 2,200 electric utilities, effective in the year 2000. Madison Gas and Electric company and the City of Springfield, Illinois, City Water, Light and Power did not agree with the amount of allowances given to them by the EPA.

The Plaintiff, Madison Gas & Electric, argued that it should receive bonus allowances because under 42 U.S.C. § 7651d(c)(1) and (c)(4), they are a company whose aggregate capacity exceeds 250 megawatts. This determination depends on whether such capacity includes two electric companies of which plaintiff owns 22 percent. The EPA gave only threadbare reasons for the rejection of the plaintiff's request for additional allowances. The EPA read the ambiguous

statutory language to mean that the capacity referred to includes that capacity operated, not owned. The court held that the reasons given by the EPA were insufficient. Because the statute is ambiguous, the court held that it would not be unworkable to reallocate or give bonus allowances on the basis of capacity owned. The EPA can also require ownership verification if it wishes.

The EPA also argued that the operating company rather than the owner has a greater need for the allowances, however, the court held that this was not an issue because the penalty provisions refer to liability with respect to the "owner or operator." 42 U.S.C. § 7651(j).

The plaintiff asked the EPA to consider its "generating capacity" according to the "summer net dependable capability," rather than the "nameplate capacity." Using the former would qualify the plaintiff as a company operating at greater than 250 megawatts which would afford the plaintiff more allowances. The EPA chose to use the "nameplate capacity" for reasons considered inadequate by this court. The court noted that the EPA must furnish a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. The court held that simply because prior sections specify "nameplate capacity", it does not mean that a section referring to "generating capacity" refers to "nameplate capacity." Conversely, the use of a different term implies that a different meaning accompanies the term. The EPA did not give sufficient grounds for its action, therefore, the plaintiff's claims were granted review.

— by Tracy Warren

Espinosa v. Roswell Tower, Inc., No. 93-2238, 1994 WL 443706 (10th Cir. Aug. 17, 1994)

The New Mexico Environmental Department (NMED) brought suit against Roswell Tower, Inc., Ray Bell, and Leonard Talbert in state court for violations of the New Mexico Environmental Improvement Act. The state court entered judgment for NMED

and the defendants appealed. While the appeal was pending, NMED filed suit in federal court for violations of the Clean Air Act (CAA). The District Court dismissed the suit, holding NMED could not seek the federal penalties provided by the CAA and was thus precluded from bringing the federal suit.

Under the CAA, the Environmental Protection Agency (EPA) establishes national air quality standards, but each state has the authority to implement its own procedures to maintain these standards. Each state's implementation plan has the force and effect of federal law, giving the EPA the authority to enforce the plan in federal court.

On appeal, NMED argued that the CAA delegates broad authority to states with implementation plans to enforce federal causes of action. However, the court interpreted the CAA's language to mean that a state with a federally approved implementation plan may enforce that plan "through the state administrative and judicial process," or through citizens' suits. The court examined the procedures that must occur before the EPA files suit to enforce the plan and found no authority for a state to bring a federal action for the penalties provided by CAA.

The court also looked to other parts of the statute to support its conclusion that a state could not bring an action for damages in federal court. A state has the authority to implement a penalty assessment and collection plan. However, the EPA has the power to assess a penalty should the state not assess a penalty. According to the court, the dual authority over the assessment issue demonstrates that the federal action acts as an enforcement backup to be used only when the state has not enforced its plan in accordance with the CAA.

In another section of the CAA, Congress provided for federal preemption only when the state regulation is less stringent than CAA's standards. Therefore, because a state may implement procedures not required by the CAA, the state action has independent jurisdictional grounds and federal enforcement will not be required. The federal action

is a separate cause of action that cannot be brought by a state.

— by Stephen B. Maule

McCarthy v. Thomas, 27 F.3d 1363 (9th Cir. 1994)

Citizens brought suit against the cities of Tucson and Phoenix for injunctive relief requiring the cities to comply with mass transit proposals submitted to the Environmental Protection Agency (EPA) under the Clean Air Act (CAA), 42 U.S.C. § 7410(a)(2). The District Court granted summary judgment for the defendants, and the Ninth Circuit Court of Appeals reversed.

The CAA requires that the EPA determine national ambient air quality standards (NAAQS) for specific pollutants. 42 U.S.C. § 7409. The state then submits a plan to implement and enforce the NAAQS to the EPA, and upon approval this plan becomes the "state implementation plan" (SIP). 42 U.S.C. § 7410. If an area does not meet the NAAQS for a certain pollutant after the approval of the SIP, the EPA labels it a "nonattainment area."

The EPA declared certain portions of Tucson and Phoenix (Pima and Maricopa County) as nonattainment areas for Carbon Monoxide (CO). Arizona's SIP revisions proposed that these two cities would enlarge their mass transit systems in order to comply with the NAAQS. In 1982, the EPA conditionally approved the Pima County SIP but formally approved the Pima Improvement Schedule which specifically outlined the mass transit improvements. In addition, the EPA conditionally approved the SIP revision for Maricopa County in 1982. The condition for these approvals was that certain deficiencies unrelated to mass transit would be corrected. The EPA formally disapproved the attainment demonstrations in 1986 because Arizona failed to correct the SIP's for Pima and Maricopa Counties. In the same notice, the EPA approved the mass transit measures. After Arizona submitted acceptable proposals for the attainment of NAAQS for CO, the EPA approved them in 1988.

Upon review, Ninth Circuit Court of Appeals found that the EPA must promulgate a federal implementation plan (FIP) since Arizona's plan would not meet the NAAQS in a timely manner to comply with the CAA. Although the EPA created a FIP, it allegedly reapproved the state measures which it had approved prior to the Ninth Circuit decision.

The District Court dismissed the plaintiff's suit to implement the previous mass transit provisions, reasoning that an SIP or FIP is only approved and applicable to a state if the EPA specifically includes it in a final set of documents. On appeal, the Ninth Circuit determined that the EPA meant to leave in place the former approved measures because it did not delete the measures by amending the Code of Federal Regulations.

The Court of Appeals supported its holding with the reasoning in *Kamp v. Hernandez*, 752 F.2d 1444 (9th Cir.), which recognized that the EPA can approve a substantially complete plan and can comply with the CAA by approving the SIP in increments. The court compared the 1982 conditional approvals to the *Kamp* issue, reasoning that the EPA properly approved the plans because they were substantially complete and therefore binding on the cities as part of the state's SIP.

In addition, the EPA argued that prior to 1990 it interpreted the CAA such that plans which were conditionally approved become part of the SIP. The court chose to give deference to the EPA's interpretation. Furthermore, 42 U.S.C. § 7410 instructed that the EPA could approve a portion of any submitted plan and was not necessarily required to create an FIP. The court also adopted appellants' assertion that SIP revisions constitute additions rather than substitutions for the existing SIP. It stated that the District Court's interpretation could create a counterproductive result. Furthermore, the court found its decision supported by cases in other circuits.

The cities asserted several arguments which did not persuade the court. Namely, they argued that this court's factual statements in a prior suit, *Arizona v. Thomas*,

829 F.2d at 834, prevented enforceability of the mass transit provisions. The court rejected this assertion as being too broad of a reading, and the court determined that the cities could no longer challenge the adequacy of Arizona's earlier submissions. Finally, the court rejected the claim that its interpretation created excessive confusion because the enforceable portions of the SIP are easily attainable by referring to the Federal Register.

The court held that the mass transit provisions were incorporated into the SIP in 1982 and were subsequently reapproved by the 1991 documents, thus Tucson and Phoenix are bound by these provisions. In addition, the court declined to design a remedy and remanded the case instructing the District Court to grant the appellants' request for summary judgment and injunctive relief.

— by Jill A. Morris

CLEAN WATER ACT

Alaska Sport Fishing Association v. Exxon Corporation, No. 93-35852, 1994 WL 450327 (9th Cir. July 13, 1994)

The Alaska Sportfishing Association and four individual sportfishers (plaintiffs) filed suit in June 1989 against Exxon Corporation seeking injunctive relief and monetary damages resulting from the 1989 Exxon Valdez oil spill. Plaintiffs based their suit on negligence, nuisance, and violation of an Alaska statute imposing strict liability for release of hazardous substances. Plaintiffs consolidated this action with a similar suit brought by the National Wildlife Federation and other environmental groups. Exxon subsequently removed the consolidated action to federal court.

The United States and the state of Alaska (governments) filed suit against Exxon in March 1991 as "trustees for the public" under the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This suit claimed damages to restore the environment and to compensate the govern-

ments for the loss of natural resources. Exxon entered into a consent decree with both governments in which Exxon agreed to pay at least \$900 million for environmental damages. The governments thereby released Exxon from any further civil litigation concerning damages for the loss of natural resources.

In 1992, Exxon moved for summary judgment, claiming the consent decree it entered into with the governments precluded the plaintiffs' claims for damages regarding loss and use of natural resources. The district court granted Exxon's motion for two reasons: (1) the plaintiffs were in privity with the governments; and (2) res judicata prevented further claims for public relief.

Plaintiffs raised two issues on appeal. First, plaintiffs claimed that Department of Interior (DOI) regulations under CERCLA mandate recovery by trustees only for "residual" resource injury and not for public loss of use and enjoyment that occurs prior to "recovery" or cleanup. The Ninth Circuit Court of Appeals relied on case law and the DOI regulations in denying plaintiffs' argument. The court held that, as trustees, the governments were entitled to recover for all lost-use damages on behalf of the public.

Plaintiffs next argued the district court should not have relied on res judicata in dismissing their complaint. In affirming the district court's ruling that the consent decree and Exxon settlement barred plaintiffs' claims concerning lost recreational use on behalf of the public, the court relied on the privity of the parties and the identity of the issues.

First, the court found that the "parens patriae" doctrine permitted Alaska to recover damages for an injury to its sovereign interest. Alaska had an interest in protecting its natural resources, and it was the oil spill that injured these natural resources. Furthermore, the "parens patriae" doctrine presumes a state will adequately protect the interests of its citizens in a suit to protect its sovereignty. Thus, the plaintiffs' interests were adequately represented by the governments in the consent decree and they were "parties" to the decree for res judicata pur-

poses.

Second, the court held that since the governments had authority to recover for pre-cleanup lost uses, any claims regarding loss of use before cleanup had been covered in the consent decree. Moreover, the court affirmed the district court's ruling that the only causes of action that could now be brought were "uniquely private" tort claims. Once again, the court relied on the fact that the governments had already brought these claims and the plaintiffs' interests were adequately represented by the governments.

— by Stephen B. Maule

P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology, 114 S. Ct. 1900 (1994)

A public utility district (P.U.D.) wanted a permit to build a hydroelectric project on the Dosewallips River. The Washington State Environmental Agency conditioned the project's permit on a given minimum flow rate of water for the dam. A state administrative appeals board determined that the minimum flow requirement was intended to enhance, not merely maintain, a downstream fishery, and that the certification condition therefore exceeded the Department's authority under state law. On appeal, the Washington State Superior Court held that respondent had imposed the minimum flow requirement to protect and preserve the fishery, not to improve it. The United States Supreme Court affirmed the decision, holding that the minimum flow requirement was a permissible condition of a 33 U.S.C. § 1341 certification under the Clean Water Act (CWA).

The CWA requires developers to get a certification from the state showing that any "discharge" will comply with provisions of the Act. P.U.D. contended that the word "discharge," as used in § 1341(a), refers only to materials added to the water, and that this definition would not include a reduction in stream flow. The Supreme Court agreed with this definition, but held that the broad enabling provisions of 33 U.S.C. § 1341(d)

allow the state to ensure that the project complies with "any other appropriate requirements of State law" once the threshold condition, the existence of any discharge, is satisfied. In this case, the state asserted that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to the CWA, 33 U.S.C. § 1313.

P.U.D. asserted that § 1313 requires the state to protect designated "uses" solely through implementation of specific and objective numerical "criteria." The Court adopted a literal interpretation of § 1313(c)(2)(A) such that, by definition, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards. In its holding, the court referenced typical state and EPA water quality standards which include a number of open-ended requirements, including aesthetic considerations.

P.U.D.'s assertion that the CWA only regulates water "quality" and not water "quantity" was dismissed as an artificial distinction. Also dismissed was the contention that water quantity was specifically excluded from the coverage of the act. Since the CWA gave the states authority to allocate water rights, the Court found it peculiar that P.U.D. would argue that the Act prevents the State from regulating stream flow.

Finally, P.U.D. argued that the Federal Energy Regulatory Commission (FERC) has sole authority to regulate transmission of waterpower through streams. The court found no conflict with FERC licensing activity, stating that "it is quite possible ... that any FERC license would contain the same conditions as the State § 1341 certification." The Court noted that FERC was represented in the earlier proceedings, and had expressed no objection to the stream flow condition.

— by Kin Semsch

8TH CIRCUIT

Sargent Construction Company, Inc. v. State Auto Insurance Company, 23 F.3d

1324 (8th Cir. 1994)

While working at a construction site for Town and Country Supermarkets (T & C), Sargent Construction Company, Inc. (Sargent) needed to level a concrete floor. Sargent etched the floor with acid to make the surface suitable to apply a product called Flo-Top. Because fumes from the acid reacted with the chrome portions of various objects at the site, approximately \$75,000 in damages occurred to fixtures owned by T & C.

Sargent submitted a claim to its insurer, State Auto Insurance Company (State Auto), but State Auto denied coverage based on a pollution exclusion contained in the policy. While the policy covered bodily injury and property damage, if the injury or damage resulted from "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants," the policy did not apply.

State Auto moved for summary judgment in district court, claiming the policy specifically defined "pollutant," and the acid Sargent used to etch the floor fell under this definition. Sargent claimed the common practice in the construction industry was to not treat the acid used as a "pollutant." The district court granted State Auto's summary judgment motion, relying on the clear and unambiguous nature of the pollution exclusion clause.

On appeal, Sargent argued that general issues of material fact existed as to whether the acid involved was a "pollutant." Relying on Missouri law, the Court of Appeals regarded the policy as a contract and applied the rules of contract construction. Thus, if the policy contains ambiguous terms, the terms must be construed against the insurer as the drafter of the policy. Moreover, interpreting the meaning of an ambiguous term requires examining both its technical meaning and the average layperson's meaning. However, when a conflict arises, the layperson's definition will be applied unless clear intent in the policy indicates otherwise.

The court then examined the definition used in the policy and held that whether or not "pollutant" covers a particular substance

depended on the phrase "irritant or contaminant." Since "irritant or contaminant" could mean either already caused a physical irritation or may cause a physical irritation in the future, the court found the policy's definition of "pollutant" ambiguous. Thus, the court held that the district court had erred in granting summary judgment and remanded the case for further proceedings in light of the appellate court's construction of the policy.

— by Stephen B. Maule

State of Nebraska v. Rural Electrification Administration, 23 F.3d 1336 (8th Cir. 1994)

The State of Nebraska filed a petition to prohibit the Platte River Whooping Crane Maintenance Trust from participating in various environmental litigation. The district court found that the Trustees were acting within their designated rights under the trust instrument, and the Eighth Circuit Court of Appeals affirmed.

After environmental litigation between the State of Nebraska and the Basin Electric Power Cooperative of Bismarck, North Dakota, in 1978, a settlement agreement established the Platte River Whooping Crane Maintenance Trust (Trust). The purpose of the Trust is to protect and maintain the migratory bird habitat located in the Big Bend area of the Platte River between Overton and Chapman, Nebraska. The Trust obtained title to 7,000 acres and has easements over an additional 1,600 acres of land in the area. The Trustees' duties include management of the critical crane habitat, the acquisition of land or interests in land, conducting of scientific research of various crane habitat, and acquisition of all types of rights in or to water or water storage. However, the Trust agreement prohibits the Trustees from using propaganda to influence legislation, participating in any political campaign, or becoming involved in "any litigation other than litigation directly related to the administration of the Trust." Trust Declaration, § IV(C)(2).

After two corn growers associations informed of possible violations of the Trust

Declaration, the Attorney General of Nebraska investigated the matter and concluded that the Trust's intervention in the Federal Energy Regulatory Commission (FERC) relicensing proceedings for Kingsley Dam and North Platte/Keystone Diversion Dam Project, and its participation in a suit filed by Nebraska to enforce an earlier North Platte decree violated the Trust Declaration. The State of Nebraska filed a petition in district court seeking interpretation of the Trust Declaration which would prohibit the Trust from participating in the litigation.

First, the State of Nebraska argued that the participation violated the Declaration because the Trustees were trying to enhance water flows by engaging in "aggressive, policy-oriented litigation." The District Court and the Court of Appeals found that the participation in the litigation directly relates to the supply of water flowing to the critical crane habitat and the distinction between participation in such litigation and aggressively seeking such litigation is one without merit.

Second, the State asserted that the Trust's participation in relicensing proceedings were against the Trust's declaration. The Trust petitioned the FERC to implement environmental protection conditions upon two projects receiving interim annual licenses. These conditions would bring the two hydroelectric projects within compliance of federal environmental laws, including the Endangered Species Act and the Migratory Bird Treaty Act, which would secure adequate stream flows into the Big Bend area. The Trust was concerned with the power districts' practice of blocking water flow through the dams at various times during the year which results in de-watering of portions of the Platte River. This lack of water causes the degradation of the Platte River migratory bird. A condition to relicensing would include minimum instream flows of water throughout the year. The court found that the participation in the relicensing proceedings directly related to the critical habitat of the Big Bend area of the Platte River and thus was not in violation of the Trust Declaration.

Second, the State focused on the participation by the Trust as amicus curiae in *Nebraska v. Wyoming*. The litigation involves the allocation of water rights among Nebraska, Wyoming, and Colorado. Although the scope is broad and other forums exist for the Trust to present its concerns, the court found that the Trust focused on the properly restricted goal of preserving the migratory bird. The court held that the Trust's efforts to secure water flows to the Big Bend area of the Platte River are directly related to its mandate under the Trust agreement.

Third, the State argued that the Trust's participation in litigation should be limited to the water lost to the Grayrocks Hydroelectric project, which was the subject of litigation when the Trust was created. The court found that the purpose of the Trust was to protect and maintain the hydrological and biological integrity of the area for the Whooping Crane and other migratory species. This language clearly authorizes the Trust to participate in litigation that affects the Trust's purpose and is not limited to the Grayrocks project.

Fourth, the State asserted that the Trust may not litigate against a position taken by the State because the Trust Declaration mandates the Trust to operate exclusively in connection with the State's purpose. However, the ultimate goal of the Trust is to further projects protecting and maintaining Big Bend habitat. The Court held that the State's only remedy when it disagrees with the Trust is to remove its appointed Trustee.

- by Jackie Hamra

United States v. K. Freeman., No. 93-3899, 1994 WL 393426 (8th Cir. Aug. 1, 1994)

The United States District Court for the Eastern District of Missouri convicted William K. Freeman (Freeman) of illegally transporting and storing hazardous waste without a permit in violation of 42 U.S.C. § 6928(d)(1) and (d)(2)(A). During the sentencing, the District Court added to his base offense level pursuant to U.S.S.G. §§ 2Q1.2(b)(1)(B) which

resulted in an enhanced sentence. Freeman appealed the addition to his base offense level to the United States Court of Appeals, Eighth Circuit, which affirmed his sentence.

In his capacity as vice president of a corporation that manufactures automobile parts, Freeman instructed employees to store drums of hazardous waste in the corporation's leased storage space. Through delegated duties, two different employees eventually transported the drums to the storage facility. Subsequently, Freeman and his codefendant acquired ownership of the corporation. At some point thereafter, the Department of Natural Resources (DNR) inspected the corporation and found the drums were leaking the hazardous waste on the storage room floor. Freeman was subsequently convicted of illegally transporting and storing hazardous waste without a permit.

Freeman did not appeal his conviction but appealed the addition of four levels to his base offense level. U.S.S.G. § 2Q1.2(a) sets the base offense level at eight and § 2Q1.2(b) provides for increases in this level for certain offense characteristics. The base level can be increased by six for ongoing or repetitive discharges into the environment and by four if it otherwise involved discharge of hazardous substances.

Freeman claimed that these levels cannot be added because he was acquitted of discharging toxic substances. However, the court found that the standard for adding levels to the base offense level is lower than that for a conviction of discharging toxic substances, and thus the additions can be made without a conviction. The court pointed out that the government was able to prove a discharge and thus the additional levels were justified.

Freeman's appeal also addressed whether there was a lack of proof that the discharge actually contaminated the environment. Freeman asserted that the government lacked any evidence of actual environmental contamination. The court noted that while § 2Q1.2(b)(1)(A) requires that the waste be discharged into the environment, § 2Q1.2(b)(1)(B) does not have such a requirement. However, the court avoided address-

ing this distinction by showing that the environment was contaminated by the leakage. The court cited *United States v. Ferrin*, 994 F.2d 658, 662-64 (9th Cir. 1993), explaining that the volatile state of the waste caused the air to carry its organic compounds to be carried into the air, thus contaminating the environment. The court also noted that the storage facility had a drain that led to a sewer and into a creek.

Freeman also appealed the increase in his base offense level for organizing five or more people in criminal activity pursuant to U.S.S.G. § 3B1.1(a). He cited the requirements of Fed.R.Crim.P. 32(c)(3)(D) in pointing out that the court never made a finding about the number of people or his role in the offense. The court found that Freeman failed to object to the presentence report (PSR), which adequately set out seven people involved in the crime and Freeman's role in organizing these people, and thus there was no need for a finding. This, according to the court, satisfies Rule 32(c)(3)(D).

Instead of objecting to the PSR, Freeman stated that § 3B1.1 does not apply because he was acquitted of conspiring to store and transport hazardous wastes illegally. Once again, the court found that acquittal, in this case for conspiracy to store and transport hazardous waste, does not preclude an increase in his base offense level and overruled Freeman's § 3B1.1(a) objection.

— by Joe Hewes

Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994)

The Sierra Club and other environmental organizations (Sierra Club) brought an action challenging the land and resource management plan of a national forest. In particular, Sierra Club wanted to bar the Forest Service (FS) from proceeding with two timber sales in the Ouachita National Forest. Pursuant to the National Forest Management Act (NFMA), the Secretary of Agriculture is authorized to develop, maintain, and revise a land and resource management plan (LRMP) to be used by the FS in its maintenance of the units of the National Forest Service. 16

U.S.C. §§ 1600-1614 (1988 & Supp. IV 1992). Through this Act, national forests are authorized for their variety of uses. This plan must be developed to comply with the National Environmental Policy Act (NEPA) which requires that an environmental impact statement (EIS) be conducted which outlines Federal activities affecting the quality of the environment accompany the plan.

The plan is established in a two step process. The first step requires a team under the command of the Forest Service to develop a proposed plan and EIS. 36 C.F.R. § 219.10(a)-(b). This proposed plan is reviewed by the Regional Forester and is either approved or disapproved. During the second stage, individual site specific projects are proposed and assessed under the plan. The Forest Service is responsible for ensuring that all projects are consistent with the plan. 16 U.S.C. § 1604 (1988).

In 1986 an LRMP and EIS were issued for the Ouachita National Forest which contained thirteen alternative management scenarios. An alternative was selected in March of 1990. Later, an independent EIS regarding the vegetation management in the Ozark, St. Francis, and Ouachita Mountains was drafted and accompanied the plan. In addition, a vegetation management program pursuant to a record of decision amended the plan's approach to herbicide use.

Sierra Club filed an administrative appeal regarding these decisions. In April of 1991, the Sierra Club brought suit in the District Court for the Western District of Arkansas claiming that the plan violated governing statutes and regulations. The Forest Service issued two Decision Notices, one in 1988 for the Oden region and one in 1990 for the Choctaw region, stating that the plan complied with all applicable law.

In July of 1991, Sierra Club sought a preliminary injunction barring the Forest Service from proceeding with the Oden and Choctaw sales, claiming that they were denied their right to administrative review. The District Court found that they had been provided with written notice of the decision, were given the requisite forty-five days to appeal, and because of Sierra Club's failure

to appeal their request was denied. The court also noted that Environmental Assessment Supplements were not appealable decisions.

Sierra Club again requested a preliminary injunction, this time alleging that the timber sales violated the statutes governing the plan, and that the FS decisions were arbitrary and capricious. The District Court denied this request, stating that the Sierra Club had forfeited all of its challenges to the Oden sales and all but one of its challenges to the Choctaw sales by failing to exhaust its administrative remedies. The court also made an alternative decision, and held on the merits that the Forest Service had not acted arbitrarily or capriciously.

Next Sierra Club sought judicial review of the plan under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1988), arguing mainly that the plan violated NFMA and NEPA. After allowing several parties to intervene, the Forest Service's motion for summary judgment was granted. On the same day this motion was granted, the court denied Sierra Club's motion for leave of court to file a second supplemental complaint.

Sierra Club appealed the denial of its motions for preliminary injunctions and the court's denial of its motion for leave to file a second supplemental complaint. The court noted that in its brief, Sierra Club essentially abandoned its site specific objections, and instead focused its complaints on the plan violating the governing statutes. However, this court did review the District Court's rulings as they relate to the specific timber sales.

This court made quick work of Sierra Club's appeal of the court's denial of preliminary injunctions. The court held that no error of law appeared, and that the District Court did not abuse its discretion in denying the injunctions.

The important holding in this case was that Sierra Club lacked standing to challenge the plan. The court based its standing analysis on the element that the plaintiff must suffer an "injury in fact." The court did not deny that complaints of environmental and

aesthetic harms can be sufficient to confer standing, but concluded that Sierra Club failed to assert an injury that is certain to occur. Furthermore, the plan by itself is just a means of achieving environmental change, and that finding injury due merely to the existence of the plan without reference to a site-specific action is pure speculation.

It was noted that the Supreme Court has not addressed the issue of whether plaintiffs challenging a forest plan have standing, but that that Court has required an injury with a high degree of immediacy. Specifically, in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Supreme Court denied standing where plaintiffs challenged the propriety of a program used to classify and administer public lands.

Referring to *Lujan*, the court held that if this was a site-specific action, and all administrative appeals had been exhausted, persons threatened by imminent injury in fact could seek judicial review of the proposed action. Such persons could allege that the proposed action is not consistent with the plan, or that the plan violated the governing statutes.

Conceding that the standing issue was a close call, the court therefore addressed the District Court's granting of summary judgment to appellees. After a de novo review, the court held that the District Court had applied the correct standard: the deferential arbitrary and capricious standard of the Administrative Procedures Act. This court fully agreed with the District Court's findings that the plan is not arbitrary or capricious, and that it comports with the governing statutes and regulations. The court also held that the District Court did not abuse its discretion in denying the motion for leave of court to file a second supplemental complaint.

— C. Todd Ahrens

NEPA, ESA, AND BANKRUPTCY

Salmon River Concerned Citizens, et al.

v. Dale Robertson, et al.
No. 92-16113, 1994 WL 314807 (9th Cir. Oct. 4, 1993)

Salmon River Concerned Citizens (SRCC) formed to prevent the National Forest Service from implementing its plan to control vegetation in the Pacific Southwest Region (Region Five). The proposed plan, in part, consisted of an environmental impact statement required by the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332. As basis for its suit, SRCC claimed that the National Forest's environmental impact statement was insufficient in its examination of several key issues.

The National Forest Management Act of 1976 (NFMA), 16 U.S.C. § 1601, required the Forest Service (FS) to improve resource management by facilitating reforestation. Since one method of reforestation, vegetation management, can involve the use of various herbicides, NEPA required the Regional Forester to revise Region Five's 1974 environmental impact statement to update the potential effects of herbicides. The final draft of the impact statement included an analysis examining the worst case risks associated with use of different herbicides.

From the possible management plans outlined in the impact statement, the Regional Forester chose one that provided an amount of discretion in choosing the best method of vegetation management for the particular region. This approach included approval of herbicide use when deemed essential under the circumstances. SRCC appealed the Record of Decision in an administrative hearing and argued for a partial stay of herbicide use while the appeal was pending.

The FS formally approved the Regional Forester's impact statement and choice of specific plan for vegetation management. At the same time, the Forest Service removed both a temporary ban on the use of herbicides in Region Five as well as the stay on herbicide use. In light of SRCC's claim, it further determined the Service's decision was valid, as it was neither arbitrary nor capricious.

SRCC then filed suit in the Federal District

Court against the Forest Service. The court granted the Service's motion for summary judgment on the basis that the impact statement was sufficient in detail to meet the NEPA standard. Both parties appealed: the Defendants-Appellees, on the questions of SRCC's legal standing and issue ripeness, and Plaintiffs-Appellants, on the incompleteness of the impact statement with regard to herbicide use.

The Ninth Circuit Court of Appeals upheld the district court on all three issues. It found that SRCC had sufficient legal standing to bring its claim, because the group met requirements for both constitutional and statutory standing in that its grievance stemmed from a final agency action which was of concrete interest to group members. The court stated that the issue was ripe for determination because although no herbicide use had taken place, the future threat of use mentioned in the impact statement represented an addressable issue.

The Court of Appeals further held that the impact statement was complete in its analysis of herbicide use. The court stated its standard of review was based *Oregon Envtl. Counsel v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987), which held that the court can not substitute its judgment for that of the agency in question, as the agency has a measure of expertise in the area which the court lacks. The court also relied upon the standard of review articulated in *Sierra Club v. Sigler*, 695 F.2d 957 964 (5th Cir. 1983), to determine whether or not the impact statement was "arbitrary, capricious, an abuse of discretion, or otherwise not according to law."

In its complaint, SRCC identified three areas as being either absent or inadequate in the impact statement. The first was the fact that the impact statement failed to consider the cumulative effect of herbicides in the region, as it only examined the FS's use. However, the court held that while the impact statement did not identify every potential herbicide user by name or amount, the statement did call attention to the fact that exposure from multiple sources was possible. The impact statement accounted

for cumulative effect, the court found, in the statement's worst case risk analysis, which based its assessment on the combination of exposure to Forest Service herbicides in conjunction with other "lifetime exposures."

SRCC also contended that the impact statement did not explore the content and potential effects of inert ingredients in the herbicides. Based on its holding in *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 597-598 (9th Cir. 1988), the court found a listing of inert ingredients and potential effects was unnecessary. Instead, the court stated that main ingredients, which were more likely to be toxic than the inerts, should be the main focus of the impact statement. Again, the court pointed to the worst case risk assessment as ensuring reasonable accuracy by taking into account factors the impact statement did not specifically address.

The court held SRCC's last claim was likewise without merit. SRCC stated that the impact statement lacked full evaluation of the effect of herbicide use on individuals with multiple chemical sensitivities syndrome. The court reasoned that since this syndrome is difficult to quantify or even accurately define, the extent to which the impact statement addressed the issue was sufficient. The impact statement analyzed a potential range of sensitivity to the herbicides with "margin of safety factors," which the court found to be accepted by the scientific community and inclusive enough to account for the small population of chemically sensitive people.

— by Sarah Madden

***Pacific Northwest Generating Cooperative v. Brown*, 25 F.3d 1443 (9th Cir. 1994)**

Plaintiffs Pacific Northwest Generating Cooperative, Public Power Council, and Aluminum Company of America and other companies purchasing power from the Bonneville Power Administration (Direct Service Industries) challenged the response of Defendants Ronald H. Brown, Secretary of Commerce, and several other federal defendants, including the Bonneville Power Administration, to the listing of three species

of salmon as endangered or threatened species on the Snake River. The response challenged was an increase in the water flow in the Columbia River system designed to increase water spills at dams and to increase the velocity of the river in order to benefit the movement of the juveniles (young) of the listed species by improving the speed and success of the smelts' journeys downstream. This response limited the use of water for power production, resulting in an increase in the cost of power supplied by the Bonneville Power Administration.

The cases of the three separate plaintiffs were consolidated and brought before the United States District Court for the District of Oregon. The plaintiffs brought several actions alleging violations of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 et seq., and the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1988). The district court held that all the plaintiffs lacked standing to bring claims under the Endangered Species Act, and in the alternative, that the plaintiff's claims with respect to defendants' failure to conduct habitat and hatchery consultations in 1992 were moot. The district court also rejected the claim of the plaintiffs on the merits, that it is a violation of the Endangered Species Act to permit a taking of endangered species that is "incidental" to a permitted activity, and that this "incidental" taking allows the prohibited trade or transportation of members of endangered species to take place.

The Ninth Circuit Court of Appeals began its analysis of the plaintiffs appeal with a discussion of standing. The court noted that the District Court properly considered whether an interest worthy of standing exists in this case is based on the elements set forth in *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). The three elements are: 1) an actual or imminent invasion of a concrete and legally protected interest; 2) a causal connection between that invasion or injury and the conduct of the defendant; and 3) that it is likely, not speculative, that the injury will be redressed by a favorable decision.

The District Court found that the plaintiff's

interest was in the water resource and not in the endangered and threatened species. Furthermore, the District Court held that the plaintiffs did not establish causation because even if the consultations and ban on taking a listed species had occurred, the plaintiffs failed to show how the listed species would rebound to such an extent that water flow increases were not necessary. Finally, the District Court found that a bar on the takings of the salmon would not necessarily take the species off the list, and therefore redressability was at best speculative.

The court held that the plaintiffs had what is called "Footnote Seven Standing" pursuant to *Defenders*, 112 S.Ct. at 2142, footnote seven. In *Defenders*, the court allowed someone living adjacent to a proposed site for a dam to have standing to challenge the failure to prepare an Environmental Impact Statement, even though it was speculative whether said statement would cause the license to build the dam to be withheld. In the instant case the court compared the plaintiffs to those in *Defenders*, in that they are businesses who are affected by the alleged failures of federal agencies under the ESA. They cannot prove that a change in the biological opinions would require the flow rates imposed by the Bonneville Power Administration to be altered or reduce the costs involved in preserving the fish, but a successful challenge might possibly impact the conduct of agencies in the consultation process. Furthermore, the court stated that under the "Footnote Seven" rule, the plaintiffs in this case arguably need only to establish causation or redressability as a reasonable possibility. In concluding that the plaintiffs have standing under the "Footnote Seven" rule, the court had no difficulty in converting the economic interests of the plaintiffs, which were recognized by the District Court, into a legal interest, and thus standing was established.

The court went on to find that the plaintiffs' claims with respect to the failure of the agencies to consider the impact on the hatcheries, habitat and that the remainder of comprehensive consultation claims were moot. Finally, the court addressed the merits

of the claim that the failure to address the impact on harvest made the consultation not comprehensive.

The plaintiffs argued that the ESA permits takings of endangered species incidental to a permitted activity due to the fact that the fisheries cannot distinguish between listed and non-listed species. This taking, in the opinion of the plaintiffs, is not "incidental." If these incidental takings were not allowed then the species would not be endangered and the increase water flow would be unnecessary. The court concluded that these takings are incidental and that even though the Endangered Species Act prohibits the transportation and trading of listed species, a situation which would certainly occur with respect to incidental takings, this would be impossible to enforce. Thus the court concluded that the harvesting claims were based on a misinterpretation of the ESA, and affirmed the grant of summary judgment to all the defendants.

— by C. Todd Ahrens

In re C. Hanna v John Mitchell, Inc., 168 B.R. 386 (Bankr. 9th Cir. 1994)

Gull Industries, Inc. (Gull) filed a complaint in Daniel Hanna's (Hanna) bankruptcy for injunctive relief and an administrative priority damage claim after discovering Hanna was contaminating Gull's land through migration of substances. The bankruptcy court found that Gull's costs to clean up the property were pre-petition claims which are not entitled the administrative expense status. However, Gull was entitled to bring a general unsecured claim against the bankruptcy estate. The Ninth Circuit Court of Appeals affirmed.

Hanna, and Gull owned adjacent filling stations which leaked petroleum products into the soil. Gull sold the property to BP Oil Company whereby the sale agreement required Gull to clean up the environmental

damage to the site. Gull hired an environmental consultant to inspect the site. The specialist discovered that the groundwater beneath the Gull site was contaminated by migration from the polluted Hanna land. Gull removed the material and in June of 1990, demanded that Hanna stop the flow of contaminating substances which were hampering his cleanup efforts. About a week later, Hanna filed for Chapter 11 bankruptcy and appointed John Mitchell, Inc. (Mitchell) as Chapter 11 Trustee.

Gull filed a complaint seeking injunctive relief and tort damages under Oregon Revised Statute § 465.255, and requested these expenses be considered administrative expenses under 11 U.S.C. § 503. Although Hanna emptied the leaking underground storage tanks on Hanna's site and removed them, he did not remove the underlying contaminated soil or perform a site study as ordered by the bankruptcy court. The bankruptcy court denied Gull's administrative claim but found that remedial action costs were recoverable as a general unsecured claim under O.R.S. § 465.255. Gull and Mitchell appealed the finding.

The court first addressed Gull's appeal for denial of administrative status. The court grants administrative status "only when a claim is (1) incurred postpetition, (2) directly and substantially benefits the estate, and (3) is an actual and necessary expense." The bankruptcy court found that the petroleum leaks on the Hanna property occurred pre-petition and that no significant contamination was added to the Hanna land postpetition. However, the court also found that the migration of contamination continued during the cleanup efforts. This inconsistency is explained by the court's citation to earlier cases finding that once a pre-petition triggering event has occurred, the claim is dischargeable regardless of when the claim is finally adjudicated. The bankruptcy court identified the triggering event as

the petroleum spills from the underground storage tanks into the soil which occurred pre-petition. The Ninth Circuit agreed, finding that pre-petition damages are not entitled to administrative expense priority.

Gull also argued that its claim should be an allowed administrative expense as a matter of environmental policy. However, the court states that Congress alone sets priorities and that courts are not given the right to create priorities for environmental cleanup costs. The Ninth Circuit held that the bankruptcy court did not abuse its discretion in denying Gull administrative expense status.

The court next discussed Mitchell's cross-appeal allowing Gull's claim to be classified as an unsecured claim under Oregon law. Mitchell asserted that Gull failed to follow the guidelines issued by the Oregon Department of Environmental Quality (ODEQ) in its cleanup efforts, and therefore Gull's claim should not be allowed. Mitchell also claimed that the court's alternative theory of liability based on trespass is not lawful, but the court did not address this theory affirmed solely on the former theory.

Mitchell argued that a claim is only allowed if it is consistent with a permanent, remedial action as defined in the applicable rules governing remedial actions in containing the gasoline plume pursuant to O.R.S. § 465.200(15). However, the definition of remediation includes actions taken to remove or minimize the release of contamination so that it does not migrate to cause substantial danger. The court found that Gull's actions slowed the migration of the contamination which appears to be "actions" in compliance with the statute. The statute expressly states that the particular actions of remediation listed are not exhaustive. The court concluded that the action was remedial under the statute and Gull is therefore entitled to a general unsecured claim.

— by Jackie Hamra