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Case Summaries

CASE SUMMARIES

CERCLA

OHM Remediation Services v. Evans Cooperage Co., Inc., et al., No. 96-30714, 1997 WL 370843 (5th Cir. July 22, 1997)

OHM, a remediation contractor, brought action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) against numerous named defendants for response costs according to section 107(a) and section 113(f), while claiming it was not a potentially responsible party (PRP). OHM Remediation Services provided for the containment and/or clean-up of hazardous wastes. When Louisiana's Department of Environmental Quality (DEQ) ordered Louisiana Oil to take immediate action for a hazardous substance spill, Louisiana called upon the services of OHM. Only a contractual relationship existed between OHM and Louisiana; OHM never had any property interest in the Louisiana Oil facility.

According to the DEQ, OHM's work successfully abated the emergency situation at the facility and left the site in a secure condition. Because the DEQ found that Louisiana Oil's spilled materials were hazardous wastes, it shut down the facility. This order effectively caused Louisiana Oil to go out of business and its insurance would not cover OHM's three million dollar response cost bill.

OHM then sued Evans Cooperage (which during a critical two year period sent approximately 450,000 gallons of waste material to Louisiana Oil for treatment/disposal) for the recovery of clean-up costs under CERCLA section 107(a), 42 U.S.C. Section 9697(a). Evans named several PRPs as third-party defendants, those PRPs in turn named more PRPs. One of the named defendants was OHM for ten drums of waste it had delivered to Louisiana Oil in 1991. OHM did not admit that the material it sent to Louisiana Oil was hazardous, nor that the materials made it a PRP under the statute. Instead, the company brought a contribution action against the defendants under CERCLA section 113(f), 42 U.S.C. Section 9613(f).

The district court dismissed both OHM's section 107(a) and section 113(f) claims, and OHM appealed.

The Fifth Circuit reversed the district court's rulings and remanded the case. First, the Court addressed OHM's section 107(a) claim. The Court stated the question was whether recovery of response costs under section 107(a) is restricted to persons with a "protectable interest" in the clean-up site. The district court argued that the word "causes" (from section 107(a) language "[c]auses the incurrence of response costs") implied a requirement that there be a connection between the plaintiff and the property. The connection could only be satisfied by an interest in the site. This interpretation of section 107(a) would bar OHM's claim because as an independent contractor it had no "protectable interest" in the Louisiana property.

Contrary to the argument employed by the district court, the Fifth Circuit reasoned that a "protectable interest" in the clean-up site was not a required element of a section 107(a) claim. The Court pointed out that such a limitation cannot be fairly implied by the text of the statute, by legislative history, or by reading the statute as a whole. Specifically, the Court noted that nowhere does the statute require a showing of a "protectable interest." Moreover, the Court concluded, such a reading of section 107(a) would render the nonsensical result of requiring even the government to show it had a protectable interest in any Superfund site for which it incured response costs before it could bring suit. Accordingly, the Court ruled that section 107(a) did not impose a "protectable interest" limitation on who may recover response costs, and that OHM was not barred from bringing its claim because it was an independant contractor.

Second, the Court addressed OHM's section 113(f) claim. In a claim for contribution, the Court asked whether a contribution action could be brought by a party that was neither liable nor potentially liable. The Court noted that the legislative history of CERCLA appears to limit section 113(f) claims to RPs and/or PRPs. Specifically, section 113(a) was not meant to be duplicative of section 107(a), instead it was meant to allow PRPs a cause of

action to mitigate the harsh effects of joint and several liability. The Fifth Circuit acknowledged that it had, in dictum, suggested that section 113(f) actions may only be brought among PRPs. The Court agreed with the analysis in *United Technologies v. BFI*, 33 F.3d 96 (1st Cir. 1994), holding that section 113(f) contribution actions may only be brought by persons who are liable or potentially liable under CERCLA.

The Court briefly noted the decision in *Companies for Fair Allocation v. Axil Corp.*, 853 F.Supp. 575 (D.Conn. 1994), a case directly on point, which held that the plain language in section 113(f) states that "any person" can sue for contribution, therefore the claimant need not be a PRP. Nonetheless, the Fifth Circuit declined to adopt this reasoning.

Instead, the Court, while adhering to the rule that only RPs and PRPs may bring a section 113(f) action, broadly defined the term "potentially responsible." Because the terms "liable or potentially liable" and "potentially responsible party" have not been defined by the statute, the Court, from examining the text and the structure of CERCLA, defined "potentially responsible" as any party being sued under the statute. The Court reasoned that until a defendant is cleared of liability, he is at least potentially liable. Thus, under the Court's broad definition of a PRP, OHM, which had not been deemed liable under the statute by a court and which disputed its own liability, is permitted to bring a section 113(f) contribution action because it was sued under CERCLA.

-Pang V. Ly

Pinal Creek Group v. Newmont Mining Corp., No. 96-16334, 1997 WL 362462 (9th Cir. July 2,1996)

The Pinal Creek Group commenced an action to recover all or a portion of the voluntary response costs it expended in the cleanup of the Pinal Creek Drainage Basin in Arizona. The defendants, consisting of other potentially responsible parties ("PRPs"), denied joint and several liability and moved to dismiss. After the district court denied the motion to dismiss, the United States Court of Appeals for the Ninth Circuit granted the defendant's petition for interlocutory appeal.

Three mining companies formed the Pinal Creek Group ("the Group") to coordinate the cleanup efforts of the hazardous waste site. The Group admitted partial responsibility for a portion of the cleanup costs, but sought full recovery of those costs from the defendants ("the Newmont PRPs"). The Group's theory was that since CERCLA provided for joint and several liability among all defendants, the Newmont PRPs must reimburse the Group for the cleanup costs it had voluntarily expended. Following reimbursement, the Newmont PRPs would be entitled to assert a contribution claim against the Group for its portion of the costs.

As this was a question of law, the Ninth Circuit reviewed the interpretation of CERCLA de novo. Section 107(a) of CERCLA provides in pertinent part that suits are permitted against certain "statutorily defined 'responsible parties' to recover costs incurred in cleaning up hazardous waste disposal sites". 42 U.S.C. § 9607(a). The Group argued that this section authorized them to impose joint and several liability on the Newmont PRPs and recover the totality of the Group's response costs.

The Court noted that Congress amended CERCLA in 1986 to address the issue of apportioning response costs among PRPs. Prior to the amendment, CERCLA did not explicitly recognize a claim for contribution. Congress, however, aware of the utility of claims for contribution for cleanup costs, amended CERCLA by enacting § 113(f) to recognize and regulate such claims. The Newmont PRPs argued that the combined effect of §§ 107 and 113 limited their liability to contribution.

The Ninth Circuit, consistent with decisions of the United States Supreme Court and five circuits, agreed with the Newmont PRPs. The Court found that a claim by one PRP against another must necessarily correspond to that party's equitable share of the total liability. Had the Court permitted the Group to recover its full costs, the Ninth Circuit reasoned, the Group would have enjoyed two unfair advantages: (1) it would avoid the delay and burden of arguing for the equitable allocation of costs among the PRPs under § 113(f); and (2) it might avoid bearing the cost of any "orphan shares," which are costs attributable to insolvent, unidentified, or

missing PRPs.

The Group advanced several arguments against this proposition. First, the Group suggested that the decision would discourage CERCLA's policy of promoting expeditious and voluntary environmental responses to hazardous waste sites. The Court rejected that argument because the text, structure, and legislative history of §§ 107 and 113, as well as judicial precedent, mandated the holding regardless of policy considerations. The Ninth Circuit concluded that § 107 implicitly provided for a claim for contribution. Moreover, the legislative history of § 113(f) supported that conclusion by confirming that a claim for contribution could be made under § 107. Essentially, § 107 provided the right to make claims for contribution and § 113 provided the mechanism for apportioning that liability among responsible parties.

Second, the Group reasoned that the holding would eliminate the statute of limitations on a contribution claim by a PRP who incurred voluntary response costs. Section 113(g)(3) provides a three year statute of limitations on contribution actions, but the statute is only triggered by events which would follow coercive governmental intervention, such as a settlement, consent decree, or judgment. The Court, though, declined to expound on that issue. The decision limited itself to the interpretation of the substantive provisions of CERCLA.

Third, the Group argued that the only claim it could assert against the Newmont PRPs was a cost recovery claim for the totality of its cleanup costs. The Group suggested that, as a PRP, it had not incurred the requisite liability to authorize a contribution claim under § 113. It contended that the government must incur response costs before liability would exist under § 107(a). The Court rejected the argument for several reasons. First, even the Newmont PRPs acknowledged that the Group had a contribution claim against them. In addition, once the Group incurred response costs, all the PRPs, including the Group, became partially responsible for those costs. Finally, the argument was inconsistent with the Group's own position. Under the Group's original theory, the Newmont PRPs owed the Group the full response costs, from which the Newmont PRPs could then seek contribution. The same premise that would permit the Newmont PRPs' claim for contribution against the Group authorizes the Group's claim for contribution against the Newmont PRPs.

The Ninth Circuit found that CERCLA's claim for contribution creates only several liability, not joint liability, among PRPs. The opinion stated that the Group's theory was unsupported by CERCLA's provisions, would create procedural turmoil, and ran afoul of the traditional doctrine of contribution. Thus, the Court held that a PRP does not have a claim under CERCLA for the totality of its cleanup costs against other PRPs. Further, PRPs cannot be found jointly and severally liable to another PRP who voluntarily incurred response costs.

-Eric Walter

CONSTITUTIONAL CLAIMS

Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997)

In 1980, Minnesota enacted the Minnesota Waste Management Act to protect public health and the environment by creating an "integrated waste management system" in the state. Minn. Stat. Section 115A.02(a) and (b). The Act sought to reduce the amount of waste generated and disposed of, and to improve recycling, composting, resource recovery, and land disposal. The Act allowed counties to develop their own designation plans for transfer or disposal facilities. Accordingly, Hennepin County created a waste management plan and eventually enacted a "flow-control" regulation, Ordinance 12, to implement the plan.

The Ordinance, which took effect in 1989, required that all designated waste be delivered exclusively to transfer stations or processing facilities designated by Hennepin County. In 1993, the county suspended enforcement of the regulation against waste destined for disposal outside of Minnesota, but still required all in-state waste to go to the county-designated facilities. Consequently, in 1994, the Oehrleins plaintiffs, which included eight Minnesota waste haulers, one Minnesota landfill, and one Iowa landfill, filed suit in federal district court. In 1995, a certified class of residential and commercial "waste generators" from Hennepin County also filed suit. both the Oehrleins

and Robinson Rubber plaintiffs alleged that Ordinance 12 violated the Commerce Clause of the United States Constitution. In addition to damages, the plaintiffs sought an injunction against enforcement of the Ordinance.

The district court held that the Ordinance, as it was enforced subsequent to the suspension of enforcement against out-of-state waste deliveries, discriminated against interstate commerce in violation of the Commerce Clause. The court granted summary judgment to both sets of plaintiffs. It was from that decision that the instant appeal was taken.

The County's principal arguments on appeal were that the Tax Injunction Action, 28 U.S.C. Section 1341, did not confer jurisdiction upon the federal courts to enjoin the Ordinance, that neither set of plaintiffs had standing, and that the Ordinance did not violate the Commerce Clause.

The Eighth Circuit Court of Appeals quickly concluded that the Oehrleins plaintiffs did meet the three minimal constitutional requirements to demonstrate standing. First, the Court stated, the Oehrleins plaintiffs had suffered an actual or imminent injury in fact because haulers had been subjected to penalties for noncompliance and because processors had been prohibited from participating in the market. Second, the Court found that these injuries were traceable to the enactment and enforcement of Ordinance 12. Third, the Court concluded that a decision holding Ordinance 12 to be unconstitutional would redress those injuries by allowing for recovery or damages and enjoining further enforcement. Finally, the Court could find no prudential concerns that would bar the Oehrleins plaintiffs standing.

As for the Robinson Rubber plaintiffs, the Court concluded that prudential considerations of third-party standing barred standing. The Court found that the Robinson Rubber plaintiffs had in fact suffered an economic injury when they were charged higher fees for waste processing, which the Court concluded were the direct result of the enforcement of Ordinance 12. Additionally, the injuries alleged by the Robinson Rubber plaintiffs would be redressed by recovery of damages and an injunction against enforcement. Having satisfied the constitutional minimum for standing, the Court considered any prudential limitations.

The Court first stated that it knew of no Commerce Clause cases where a court had granted standing to consumers whose alleged harm was the passed-on costs incurred by the regulated entity. Further, the Court decided that the Robinson Rubber plaintiffs' claims fell within the doctrine of third party standing, which usually bars parties from asserting the rights or legal interests of others in order to obtain relief from injury themselves. The Robinson Rubber plaintiffs, according to the Court, could not claim any personal right under the Commerce Clause to lower garbage bills, and any relief due to them turned on the rights of the waste haulers to be free from enforcement of the Ordinance. The Court could find no reason to relax the third-party bar in this situation. Additionally, the Court found that the Robinson Rubber plaintiffs did not fall within the zone of interests doctrine, which requires that whatever interest is sought to be protected by the complaining party is within the zone of interests to be protected or regulated by the challenged statute or regulation.

Next the Court addressed the County's argument that the Tax Injunction Act, 28 U.S.C. 1341, deprived the federal courts of jurisdiction in this case. In rejecting the argument, the Court pointed out that whether or not the Ordinance constitutes a tax is a matter of federal law, and that the purpose of the Ordinance was clearly regulatory rather than revenue-raising. The Court concluded that it did have jurisdiction to decide the matter before it.

Finally, the Court examined the County's argument that the Ordinance did not violate the Commerce Clause. It did so separately, considering whether purely intrastate enforcement of the Ordinance was different from full enforcement. The Court found that the interstate enforcement of the Ordinance could not survive rigorous scrutiny, since the purpose of the Ordinance was to grant an absolute preference to a particular local interest at the expense of all others. Therefore, the Court concluded, interstate enforcement of the Ordinance violated the Commerce Clause.

Next the Court considered whether the County could enforce flow control restrictions to waste that stayed within the state. The

Court found that there was no differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Conceding that this might create a local monopoly, the Court still concluded that this did not constitute discrimination against interstate commerce. The plaintiffs argued that interstate commerce meant more than just goods crossing state lines, and the Court agreed that even a regulation that does not discriminate may constitute an unconstitutional burden on interstate commerce and so must withstand a balancing test.

The Eighth Circuit held that with regard to the Oehrleins plaintiffs, the provisions of the Ordinance preventing the delivery of out-of-state waste was unconstitutional. Further, the Court found the provisions of the Ordinance that restrict intrastate delivery did not discriminate against interstate commerce. The Court remanded the case for a determination of whether the benefits of the intrastate enforcement of the Ordinance were clearly outweighed by the burdens on interstate commerce.

-Laura Krasser

Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997)

Petitioner Bernadine Suitum was the owner of an undeveloped lot near the Nevada shore of Lake Tahoe. Respondent Tahoe Regional Planning Agency ("the Agency"), which regulates land use in the region, determined that Suitum's property was ineligible for development but was entitled to receive certain allegedly valuable "Transferable Development Rights" (TDRs) that could be sold to other landowners with the agency's approval. Suitum brought an action for compensation under 42 U.S.C. Section 1983, claiming that the Agency's determinations amounted to a taking of her property without just compensation, a violation of the Fifth and Fourteenth Amendments.

The District Court held that Suitum's claim was not ripe for adjudication as she had not attempted to sell her TDRs. Because the specific values of the TDRs were unknown, the court could not realistically assess whether the Agency's regulations had frustrated Suitum's reasonable expectations. On appeal, the Ninth Circuit affirmed, noting that action on a TDR transfer application would be the requisite "final decision" by the agency regarding its regulations' application to Suitum's lot. Appeal was then taken to the United States Supreme Court.

The sole question before the Court was whether the claim was ripe for adjudication, even though Suitum had not attempted to sell the development rights she had or was eligible to receive. The Court held that Suitum's regulatory taking claim was ripe for adjudication. First, the Court recognized that Suitum must satisfy the prudential ripeness principle requiring that she receive a "final decision" from the agency regarding the application of its regulations to her property. The Court stated that the Ninth Circuit's rationale for holding Suitum's claim unripe--that she had not obtained a final and authoritative agency decision--was unsupported by the United States Supreme Court's precedents, which make clear two points regarding the finality requirement: (i) it applies to decisions about how a taking plaintiff's particular parcel may be used, and (ii) it responds to the high degree of discretion characteristically possessed by land use boards in softening the stricture of the general regulations they administer. The Court maintained that Suitum's claim satisfied the demand for finality. The Court recognized that it was undisputed that the Agency had finally determined that her land lies entirely within a zone in which development was not permitted. As the Agency had no discretion to exercise over Suitum's right to use her land, the Court reasoned, no occasion existed for applying the requirement that a landowner take steps to obtain a final decision about the use that would be permitted on the particular parcel.

The Court found no merit in the Agency's argument that Suitum's case was not ripe because no values attributable to her TDRs were known. First, little or no uncertainty remained, as to Suitum's right to recieive TDRs that she may later sell. Second, as to her right to transfer her TDRs, the only contingency apart from market demand was the right of the Agency or a local regulatory body to deny approval for a specific transfer based on the buyer's intended improper use of the TDRs. The Court pointed out that as the Agency did not deny that there are many potential lawful buyers who

would unquestionably be approved, the TDRs' valuation is but an issue of fact about possible market prices, on which the District Court had considerable evidence. The Court recognized that similar determinations are routinely made by courts without the benefit of a market transaction in the subject property.

Finally, the Court rejected the Agency's argument that Suitum's claim was unripe under the "fitness for review" requirement of *Abbott Laboratories v. Gardner*, 87 S.Ct. 1507. The Court maintained that Abbott Laboratories was not on point because the petitioners there were challenging the validity of a regulation as beyond the scope of its issuing agency's authority, whereas Suitum sought to be paid for the consequences of the regulations as issue, not to invalidate them. Thus, the Court, finding that Suitum had received a "final decision" consitent with the ripeness requirement, vacated the judgment of the Court of Appeals and remanded for further proceedings consistent with its opinion.

-Melissa McAllister

TSCA

Sierra Club v. United States Environmental Protection Agency, No. 96-70223, 1997 WL 367396 (9th Cir. July 7, 1997)

At issue in this case was the authority of the Environmental Protection Agency ("EPA") to promulgate a final rule allowing for the importation of polychlorinated biphenyls (PCBs) into the United States for purposes of disposal. Section 6(e) of the Toxic Substances Control Act (TSCA) concerns regulation of PCBs. The statute prohibits the manufacture, processing, and distribution in commerce of PCBs. The statute contains an exception to this broad ban, allowing the EPA Administrator to grant an exemption on an individual basis, provided that (1) the administrator finds "an unreasonable risk of injury to health or environment would not result"; (2) the exemption does not last for more than one year; and (3) the party seeking the exemption first makes a good faith effort to develop a substitute chemical. The statute also instructs EPA to promulgate regulations to "prescribe methods for the disposal" of PCBs consistent with the prohibitions set forth in the statute.

Pursuant to its TSCA § 6(e)(1) authority to regulate the disposal of PCBs, EPA held a notice and comment rulemaking process, and on March 18, 1996, promulgated the final rule that was at issue in this case (now codified at 40 C.F.R. § 761.93 (1997)). Under this "Import for Disposal Rule," "it is no longer necessary for persons who wish to import PCBs for disposal in accordance with this rule to apply for case-by-case exemptions under section 6(e)(3)." Rather, importers must submit notice to the EPA Office of Enforcement and Compliance Assurance at least 45 days before the date they intend to bring PCBs into the United States. According to the new rule, if notice is provided in a timely and complete manner once per year, a party may "continue importing indefinitely without interruption." The Sierra Club petitioned the United States Court of Appeals for the Ninth Circuit to review the Import for Disposal Rule under 15 U.S.C. § 2618(a)(1)(B), asserting that the rule violated the import ban contained in TSCA § 6(e)(3)(A).

On appeal, the Ninth Circuit first addressed whether the petitioner, Sierra Club, was required, under Fed. R. App. Pro. 15(c), to serve notice of its petition for review on all of the commenters and witnesses of the informal rulemaking proceeding that preceded the promulgation of EPA's rule. Sierra Club moved for leave to dispense with the service requirement with regard to the three hundred and seventeen groups, individuals, and organizations that provided EPA with comments and input during the administrative rulemaking process. A motions panel of the Ninth Circuit had previously denied Sierra Club's motion "without prejudice to renewal in the opening brief." Sierra Club renewed its motion for leave to dispense with the service requirement in its appellate brief, asserting that the FRAP 15(c) requirements should not apply to this case, where the rulemaking proceeding was informal and where so many different parties provided comments and input to the agency. The Ninth Circuit agreed and granted the motion, recognizing that the facts and procedural circumstances of the case did not bring the rule's service requirements into play.

Finally, the Ninth Circuit considered whether EPA's rule allowing importation of PCBs for

disposal violated the statutory prohibitions concerning PCBs contained in § 6(e)(3)(A)(I) of the TSCA, 15 U.S.C. §§ 2601-2618. Looking to the text of the statutes to decide if congressional intent was clear, the Ninth Circuit stated that the absolute ban on manufacturing PCBs contained in TSCA § 6(e) includes an absolute ban on their import. As such, the Court stated, EPA may not promulgate a rule governing the disposal of PCBs that would violate this categorical ban. While the court recognized the lone exception to TSCA's ban on the manufacture and import of PCBs, which allows the EPA Administrator to grant an exemption, under certain circumstances, for no more than one year, it pointed out that the EPA, however, may not promulgate a rule to dispose of PCBs which allows parties to "continue importing [PCBs] indefinitely without interruption," as it did here.

The Court also observed that the Import for Disposal Rule attempted to obviate the TSCA's requirements with respect to granting an exception to the import and manufacture ban. The Court held that such actions were impermissible under any reading of TSCA. Thus, the Ninth Circuit held that EPA lacked the statutory authority to promulgate the Import for Disposal Rule, as it was a violation of the PCB manufacture ban contained in TSCA § 6 and contrary to the clear intent of Congress embodied in the statutory text.

-Melissa McAllister

WSRA

Newton County Wildlife Association v. United States Forest Service, 113 F.3d 110, (8th Cir. 1997)

The Newton County Wildlife Association, the Sierra Club and various individuals brought an action against the United States Forest Service for violating the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. Sections 1271 et seq., and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. Sections 703 et seq., by approving timber sales prior to completing plans for a comprehensive management plan as mandated by Section 1271(d)(1) of the WSRA. The WSRA authorizes particular government entities to designate portions of rivers which have high environmental or cultural value as "components of the national wild and scenic river system." 16 U.S.C. Sections 1271, 1274. The authorized agency must designate the boundaries of the land and within three years after the designation is made, implement a plan which addresses resource protection, development of lands and facilities, and other management practices necessary to achieve the purpose of the WSRA.

In 1992 Congress designated portions of six rivers located in the Ozark National Forest. The Forest Service did not meet its deadline for completing the comprehensive management plan, but did conduct four separate timber sales which were at issue in this case. On appeal, the appellants sought to enjoin the Forest Service from selling the timber until the agency completed its management plan. The Eighth Circuit affirmed the district court's holding that the WSRA was not violated because the WSRA did not mandate completion of the management plan prior to implementing timber sales. The Court also indicated that because the plan was not a precondition to approving timber sales, it could not enjoin the Forest Service's sale of timber. Such an injunction was also found to be inappropriate because the Court agreed with the Forest Service's contention that the four timber sales were outside of WSRA designated territory. Since the Forest Service did not have to provide a management plan for areas that were not in the designated territory, the Eighth Circuit found that failure to provide a plan for timber sales outside of the area cannot be grounds for an injunction.

The appellants also argued that the sale of the timber prior to implementing the management plan violated the MBTA. The Court noted that the MBTA did not provide a private right of action, but the National Forest Management Act (NFMA), 16 U.S.C. Sections 1600 et seq., did. The appellants claimed that because the MBTA makes it illegal to kill, posses, pursue, hunt or harm migratory birds in various other ways, the Forest Service's sale of timber, which would inevitably harm the migratory bird population in the harvested area,

violated the MBTA and the Forest Service should be enjoined. The court stated that it would stretch the bounds of reason to make any conduct which may indirectly harm migratory birds absolutely prohibited. The Court construed the language which prohibits the "taking" and "killing" to mean "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918."

Further, the Court held that the MBTA does not apply to actions of federal agencies. By its terms the statute's sanctions apply to "any person, association, partnership, or corporation". 16 U.S.C. Section 707(a). The court rationalized that because, in common usage, the word "person" did not include the government, statutes were construed to exclude the government. In response to the appellant's argument that the MBTA must apply to the government if the nation is to meet its obligations under the 1916 treaty with Great Britain which gave rise to the MBTA, the Court stated that the government's duty arose from the treaty itself, but the statute extended only to "persons".

The Court noted that its conclusions regarding the MBTA were tentative because it lacked the expertise and knowledge of the Fish and Wildlife Service, the agency charged with administering that statute. In its conclusion, the Court committed the enforcement of these environmental policies to agency discretion, not judicial review. For those reasons, the Court affirmed the district court's decision which refused to enjoin the sale of the timber.

-Rachel M. Craig

MISCELLANEOUS

Lindsay Manufacturing Co. v. Hartford Accident & Indemnity, No. 96-1282, 96-1440, 1997 WL 369989 (8th Cir. July 8, 1997)

Lindsay Manufacturing Company (Lindsay) appealed the district court's grant of summary judgment to Hartford Accident & Indemnity Company and the Hartford Insurance Company of Illinois (collectively referred to hereinafter as Hartford) on Lindsay's claim and Hartford's restitution counterclaim arising out of insurance coverage for environmental clean-up costs.

Lindsay, an irrigation equipment manufacturer, cleaned its equipment using a bath of sulfuric acid solution known as "pickle liquor." When the pickle liquor was no longer effective, it was disposed of into an open, unlined, clay-bottomed earthen waste pit. In May of 1980, Lindsay was notified by the EPA of potential contamination problems. In response, Lindsay installed a monitoring well in June of 1980 to collect and test the water samples. On December 16, 1982, contamination of the aquifer was detected in one of the wells. Lindsay then entered into several stipulation agreements with the Nebraska Department of Environmental Control (NDEC). By October 1, 1983, the waste pit was certified closed. Lindsay retained an independent engineering firm to investigate and develop a plan for cleaning the site. The firm concluded the contamination occurred when the monitoring wells were drilled in December 1982.

Although Lindsay began its investigations in 1980, it did not notify Hartford of the contamination until October 4, 1985. Lindsay claimed the expenses incurred in the clean-up of the site constituted damages under its primary and umbrella policies with Hartford.

The comprehensive general liability (CGL) policies obligated Hartford to pay all sums which the insured becomes obligated to pay "as damages" caused by an occurrence. The policies contained a "pollution exclusion" which excluded from coverage payments that were "damages," but were not the result of environmental contamination that was "sudden and accidental." The policies covered the period from January 1, 1982, to January 1, 1983.

Hartford negotiated a written agreement with Lindsay to pay the expenses incurred in the clean-up. In subsequent investigation, Hartford discovered that a NDEC government geologist concluded that the contamination was a result of seepage rather than the drilling of the monitoring wells. Nonetheless, Hartford continued to make the payments as required by the CGL policies.

Over time, Hartford accepted that the cause of the contamination was not a "sudden and accidental" occurrence, but rather a gradual seepage. Because the clean-up costs were a result of seepage, which was not covered by the policy, Hartford ceased making payments. Lindsay then brought

action against Hartford based on: (1) breach of the CGL policies; (2) breach of the separate agreement to reimburse Lindsay for all expenses resulting from the clean-up; and (3) an equitable estoppel theory which required Hartford to continue making payments.

The district court granted summary judgment to Hartford and Lindsay appealed.

The Eighth Circuit reversed the district court's ruling and remanded the case. The primary disagreement between Lindsay and Hartford was the phrase "as damages," contained in the policy language. Since Nebraska state law governed the scope of the term "as damages" and the Nebraska Supreme Court had not reached its conclusion, the Court attempted to predict how the Nebraska Supreme Court would address the issue.

The Court found most persuasive decisions of the Supreme Court of Nebraska indicating that it would: (1) find the term "damages" ambiguous in lay understanding and (2) would not take the second step of applying the "insurance context" to give it technical meaning. The Court specifically looked at *Sandy Creek Public Schools v. St. Paul Surplus Lines Ins. Co.*, 384 N.W.2d 279 (Neb. 1986), and *Katskee v. Blue Cross Blue Shield*, 515 N.W.2d 645 (Neb. 1994). The Nebraska Supreme Court in both cases adopted a lay person's understanding in the construction of a term. Based on this demonstrated preference, the Eighth Circuit concluded that although the term "as damages" had a particular meaning in a insurance community, such would not be employed if the term could be fairly interpreted in more than one way. The Eighth Circuit interpreted the term "as damages" to include both legal damages and equitable relief because that interpretation favored the insured. Accordingly, the Court found that the term "as damages" in a CGL policy covered environmental response costs and that Lindsay had a policy claim against Hartford for the costs of cleaning the site.

-Pang V. Ly

Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 946 S.W.2d 234 (Mo. 1997)

In April, 1994, Plaintiff, Premium Standard Farms, Inc. ("Premium"), a Missouri corporation engaged primarily in hog farming, purchased 3084 acres of farmland in Lincoln Township of Putnam County, which it amed White Tail Farm. Premium erected 96 hog barns and 12 hog waste lagoons on 12 separate sites containing one lagoon and 8 barns each. Each hog barn was designed to allow hog manure to fall through the floor into a shallow holding area. Every two hours water flushes the waste into an adjacent lagoon. The lagoons store and break down the hog waste. Each lagoon is equipped with intake pipes for receiving the waste from the hog barns and exit pipes through which water is pumped to fertilize Premium's hay fields.

In June, 1994, Defendant Lincoln Township adopted "Comprehensive Plan and Zoning Regulations for Lincoln Township." Under the regulations, the land owned by Premium was zoned A-1 (Agricultural). The regulations permitted livestock sewage lagoons systems (undefined) and livestock feedlots (defined as 100 cattle per acre, 1000 hogs per acre, 1000 sheep per acre, 1000 poultry per acre). In addition, the regulations required cash or surety bonds to guarantee proper closure and post-closure care of sewage lagoons and minimum setbacks of 5,280 feet from adjacent residences or dwellings for lagoon systems with capacities of twenty acre feet or more. Further, the regulations imposed a bonding requirement of over $750,000 per lagoon, totaling over $9,000,000. The regulations also required minimum setbacks of 1,400 feet from adjacent residences or dwellings for livestock feedlots.

In mid-July, 1994, the code enforcement officer for Lincoln Township sent a letter to Premium reminding Premium of the procedures set forth in the 1994 regulations. In September, 1994, an inspection of Premium's property was made by the code enforcement officer, who observed 72 feedlots and nine lagoons. The lagoons were located closer than 5,280 feet from adjacent residences or dwellings.

In late July, 1994, Premium brought an action for declaratory judgment and injunction against Lincoln Township to prevent enforcement of its regula-

tions. Lincoln Township counterclaimed for enforcement of its regulations and for relief based on the theory of public nuisance. Premium filed three motions for summary judgment, which the trial court entered in favor of Premium, at the same time dismissing Lincoln Township's counterclaims. While numerous issues were raised by the parties on appeal to the Missouri Supreme Court, the Court primarily addressed two issues: (i) whether Lincoln Township's actions imposing setback and bonding requirements on Premium Standard Farms livestock sewage lagoons and setbacks on its finishing buildings exceeded the township's statutorily granted zoning powers and (ii) whether Lincoln Township had the power to commence a public nuisance action.

As a threshold matter, the Missouri Supreme Court addressed Lincoln Township's challenge of its and the trial court's jurisdiction to adjudicate the issues presented. Lincoln Township claimed Premium had failed to exhaust its administrative remedies because it failed to pursue an appeal for a variance permit to the Lincoln Township Board of Zoning Adjustment before seeking review by the courts. The Supreme Court reasoned that because the issue presented in the instant case was not in any way dependent upon further development of the record through administrative procedures, as the case involved a legal issue, the doctrine of exhaustion of administrative remedies did not apply.

The Supreme Court then addressed the primary issues involving Lincoln Township's powers. Premium challenged Lincoln Township's attempted regulation of its finishing buildings and sewage lagoons, asserting they were "farm buildings" and/or "farm structures" exempt from the township's general zoning power. The Court examined the language of the statutes which Lincoln Township claimed to have been granted its powers (specifically §§ 65.260, 65.270, 65.677, 65.697, of the Revised Missouri Statutes, as amended). The Court stated that a plain reading of § 65.677 revealed no ambiguity, as Lincoln Township contended. The Court maintained that while the statute generally granted the township power to restrict certain "areas for agricultural, forestry, and recreation" uses, it did not authorize the regulation of agricultural uses, as Lincoln Township contended. The Supreme Court held that the livestock sewage lagoons and the livestock finishing buildings at issue in the instant case were "farm structures" within the meaning of § 65.677 and that setback and bonding requirements were not authorized and, thus, were impermissible. As there was no genuine issue of material fact as to the nature and composition of the lagoons and finishing buildings, the Court held that Premium was entitled to judgment as a matter of law.

Finally, the Missouri Supreme Court addressed whether Lincoln Township had been granted express power to bring a public nuisance action or, in the alternative, whether the power to prosecute a nuisance action is necessary to the exercise of some express township power. The Court stated that no express authority to prosecute a nuisance action had been granted townships. The Court further recognized that the power to prosecute a public nuisance action was neither implied in nor incident to the exercise of the powers expressly granted to townships in chapter 65 of the Revised Missouri Statutes. Thus, the Court, affirming the trial court's judgment, found that Lincoln Township's counterclaim seeking injunction of Premium's operations was properly dismissed, as the township did not have the power to commence a public nuisance action.

-Melissa McAllister

SWAMPBUSTER

Gunn v. U.S. Dep't of Agriculture., No. 96-3995SI, 1997 WL 367337 (8th Cir. July 7, 1997)

Charles Gunn, an Iowa farmer, challenged a determination by the Soil Conservation Service (SCS) that 160 acres of Gunn's farmland were converted wetlands, and therefore, could not be farmed without his losing eligibility for certain federal farm-assistance programs. The SCS made its determination pursuant to 16 U.S.C. §§ 3108, 3821-24, commonly known as the "Swampbuster" law. The purpose of the Swampbuster law is to preserve wetlands throughout the United States by discouraging their conversion into crop lands. Under Swampbuster, a farmer's eligibility for federal benefits is forfeited if he

or she elects to farm upon a land declared a converted wetland.

The 160-acre tract of land in question had been farmed by Gunn and his predecessors since 1906. Prior to 1906, the land was a wetland and was not arable. In 1906, in an effort to achieve increased production, the local drainage district inserted tiles under the land for the purpose of draining excess water. As a result, some of Gunn's land became generally productive and suitable for farming. However, due to neighboring drainage, a significant portion of Gunn's land remained wet and was not agriculturally productive.

In 1985, Congress passed the Swampbuster law which, in essence, denied federal farm-assistance benefits to farmers who produced an agricultural commodity on a "converted wetland." A converted wetland is generally defined as a wetland that has been manipulated in any way so that agricultural production is possible. One exemption to the statute is noteworthy: no farmer is ineligible for benefits if his or her land has been converted from wetland to arable land before December 23, 1985. In 1991, when Gunn sought certification for federal benefit programs, the SCS determined that 32.9 acres of Gunn's land were "farmed wetlands," which are wetlands that are sometimes dry enough to farm. At that time, the SCS advised Gunn that he could continue to farm the 32.9 acres and maintain the 1906 drainage system without losing his benefits because the land was not considered a converted wetland and because the drainage system was in place before December 23, 1985. However, the SCS also warned that any improvements to the drainage system would cause him to forfeit his benefits if he subsequently chose to make the land productive.

In 1992, considering the significant drainage problems that still existed on some of Gunn's land, the local drainage district installed new drainage tiles and dug an open ditch on the land. This cured most, but not all of the shortcomings of the 1906 system. However, when Gunn applied for certification of his eligibility for benefits in 1992, the SCS found that the new system had a greater drainage capacity and had completely drained the land. The SCS determined that 28.2 acres of Gunn's land now qualified as converted wetland and that, under the Swampbuster law, Gunn would lose his federal benefits if he elected to farm the land.

Gunn sued in Iowa District Court challenging the SCS's decision that the 28.2 acres were converted farmland. After the District Court found against Gunn, he raised a number of points on appeal before the 8th Circuit. First, Gunn argued that regulations promulgated by the SCS to refine the scope of the Swampbuster statute were not consistent with the act. The Eighth Circuit considered Gunn's argument that the SCS's definition of "converted wetland" was inconsistent with the meaning Congress intended for the term, but found the challenge without merit. Moreover, Gunn could not convince the Eighth Circuit that the conversion of wetlands in this particular instance was in fact a process that "commenced" in 1906, thereby falling under the December 23, 1985 exemption. Gunn pointed to specific statutory language as well as a plain meaning argument that the conversion process had commenced before the statutory cutoff, but the court found the 1906 system and the 1992 system to be mutually exclusive undertakings, and further, that significant wetland characteristics had vanished after the implementation of the 1992 system. Thus, the 1992 system was found to have been commenced after 1985. The Court, however, noted that had Gunn demonstrated that the 1992 system was the culmination of one actively pursued conversion, or at least one that had commenced prior to 1985, his argument would have been warranted.

The Eighth Circuit was careful to point out that the general purpose of the Swampbuster statute, to preserve the wetlands as they existed in 1985, would be defeated by a ruling in Gunn's favor. The land in question continued to have significant wetland characteristics prior to the installation of the 1992 system and part of Congress' purpose was to preserve those characteristics. The Court decided that this purpose was certainly not accomplished by the drainage work done on the land in 1992, and that no argument made by Gunn could convince the Court that the 1992 work was exempt from the statute. Gunn's further argument that the changes in 1992 were attributable to the local drainage district was found by the Court to be without a sound legal

basis and was subsequently rejected.

Another argument put before the Eighth Circuit by Gunn, that the SCS failed to follow its own regulations in determining that the land was wetland prior to 1992, was also rejected by the Court. Gunn argued that the land should have been classified as "converted wetland" prior to 1992, and not "farmed wetland." However, the Eighth Circuit found that the regulation put forth to support Gunn's claim applied only to converted wetland. The Court held that Gunn's land was not converted wetland before 1992 because of its wetland characteristics, and that any determination by the SCS before 1992 was sound.

A final claim made by Gunn in his original petition sought compensation for a taking of land by inverse condemnation under the Fifth Amendment. This claim was rejected by the District Court because the United States Court of Federal Claims had exclusive jurisdiction over the claim because Gunn sought damages which exceeded $10,000. On appeal, Gunn asserted that the District Court erred in not transferring the case to the Federal Claims Court. The Eighth Circuit ruled that the decision to transfer was discretionary with the District Court, and that because there was no bar to Gunn's filing a separate action in the Federal Claims Court, there was no abuse of discretion.

-Craig D. Brewer

FEDERAL ENVIRONMENTAL RESOURCES ON THE WEB

EPA HOMEPAGE
http://www.epa.gov/epahome/index.html

EPA CIVIL CASES AND ADMINISTRATIVE ACTIONS - *Contains records of all civil cases filed by the Department of Justice on behalf of the EPA.*
http://www.rtk.net/www/data/doc_gen.html

EPA PERMIT CONTROL SYSTEM FOR WATER PERMITS - *Contains Area PCS Reports, Facility PCS Reports, and Non-Compliance PCS Reports.*
http://www.rtk.net/www/data/pcs_gen.html

EPA ACCIDENTAL RELEASE INFORMATION PROGRAM - *Contains Area ARIP Reports, Facility ARIP Reports, and Chemical ARIP Reports.*
http://www.rtk.net/www/data/arip_gen.html

CERCLA SUPERFUND INFORMATION SYSTEMS
http://www.rtk.net/www/data/cer_gen.html

U.S. FISH AND WILDLIFE SERVICE HOMEPAGE
http://www.fws.gov/fwshomep.html

U.S. FISH AND WILDLIFE SERVICE ENDANGERED SPECIES HOMEPAGE
http://www.fws.gov/~r9endspp/endspp.html

NATIONAL WILDLIFE REFUGE SYSTEM HOMEPAGE
http://bluegoose.arw.r9.fws.gov/NWRSFiles/Welcome.html

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