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Case Summaries

CASE SUMMARIES

Dico, Inc. v. Employers Insurance Of Wausau, 581 N.W.2d 607 (Iowa 1998).

Dico, Inc. (Dico) is an industrial manufacturer in Des Moines, Iowa located across the Raccoon River from the Des Moines Waters Works facility. In 1974, Trichloroethylene (TCE) was detected in the finished water at the municipal water treatment plant, and two years later the Environmental Protection Agency (EPA) confirmed the contamination. When investigations by the EPA in 1978 confirmed that a well inside the Dico plant was contaminated with TCE, that Dico used TCE to degrease metal wheels produced in its plant, and that they spread sludge containing TCE around their facility to control dust they were identified as a possible contributor to the TCE-polluted water. In early 1979, Dico ceased these practices when federal and state officials alerted them of the environmental implications.

In August 1979, Dico obtained a comprehensive general liability policy (CGL) from Employers Insurance of Wausau (Wausau), which was renewed annually by Dico through August 1985. The policy stated among other things that Wausau would pay on behalf of Dico all sums that Dico became legally obligated to pay as a result of property damage caused by an "occurrence". However, as a condition precedent to coverage, the policy stated that Wausau was to receive a written notice of the event of an occurrence, and Dico was to forward to the company every demand, notice, summons, or other process received.

During the time of coverage, the EPA evaluated the contaminated area. In May 1981, the EPA concluded that the source of TCE in the water could have been from the sludge Dico spread around its perimeters. However, by the summer of 1985, the EPA had named neither Dico nor anyone else as a potentially responsible party (PRP) for the site's contamination. In April 1986, the EPA invited Dico to a meeting to discuss a proposed administrative order that would address the liability for the contamination. The following month, the insurance broker for Dico notified Wausau that Dico had received a proposed administrative order, but that no formal claim had been made by the EPA. The EPA issued an administrative order on July 21, 1986, which was forwarded three days later by Dico to Wausau. In the order, the EPA identified Dico as a responsible party and thereby ordered Dico to "design, construct, operate and maintain the response action." Dico then turned to Wausau as its CGL insurer for indemnification, but Wausau denied coverage on the grounds of late notice. Wausau took the position that Dico had been aware of the ongoing EPA investigations since 1976, but had failed to give notice until 1986.

Based on its defense of late notice, the district court awarded Wausau with a summary judgment, but the court delayed dismissal for three weeks, giving the sides time to "comment" on the court's decision. During this time, Dico filed a motion for enlargement under Iowa Rule of Civil Procedure 179(b). However, the court declined to enlarge its finding because it was filed more than ten days following the court's summary judgment order.

Dico appealed and Wausau moved to dismiss the appeal claiming that Dico's rule 179(b) motion was untimely and insufficient to delay appeal from the court's summary judgment ruling. The court of appeals ordered Wausau's motion to dismiss. The court held that a deadline for an appeal must be taken within thirty days from the entry of final judgment, and a motion to enlarge must be filed within ten days after the court's decision is filed.

In their review of the case, the Supreme Court of Iowa rejected Wausau's argument that a party's contamination was an "occurrence" that would trigger notice under the CGL policy, and that preliminary correspondence concerning the contamination with the EPA put Dico on notice. Wausau first argued that the district court's forty-five page ruling put Dico on notice of the grounds supporting summary judgment sufficient for a timely motion to enlarge. However, the court found the issue to be more analogous with *Egy v. Winerset Motor Co.*, 2 N.W.2d 93 (1942), where it was held that the time for appeal did not begin to run until the written ruling was filed.

Wausau's second argument was that there was no coverage under their policy because Dico did not give timely notice. In making its determination, the court looked at the language of Wausau's policies

and how it defined "occurrence". According to the policy, "occurrence" is "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." However, in *Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Farmland Mutual Insurance Co.*, 568 N.W.2d 815 (Iowa 1997), the Supreme Court of Iowa determined that the term "accident" meant "an unexpected and unintended event," and that ground contamination over a period of time fell outside the definition of an "accident." Applying this analysis, the court found that because Dico's contamination resulted from procedures occurring over a period of time, they were not "occurrences" that would trigger notice under Wausau's policy.

A third argument by Wausau was that the correspondence between the EPA and Dico concerning the contamination were claim letters. In *A.Y. McDonald Industries, Inc. v. Insurance Company of North America*, 475 N.W.2d 607 (Iowa 1991), the Supreme Court of Iowa held that an EPA demand letter was the equivalent to the commencement of a suit for the purpose of triggering the insurer's duty to defend. However, the court in *Dico* distinguished the current issue in that no petition had been filed before Wausau received notice of Dico's claim. The court noted that early correspondence between the EPA and Dico did not imply a duty that could amount to a defense. Although Dico was eventually named as the party responsible for the contamination, that assignment of liability did not occur until July 1986.

Moreover, the court in *Dico* considered one of its recent decisions, *Fireman's Fund Insurance Co. v. ACC Chemical Co.*, 538 N.W.2d 259 (Iowa 1995), where they held that an insured's lack of compliance with the notice requirements can be determined as a matter of law when the delay is measured in the terms of months and years. In considering *Fireman's Fund*, the court held that the precedence would not find that Dico failed to substantially comply with Wausau's notice requirements as a matter of law because the dispute came down to the matter of the weeks between April 18th when Dico received the proposed administrative order from the EPA, and May 7th, when Dico informed Wausau of the imminent action of the EPA.

In summary, the Supreme Court of Iowa held that Dico's contamination was not an "occurrence" triggering notice under CGL policies and that there was a genuine issue of material fact to preclude summary judgment as to whether Dico failed to substantially comply with the CGL's notice requirements.

SCOTT MILLER

***Johnson v. United States Army Corps of Engineers*, 6 F.Supp.2d 1105 (D.Minn 1998).**

Gary and Sharron Johnson ("Johnsons") filed an action in 1998 against the United States Army Corps of Engineers ("Corps"). The controversy originally arose from a project, proposed by the Red Lake Chippewa Indians ("Band") and the Bureau of Indian Affairs ("BIA"), dedicated to the reconstruction and realignment of the route from the reservation to the main thoroughfare. The Band, pursuant to the National Environmental Policy Act, 42 U.S.C. 4321, prepared an environmental assessment ("EA") listing six possible alternatives for the project's site. The alternative most beneficial to the Band ran through the Johnsons' land, effectively splitting the property in two, and required the filling of thirty acres of wetlands. To fill wetlands the CWA requires a section 404 permit to be issued by the Corps. The Band applied to the District Engineer of the Corps for the permit, which was eventually granted.

The Johnsons requested a preliminary injunction and/or restraining order for the issuance this section 404 permit for the filling of wetlands, and for acquisition and condemnation proceedings by Pennington County stating two separate counts. Count 1 claimed that the Secretary of the Army and/or the Chief of Engineers had sole authority to issue a section 404 permit for the filling of wetlands pursuant to the Clean Water Act ("CWA"), 33 U.S.C. 1344. Count 2 alleged that even if the District Engineer had the authority to issue the section 404 permit, the issuance in this case was arbitrary and capricious. The Minnesota District Court ("District") followed the Eighth Circuit's analysis in deciding whether to issue the preliminary injunction. Though the analysis contained a four part test the District only relied on part three, which called for a determination of whether the movant would eventually succeed on the merits.

Because the District believed the Johnsons would ultimately fail on the merits of their case, their motion was denied.

As to Count 1, the Johnsons, relying on *United States v. Mango*, 997 F.Supp.264 (N.D.N.Y. 1998), contended that the District Engineer who granted the permit was acting outside the scope of his authority. The Johnsons claim that the CWA only allows the Secretary of the Army or the Chief Engineer to grant a section 404 permit. The District reviewed the New York decision and found its conclusion to be erroneous. Instead the District relied on the two part test for statutory interpretation by an agency introduced in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

The Supreme Court stated that the job of a court is to decide if the statute is ambiguous concerning congressional intent. If the statute is ambiguous then the court must next consider whether the interpretation of the agency is a reasonable/permissible construction of the statute.

Looking to the plain language and legislative history of the CWA, the District concluded that the statute was silent on the issue of whether the District Engineer had authority to grant the permit. The District did find that Congress often authorized the District Engineers to perform tasks in the usual course of business by using the same or similar language found in the CWA. Furthermore, the District concluded that the reality of the situation requires the Secretary of the Army to delegate authority to his District Engineers, because his duties are too vast for one person to accomplish alone. The District found no evidence that the granting of section 404 permits by the District Engineer was unreasonable or impermissible, thereby ruling in favor of the Corps on Count 1 of the Johnsons' complaint.

In Count 2, the Johnsons alleged that even if the District Engineer had authority to grant the permit, he only conducted a cursory review of the other possible location alternatives. The Johnsons contend that a more stringent review of the alternatives was required, thereby making the decision to issue the permit arbitrary and capricious. The District conceded that the Corps possessed a high level of expertise on the subject of issuing section 404 permits, and its decisions deserved to be given deference. The District stated that their scope of review in such situations was limited. The Corps' decision could only be overturned for clear error or if based on a disregard of relevant factors.

Reviewing the purpose of the project stated in the EA, reduction of traffic and safety, the District concluded that the Corps decision was consistent with the stated purpose. Furthermore, the District found that the Corps decision was based on a thorough review of relevant factors, including reports offered by numerous environmental and administrative agencies as well as the Johnsons. Therefore, the District held that the Corps decision to grant the permit was not arbitrary or capricious. The District found that the District Engineer had the authority to grant a section 404 permit under the CWA, and that the granting of the permit in the present instance was not arbitrary or capricious. Since the Johnsons failed to establish either count, the District denied the motion for a preliminary injunction and restraining order, because the claim was not likely to succeed on the merits.

BRIAN LAFLAMME

***City of Richfield, Minnesota v. Federal Aviation Administration*, 152 F.3d 905 (8th Cir. 1998).**

After the Federal Aviation Administration (FAA) approved a proposal by the Metropolitan Airports Commission to build a taxiway and alter flight patterns at the Minneapolis-St. Paul International Airport for the purpose of shifting noise to the airport's southwest, the City of Richfield ("Richfield") appealed the FAA's decision. Richfield alleged that the environmental impact statement (EIS), the basis for the FAA's decision, did not comply with 42 U.S.C. §4332 (2)(c)(1994), part of the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370d.

The provisions of NEPA require an EIS to examine the environmental impact of a proposal. An EIS complies with these requirements by taking a genuinely "hard look" at a project significantly affecting the quality of the environment. To what extent the EIS complied with the requirements of NEPA was the subject of this case. First, Richfield argued that the proposal would not significantly affect the environment. Second, Richfield claimed that the EIS should have examined instituting noise

mitigation measures northwest of the airport as an alternative to the proposed project. Third, Richfield contended that the EIS was a post-hoc rationalization of a decision that the FAA had already made.

The Eighth Circuit denied Richfield's petition for review, stating it found the city's arguments to be without merit. As to the first argument, the Court stated that the purpose of an EIS is to evaluate a project "significantly" affecting the environment. If the project at hand would have no significant impact, as Richfield maintained, then the FAA was not required to prepare an EIS, much less one that thoroughly examined the reasons why the project would leave the environment unaltered.

Regarding the second argument, the Court referred to federal regulations, which require that an EIS only examine "reasonable alternatives" to a project. Further, "reasonable alternatives" were defined as those that fulfill the purpose of the project. According to the Court, Richfield's alternative would not satisfy the project's purpose of equitably redistributing noise because of instead of shifting the noise, it would merely limit its impact. Thus, the EIS did not need to consider this alternative.

Finally, the Court stated that the approval of this project did not occur until the completion of an extensive review process that included opportunity for public comment. Richfield took advantage of that opportunity and was heard and responded to by the FAA on all of its concerns. Thus, the argument that the EIS was a post-hoc justification of a preordained decision was without merit.

In upholding the FAA's order approving the project, the Eighth Circuit followed the approach used by the Court of Appeals for the District of Columbia. The approach limits the consideration of alternatives in an EIS to those related to the purpose of the project proposed by the federal agency. Under this approach, agencies that define objectives too narrowly can avoid consideration of less preferable alternatives to their actions. Yet, in this case the facts demonstrated that careful consideration was taken before approving this project. Thus, the Court made a sound decision in denying Richfield's petition for review.

ELIZABETH LAFLAMME

***Newton County Wildlife Association v. Rogers*, 141 F.3d 803 (8th Cir. 1998).**

The Newton County Wildlife Association, Sierra Club, and other individuals brought suit against the United States Forest Service ("USFS") in the United States District Court for the Eastern District of Arkansas seeking to enjoin four timber sales in the Ozark National Forest. The collective plaintiff's wildlife association, hereafter referred to as the "Association," alleged, *inter alia*, the USFS violated required duties under the National Environmental Protect Act ("NEPA"), 42 U.S.C. Sections 4321 et seq. (1994), by failing to consider all relevant environmental factors related to the planned clearcutting, herbicide use, and road building in the watershed areas of the protected Buffalo River. The Association plead separate claims for alleged violations of the National Forest Management Act ("NFMA"), 16 U.S.C. 1600 et seq. (1994), the Wild and Scenic Rivers Act (WSRA"), 16 U.S.C. Sections 1271 et seq. (1994), the Arkansas Wilderness Act (AWA"), 16 U.S.C. Sections 1131 et seq. (1994), the Clean Water Act ("CWA"), 33 U.S.C. Sections 1251 et seq. (1994), and the Endangered Speicies Act ("ESA"), 16 U.S.C. Sections 1531 et seq. (1994), and filed its suit pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. Sections 551 et seq. (1994), with motions to allow admission of extra-agency record evidence and depositions of USFS officials. The District Court ruled as a matter of pleading the APA provides a single claim for relief and was not violated with promulgation of the timber sales. All claims and motions were dismissed, and ultimately, at a second appeal, the court granted summary judgment in favor of the USFS.

The Association appealed to the United States Court of Appeals, Eighth Circuit, alleging: (1) exclusion of extrinsic extra-record evidence violated the bad faith exception to administrative record review; (2) the USFS acted arbitrarily and capriciously when determining the sales had an insignificant effect on the WSRA protected Buffalo River segments; (3) the USFS violated the WSRA by failing to consult the Secretary of the Interior and State pollution control agencies to prevent pollution of these river components; (4) the agency violated the NFMA's required forest management plan by failing to designate

"special interest" areas, failing to provide inventory maps of the road construction, and by authorizing road construction within the protected Highlands Trail region; (5) the USFS violated the NEPA by failing to prepare comprehensive Environment Impact Statements (EIS) for the harvest areas; (6) the USFS failed to obtain CWA required National Pollutant Discharge Elimination System permits (NPDES) and dredge and fill permits for discharges accompanying logging road construction and timber harvesting; (7) the sales violated the Arkansas antidegradation policy; (8) the sales violated the AWA as they would degrade the quality of the Buffalo River segments; and (9) the USFS violated the ESA as their "no effect" biological assessment necessitated consultation with the United States Fish and Wildlife Service ("USFWS") to determine potential effects on endangered species.

The Eighth Circuit reviewed the USFS's action applying the APA's standard of review that such agency actions can only be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The court determined there was primarily a single cause of action for APA review and concluded the district court did not violate its discretion by conducting its review solely on the USFS's administrative record. Exclusion of extra-record evidence was proper because the Association failed to reach a threshold showing of bad faith on the part of the USFS. Additionally, the court held no de novo proceeding could ensue in relation to the Association's invoking of the "citizen-suit" provisions of the ESA and the CWA as, absent a prescribed limitation of the scope of review by these two acts, review is confined to the administrative record. The Eighth Circuit then applied the arbitrary and capricious standard of review to the Association's multiple claims for relief.

In regard to WSRA obligations to protect designated rivers in relation to timber harvesting and road construction, the court determined nothing in the administrative record substantiated that the USFS acted in an arbitrary or capricious manner in finding the sales would have no significant effect on the Buffalo River and its segments. The court noted that any WSRA's imposed duties for cooperation with the Secretary of the Interior and State water pollution control agencies to eliminate or diminish river pollution were met when the agency considered the State's belatedly filed objections.

The court concluded the Association's claims that the USFS violated the NFMA with harvesting plans inconsistent with the Ozark National Forest's Management Plan also failed to violate the arbitrary and capricious standard. The court added that complaints of the USFS failing to provide inventory maps of the forest road's increased mileage, and logging authorization within the protected Highlands Trail region were "insignificant issues."

The court determined the USFS's alleged failure to comply with the NEPA for not analyzing the cumulative effects of the harvest on the watershed of the Buffalo River and its segments by means of a full EIS was not arbitrary or capricious as the USFS had prepared abbreviated Environmental Assessments (EAs) in conjunction with an EIS prepared for the entire Ozark National Forest. Each EA covered an area larger than the zone of immediate impact, was consistent with cost reduction policies avoiding duplicative inquires, and met the "hard look" standard established for "findings of no significant impact" ("FONSI").

The court determined the Association's contentions of violation of the CWA, were without merit based on the facts that the Environmental Protection Agency ("EPA"), charged with administering the NPDES program, had not intervened; it was the timber company's duty to obtain such permits; and EPA regulations for NPDES permits did not apply to these types of logging and road construction activities. The court also concluded that the logging and road building activities were exempt from dredge and fill permits "as long as construction and maintenance comply with the best management practices." The Association's additional claim that the timber sales violated the State of Arkansas's antidegradation policy was without merit as the policy was too broadly stated to find an arbitrary or capricious violation.

The Eighth Circuit held that to rule the AWA was violated because the logging activities would degrade the quality of the Buffalo River and its segments would violate of Section 7 of the AWA itself which prohibits the creation of "protective perimeters or buffer zones around each wilderness area . . . solely because of its potential effect on the Wilderness area." The court concluded nothing in the administrative record demonstrated the USFS acted in an arbitrary or capricious manner in determining

that use of mitigation measures and best management practices would prevent significant environmental impact on the quality of these waterways.

As far as any requirement for the USFS to consult with the USFWS when its actions may affect endangered or threatened species, the court held the USFS's decision was not arbitrary or capricious as their "no effect" biological evaluation negated this requirement. Additionally, the Service's biological assessments covered the species in question.

In a final statement, the Eighth Circuit affirmed the judgment of the district court, added that all other arguments advanced by the Wildlife Association were without merit, and denied the Association the award of attorney's fees and costs as they were not the prevailing party.

HAROLD STEARLEY

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