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Case Summaries

CASE SUMMARIES

Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999).

Federal restrictions on the use of motorboats in the Boundary Waters Canoe Area Wilderness have been controversial since the Wilderness Act of 1964 included the BWCAW in a newly created national system of wilderness areas. The Wilderness Act of 1964 generally prohibited the use of motorboats in wilderness areas, although it did allow for any pre-existing use of motorboats in the BWCA to continue. The "grandfather" clause for motorboats was superceded in 1978 by the passage of the BWCA Wilderness Act, banning motorboats in the BWCA, except on certain waterways, where the Secretary of the United States Department of Agriculture ("USDA") was directed to establish specific use quotas. The current two cases, consolidated by the United States District Court for the District of Minnesota, challenge the motorboat use and visitor restrictions promulgated by the Forest Service's BWCAW Management Plan and Implementation Schedule of 1993 (the Wilderness Plan).

Plaintiffs sued the United States Forest Service ("USFS") and the USDA, which manage the BWCAW, claiming the restrictions in the Wilderness Plan violated the statutes governing the BWCAW. The USFS concluded that use levels had begun to "strain" the wilderness environment requiring the Service to restrict visitor and motorboat use in the BWCA through a quota system. Entry point restrictions, special permits for commercial towboats, and a special exemption from the motorboat quota system for homeowners, resort owners, and their guests were all implemented.

The first group of plaintiffs, collectively called the "Outfitters," claimed that the Wilderness Plan unduly limited access to the BWCAW in violation of the Administrative Procedure Act ("APA"), the Americans with Disabilities Act, and the National Environmental Policy Act ("NEPA"). The Outfitters claimed the definition of "guest" was inconsistent with the language of the statute and was a departure from how the agency had defined the word in the past. They also claimed that the USFS violated NEPA by developing a EIS that failed to include all reasonable alternatives, relied on flawed data, and insufficiently evaluated all of the significant social and economic effects of the Wilderness Plan. The second group of plaintiffs, collectively called the "Environmentalists," intervened in the Outfitters' suit and bought its own challenge to the Wilderness Plan. They claimed that the plan allowed the excessive use of motorboats in the BWCAW by its allocation of special use permits for towboats and by defining certain connected lakes as a single lake, on which homeowners, resort owners, and their guests were exempt from the quota system. The Environmentalists contended that the Wilderness Plan was thus a violation of the BWCAW Act and the APA.

The district court dismissed the Outfitters' and Environmentalists' APA claims, ruling the contested portions of the Wilderness Plan were consistent with a reasonable interpretation of the BWCAW Act. The court also dismissed the Outfitters' NEPA claims, ruling that the Outfitters lacked standing under NEPA to assert their claims because their complaint of potential economic loss was not a protected interest under NEPA. The court also dismissed the Outfitters' ADA claim, which was not appealed.

On appeal, the Eighth Circuit held the USFS concern that towboats could become a disproportionate share of the motorboat quota was reasonable. The court found that the "plain language of the statute" empowered the Secretary of Agriculture to implement entry point quotas, as long as those quotas did not exceed the average use from 1976-78. The court noted that the number of special use permits for towboats--when added to the balance of motorboat quotas--did not exceed the BWCAW Act's overall restrictions on motorboat use. The court concluded that issuing special use permits for towboats was consistent with the statute.

The court rejected the Outfitters' argument that the USFS had defined the word "guest" differently in the past, finding that the agency had not previously defined the word at all, nor had it changed its policy in a manner that was arbitrary, capricious, or an abuse of discretion. The court concluded the USFS's definition of "guest" was a reasonable attempt to comply with the overall congressional intent of protecting the wilderness by using motorboat quotas.

The court reversed the lower court's decision against the Environmentalists and found the USFS interpretation of the statutory term "that particular lake" to include chains of lakes was contrary to the plain language of the BWCAW Act. It noted that elsewhere within the statute Congress referred to the individual lakes in the chains by name and implemented specific restrictions for those lakes. Therefore, the court concluded, the agency's interpretation of "that particular lake" was unreasonable and impermissibly expanded

the statutory exemption from the motorboat quotas for landowners (and their guests) whose property abuts those lakes.

The court found the Outfitters did have prudential standing under NEPA to challenge the USFS's EIS because the Outfitters' claims were within the "zone of interests" protected by the particular provision of NEPA. In reversing the lower court's decision, the appeals court relied the proposition that the plaintiffs "can assert an injury arising from the agency's failure to take into consideration the particular purposes or provisions" of NEPA.

Turning to the merits of the Outfitters NEPA claims, the court rejected the Outfitters' claim that the USFS intentionally limited the alternative plans it considered and was predisposed toward alternatives that reduced visitor use. The court noted the EIS was "a long and detailed document" that included ten alternative plans, eight of which were given detailed study, and two of which did not call for reduced visitor use. Additionally, the court ratified the USFS's decision not to study further alternative plans that would have increased visitor use of the BWCAW. The court found that the USFS's concern that visitor use levels were beginning to strain the viability and solitude of the wilderness area and to degrade the intended primitive recreational experience was reasonable and furthered the goals of NEPA. The court also rejected the Outfitters' claims that the EIS was invalidated by the use of flawed data and methodologies, and declined to choose between different studies, expert views, and schools of scientific thought. Finally, the court found that the Outfitters had inadequate evidence to support their contention that the EIS inadequately considered all of the significant social and environmental effects of the Wilderness Plan. Accordingly, the court found that the EIS adequately considered the environmental, recreational, social, and economic impacts of the Wilderness Plan, and that the Forest Service's use of methodologies, studies, and data was not arbitrary or capricious.

DAVID KURTZ

American Trucking Associations, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir 1999).

Petitioners filed complaints against the EPA for its revision of national ambient air quality standards ("NAAQS") for ozone and particulate matter ("PM") under the Clean Air Act ("CAA"). The court made seven holdings in this matter. In its holdings, the D.C. Court of Appeals stated: (1) construction of Act on which the EPA relied in revising PM and ozone NAAQS effected unconstitutional delegation of legislative power; (2) the EPA could not consider environmental consequences resulting from financial impact on the federal Abandoned Mine Reclamation Fund Act in revising ozone and PM NAAQS; (3) even if Unfunded Mandates Reform Act required the EPA to prepare regulatory impact statement (RIS) when setting NAAQS, judicial relief for failure to comply was unavailable; (4) the EPA properly certified, under the Regulatory Flexibility Act, that revised NAAQS would not have significant economic impact upon substantial number of small entities; (5) the EPA must enforce any revised primary ozone NAAQS under the 1990 amendments to Clean Air Act; (6) in revising NAAQS for troposphere ozone, the EPA was required to consider the health benefits of ozone; and (7) the EPA's decision to regulate coarse particulate matter indirectly was arbitrary and capricious. Ultimately, this case stands for the idea of when the EPA sets regulations without a firm scientific basis for its actions, the new regulations can be questioned and challenged as unconstitutional. How the court will decide if the action is outside the scope of the EPA's power will vary on how unreasonable the court finds the regulations.

The court broke this case into four distinct parts with separate holdings for each section. Part I of the case involved the small business petitioners against the EPA. They claimed that the EPA in its role of setting NAAQS guidelines exceeded its scope by not listing any specific, quantitative pollution data. The court never questioned the EPA's duty to issue air quality guidelines in accordance with the CAA; federal law requires the EPA to set pollution guidelines at a level that protects the public health as well as leaves a margin for safety. However, the complaint here is one of a lack of a "cut off point"; exactly how much ozone and PM pollution is allowed?

The ozone level stated in the new NAAQS was .08 ppm. The EPA claimed simply that lower levels of ozone had a transient effect on people, resulting in less if any harm. The court found this reasoning inconclusive and simply intuitive on the part of the EPA and lacking any technical or scientific reasoning. The advisory committee designed to assist the EPA in its creation of regulations, the Clean Air Scientific Advisory

Committee, also favored the .08 standard, but again, the court found no scientific reasons for such a decision. Without real reasons for setting ozone levels at .08, the EPA had no "intelligent principle" needed to validate an agency ruling. The court found no such principle existed in the present case, and thereby invalidated the EPA's new guidelines. The EPA's last argument was that lower ozone levels are similar to natural peak ozone levels, thus making it impossible to tell natural ozone from man-made pollution. The court found this argument unpersuasive as the EPA made no explicit adoption of this idea in its new ozone rule.

Part II of the opinion discussed other general claims against the EPA by all petitioners and amici regarding the proposed ozone and PM standards; the court denied relief on all claims. In the first claim the petitioners thought it unfair that the EPA did not consider costs; however, regulations specifically forbid the EPA from considering cost factors when setting NAAQS. The EPA argued that the *Lead Industries* case controlled the current issue regarding cost provisions. The petitioners tried to distinguish *Lead Industries* from the current action, but the court flatly rejected petitioners' arguments, finding them inconsistent with the CAA statute which forbids any cost considerations. The State Petitioners argued that the EPA erred in failing to consider any environmental consequences resulting from financial impact on the federal Abandoned Mine Reclamation Fund Act. The court quickly dismissed this claim as it was addressed and foreclosed in the matter of *NRDC v. EPA*. That case clearly held that the EPA may only consider health effects relating to pollutants. Petitioners also claimed the EPA failed to follow certain NEPA provisions, most notably the requirement of preparing an environmental impact statement. For this argument, petitioners relied on *Portland Cement Association v. Ruckleshaus*. In that case, the court held that a NEPA statement is required in conjunction with a CAA alteration. However, petitioners overlooked the fact that the case dealt only with a specific section of the CAA, so petitioners' faith in *Portland Cement* was not warranted. Additionally, statute directly supercedes *Portland Cement*. Petitioners also raised an economic argument, but that does not work due to § 109(d) specifically forbidding economic considerations.

State Petitioners and Congressman Bliley raised the next claim. They charged federal law required the EPA to file a regulatory impact statement (RIS) and to choose the least burdensome means to achieve their goals. Even if true, the court could not grant any petitioners relief; the lack of an RIS does not render an agency rule invalid. A court could consider an agency's behavior as capricious if it does not prepare an RIS. This course of action was unavailable as the *Thompson* case considers the "validity of the rule under other provisions of the law," and the court in the present matter could not find any impropriety in the way the EPA set the ozone and PM NAAQS.

The final charge regarding the NAAQS concerned the Regulatory Flexibility Act. The small business petitioners claimed the EPA failed to consider the NAAQS' impact on smaller entities. The court held that the EPA does not have to answer this claim because the EPA does not directly regulate small businesses. The states themselves rule over small businesses directly via state implementation plans; only if the state does not provide a state implementation plan will the EPA exercise its authority and set regulations.

Part III of the action dealt directly with ozone regulations. In response to continued ozone pollution, Congress responded by creating new ozone standards found in CAA. This section required EPA to designate areas which cannot reach the .12 ppm ozone level set as the primary goal. The State and non-State petitioners with Congressman Bliley as amicus argued that Subpart two of 42 U.S.C. § 7511 precluded EPA from revising existing ozone NAAQS, primary or secondary. The court decided some arguments in the EPA's favor, saying the EPA can promulgate revised NAAQS standards; however, the court sided with the petitioners by stating that the EPA's NAAQS guidelines must be in compliance with Subpart two as well and by stating that the EPA cannot enforce secondary ozone standards in an area that has not yet attained primary ozone standards. The other major claim concerning ozone regarded possible health benefits. There, the court held the EPA erred in not considering possible health benefits. Petitioners presented evidence that ozone in the troposphere indeed has some positive health benefits, most notably screening out ultraviolet radiation. On this charge, the EPA erred in not in considering "all identifiable effects" as required by the CAA. The court remitted this portion of the case with instructions to account for possible benefits of ozone.

The final part of this case dealt with the PM side of the NAAQS. All NAAQS standards attempt to regulate PM with a diameter of less than ten micrometers (PM_{10}). Petitioners claimed no scientific evidence existed that PM is a health hazard and if so, the EPA's method was arbitrary and capricious and should not be enforced. The court found no support for the first argument; the EPA had justification to regulate PM as ample evidence supports PM affecting health. However, the court ruled that the EPA's method as arbitrary and in need of

revision. In its holdings, the court pointed out, among other things, that PM regulations for other categories, like $PM_{2.5}$ already existed. The EPA's proposed method yielded a double regulation of categories such as $PM_{2.5}$ and not effectively serve PA's goal of regulating PM_{10}. Additionally, the court pointed to regression studies analysis that yield different amounts of PM_{10} depending on how much $PM_{2.5}$ is present.

KEVIN JOHNSON

Treadway v. State of Missouri, 998 S.W. 2d 508 (1999).

Federal law requires each state to establish a basic vehicle inspection and maintenance program and an implementation plan for all areas classified as a "moderate" ozone nonattainment area. Each state is also required to implement a "rate of progress plan" to reduce emissions of ozone pollutants in any designated moderate ozone nonattainment area. The St. Louis region failed to meet the federal clean air standards and was classified as a moderate ozone nonattainment area. Missouri was required to establish a program that would bring the level of pollution within the clean air standards or it could face federal sanctions, such as the loss of federal highway construction funds. In order to comply with the federal clean air standards, The Missouri General Assembly enacted sections 307.366 and 643.305 to establish basic and enhanced vehicle emission testing programs in the St. Louis area because the level of ozone pollution exceeded the federal clean air standards. Joseph Treadway, Plaintiff, claimed the enactment of these sections violated the restriction on the passage of special or local legislation under Article III, Section 40(30) of the Missouri Constitution. At the time the statutes were enacted, the St. Louis area was the only region in Missouri that needed to establish both a basic vehicle inspection program and an implementation plan as required by the Clean Air Act.

Treadway argued that these two statutes violate Article III, Section 40(30) of the Missouri Constitution, which states that "the general assembly shall not pass any local or special law ... where a general law can be made applicable." Treadway claimed that the statutory scheme violates the Missouri Constitution because it excludes all areas except for the St. Louis metropolitan area and the law should apply to all cities and counties that are designated moderate ozone nonattainment areas. The State argued that the statutes are general laws and do not violate the Missouri Constitution because the statutes use open-ended criteria (population) to determine which cities and counties must comply with the statute. The State further argued that even if the statutes were classified as "local or special," they are in compliance with article III, § 40(30) of the Missouri Constitution. The State claimed that a local or special law is not unconstitutional if the problem the statute sought to correct is so unique to the place classified by the law that a general law could not achieve the same result. The state moved for summary judgment on the above grounds. The Circuit Court granted summary judgment in the favor of the State against Treadway.

Treadway appealed to the Missouri Supreme Court, which affirmed the Circuit Court's ruling. The Missouri Supreme Court began its analysis of Treadway's claim by determining whether the statutes were general or special laws. Treadway argued that the statutes were special because they excluded all cities and counties except for the St. Louis area. The Court concluded the statutes were general because they established classifications based on population, which is an open-ended criteria. The Court relied heavily upon its prior decision in *School District of Riverview Gardens*, 816 S.W. 219 (1991), which held that statutes which establish classifications by population are general laws, even if no other city or county will come within the population classification during the lifetime of the statutes. Later in the decision, the Court again addressed the issue as to whether the statutes were general laws by considering the fact that the General Assembly did not follow the procedures for passing special or local legislation. Since the General Assembly did not publish a notice indicating that the statutes were special laws, which is required under the procedures for passing special legislation, the Court assumed that the General Assembly must have intended to pass the statutes as general laws.

After determining the statutes were general, the Court addressed the issue of whether the use of population to establish classes is rationally related to a legitimate legislative purpose. Without discussing what relationship population has to the legislative purpose of improving the air quality of the state, the Court said that the legislature has broad discretion in attempting to create solutions to societal problems. The Court found that Treadway failed to show an irrational relationship existed, and then it concluded that population was rationally related to a legitimate purpose. Finally, the Court addressed the State's argument that even if the statutes were

special laws, the statutes are valid because general statutes could not achieve the same results. The Court stated that the General Assembly could have enacted these statutes as general laws because the St. Louis region was the only area in Missouri that had an ozone emissions problem.

CLIFFORD MCKISSON

Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co., 65 F.3d 602 (8th Cir. 1999).

The representatives of Matthew Arnold and his father Michael David filed a claim against Dow Chemical Co. (Dow), Rofan Services, Inc. (Rofan), Epco Inc. (Epco), United Industries Corp. (United), Ciba Geigy Corp.(Ciba Geigy), Chevron Chemical Co.(Chevron), and Bengal Chemical Co. (Bengal), alleging that these companies manufactured and produced insecticides that resulted in Matthew Arnold's birth defects. The Arnolds based these claims on theories of negligence, products liability, and breach of warranty. Dow manufactures the chemical Dursban, which United uses to formulate and distribute Spectracide Dursban Indoor and Outdoor Insect Control (Spectracide). Ciba Gigy manufactures the chemical Ciazinon that Chevron uses to formulate and distribute the product Ortho Hi-Power Ant, Roach, and Spider Spray/Formula II (Ortho). Bengal manufactures and distributes Bengal Roach Spray. The Arnolds appealed the district court's ruling of summary judgment to the Eighth Circuit Court of Appeals

To deal with a household insect problem, Jerry and Patricia Arnold allegedly applied three pesticides manufactured and distributed by the defendants. The Arnolds further contend that they used these products when their son and daughter-in-law, Michael and Debra Arnold, moved into their home in December of 1992. Soon after she moved in, Debra Arnold became pregnant with Matthew Arnold who was born on September 7, 1993. The pesticides were allegedly used in the home until April 1, 1993.

The defendant companies all obtained proper registration by identifying their product's chemical, toxicological, physiological, biochemical, environmental, and ecological characteristics. The EPA then issues a Pesticide Fact Sheet summarizing the products' information. The statutory framework for this process is provided by the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"). As such, the companies moved for summary judgment, claiming that all the plaintiffs' counts were preempted by FIFRA. The Arnolds sought to delay summary judgement by claiming additional discovery would be helpful. The district court denied further discovery and granted the company's motion for summary judgement stating that all the plaintiffs' claims were expressly preempted by a FIFRA section 136 v.

The Appellants first contended that the summary judgement of the trial court was inappropriate because discovery had not been completed. They argued that additional discovery was needed so that they could gather more evidence in support of their responses to the Defendants' Motions for Summary Judgement. However, the three appellate judges found that the district court did not abuse its discretion by denying further discovery because the Appellants' failed to show how additional discovery would alter the evidence before the district court. Furthermore, the Court found that since the district court has responsibility to determine when there has been adequate time for discovery, they did not abuse their discretion by ruling on summary judgement after over a year of discovery had been completed. The second argument centered on the claim that summary judgement in favor of Dow Chemical was inappropriate because a question remained as to whether Spectracide was actually used in the Arnolds' home. The Circuit court found that since it was essential to prove the Spectracide product was actually used in the Arnolds' home, the summary judgement was proper because during discovery, Dow produced uncontroverted evidence that the distributor in question never sold or stocked this specific pesticide. The final argument offered by the Appellants centered on the issue of FIFRA preemption Because previous case law in the Eighth Circuit held state common law claims of inadequate labeling and failure to warn are clearly preempted by FIFRA, the Court sustained the summary judgement with relation to the negligence, and products liability claims. The opinion concluded by discussing the claim of defective manufacture or design based upon the presence of toxic impurities in the goods. Specifically, the Arnold's contended that the Ortho chemical was contaminated by the toxic substance Sulfotepp, which has been know to cause fetal malformations. The Court found that these claims are not preempted by FIFRA because defects can result even though the ingredients of the chemical can be known, approved and accounted for in the EPA-approved label. However, the Court found that since this claim of defective manufacturing lacked sufficient evidentiary support it would fail because a case founded on speculation or suspicion is insufficient to

survive summary judgement. Appellants failed to prove the Ortho product, with our without the contaminant, was unreasonably dangerous, and failed to establish whether the defective condition proximately caused the harm. Ultimately, the Eighth Circuit Court of Appeals held that Supremacy Clause of the United States Constitution mandated a summary judgment against the Arnolds' state law claims of negligence, inadequate labeling, products liability, and failure to warn because the state law was contrary to federal law and, thus, was preempted by FIFRA.

ANDREW SCHOLZ

ENVIRONMENTAL NEWS

Missouri Attorney General and Premium Standard Farms: A Consent Decree to Clean Up

In early August, Jackson County Circuit Court Judge Edith Messina approved a consent degree between Premium Standard Farms, Inc., and the Missouri Attorney General's Office. The consent decree requires Premium Standard Farms to spend $25 million in waste treatment technology (half within the next three years and the rest within five years) to deal with odor and pollution problems at its corporate hog farms in northern Missouri and pay a $1 million dollar fine. The company has around 105,000 sows in five Missouri counties (Mercer, Putnam, Sullivan Daviess and Gentry counties) which produce an average of 2 million pigs a year.

Attorney General Jay Nixon and Premium Standard Farms Vice President of Communications Charlie Arnot said the decree will achieve a variety of outcomes. "In addition to leveling a significant penalty, we are attempting to fix the problem and to provide relief for the hundreds of Missourians whose lives have been disrupted by the stench of these giant factory farms," Nixon said. "If we can [solve the problem] through the consent decree, then I think it will be judged a tremendous success by anybody," Arnot said. The decree, however, does not prevent the Environmental Protection Agency ("EPA") from an action also recently filed against the company, nor does it prevent the Attorney General from taking steps against Premium Standard Farms if future violations occur.

The present agreement is the result of a history of environmental violations by Premium Standard farms dating back before 1995. In 1996, the company entered into a consent decree for the violations requiring remediation with the Department of Natural Resources. Attorney General Jay Nixon initiated his own action in the Jackson County Circuit Court after Premium Standard Farms was found to have committed further environmental violations which has resulted in the current consent decree. Part of the $ 1 million in settlement fees was given to schools in Putnam, Mercer, Sullivan, Jackson and Daviess counties in August. As for the $25 million dollar technology change agreement, Arnot said that Premium Standard Farms in early November completed step one in the process when they submitted a work plan to the Attorney General and a panel of three experts in livestock waste management from across the nation. He said that the Attorney General's office gave the company a lot of leeway in developing their own plan based on their needs.

If approved, the plan will provide for technology changes in two of the company's farms. First, it will implement a series of proven technology changes at one farm including the use of permeable lagoon covers, aeration basins, nutrient reduction basins and air dams. Second, the plan will, at another farm, begin several experimental technology changes on a pilot basis. These include installing a solids concentration system to collect solids and installing filtration systems on the water. Once approved by the three-person panel, Arnot said Premium Standard Farms plans to implement the changes as soon as possible.

TANYA WHITE