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UNITED STATES FEDERAL DISTRICT COURTS

Bravos v. EPA, 2004 WL 390799 (D.D.C. 2004)

In *Bravos v. EPA*, the main issue was whether or not the EPA's approval of a New Mexico's TMDLs for a small mountain stream, which also included an implementation plan to attain those TMDLs, was a final agency action regarding the implementation plan, within the meaning of Administrative Procedure Act (APA). 2004 WL 390799 (D.D.C.).

The origins of case began when a developer built a ski resort called Ski Rio in the valley along the creek's drainage. *Id.* at *3. The construction began to pollute the creek and suit was brought by citizens to compel the EPA to take action and improve the quality of the creek's water. *Id. See Forest Guardians v. Browner*, Civil Action No. 96-0826. The result of this action was a consent decree and settlement agreement establishing ten-year TMDL schedule with New Mexico. *Id.* The New Mexico Environmental Department (NMED) adopted TMDLs for the three pollutants at issue and submitted these TMDLs to the EPA in accordance with Section 303(d) of Clean Water Act (CWA) for approval. *Id.* at **4-5. Within this TMDL document, the state also included an implementation plan outlining the steps it would take to reach the TMDLs in the allotted time period. *Id.* at *5.

The EPA approved these suggested TMDLs in a letter to the NMED. *Id.* In this letter there was a section entitled "Implementation Plans." *Id.* This section explicitly stated that "although implementation plans are not approved by the EPA, they help to establish the basis for EPA's approval of TMDLs." *Id.* The section also said that the NMED had included a "generic" implementation plan within its TMDL and that "reasonable assurances that load reductions will be achieved are not required in order for a TMDL to be approvable." *Id.*

In response to the defendant EPA's defense that there was no final agency action, and therefore the claim was not ripe, the plaintiff argued that in approving the TMDLs, the EPA had also approved the implementation plan of the NMED. *Id.* at *6.

To be considered final, an agency action must mark the consummation of the agency's decision making process and the action must be one from which legal consequences may flow. *Id.* at *7. The court will look primarily to whether agency "action is 'definitive' and whether it has a 'direct and immediate . . . effect on the day-to-day business' of the part[y] challenging the action." *Id.*

The plaintiff in the instant case was attempting to challenge the EPA's approval of the state implementation plan, not the TMDLs. *Id.* The court plainly stated that the EPA's letter did not make any definitive findings regarding the implementation plan, but merely commented that the TMDL plan included a "generic" implementation plan. It then stated that the EPA's approval of the TMDLs "does not translate into approval of the . . . implementation plan." *Id.* Furthermore, the court stated that there is no statutory language requiring the a state to submit or thee EPA to approve implementation plans. *Id.* at *8.

As such, the court held that there was no final agency action since the "EPA's correspondence in no way either approved or disapproved . . . [New Mexico's] implementation plan." *Id.* Therefore, the plaintiff's claim was dismissed as the court lacked jurisdiction under the APA to review the action. *Id.*

C. TRAVIS HARGROVE

ARC Ecology v. U.S. Dept. of the Air Force, 2003 U.S. Dist. Lexis 22005 (N.D. Cal. 2003)

In a December 3, 2003 decision, the United States District Court for the Northern District of California, San Jose Division sought to determine if the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9604 et seq. (2000), applied to claims brought by citizens of a foreign country against the U.S. to determine alleged pollution on former U.S. military bases located in a foreign country.

In *Arc Ecology*, the Plaintiffs were Filipino citizens who lived or traveled around property which formerly held U.S. military bases. Individual citizens were joined by Arc Ecology and the Filipino-American Coalition for Environmental Solutions, two non-profit organizations supporting those seeking cleanup of former U.S. military bases in the Philippines. The Plaintiffs wanted to compel the defendants, the United States Department of the Air Force, the United States Department of the Navy, the United States Department of Defense, and Donald Rumsfeld in his capacity as Secretary of Defense, (1) to conduct preliminary assessments of two former bases, and (2) to obtain an order declaring the CERCLA provisions applied to the two bases. The Defendants sought to have the suit dismissed because the Plaintiffs were not entitled to relief.

Although the District Court found that it had standing and subject matter jurisdiction, it dismissed the claim because Plaintiffs failed to state a claim on which relief can be granted. (The Court did not reach the Defendants' improper venue argument.)

The District Court noted that although CERCLA created the "Superfund" to allow the federal government to respond to hazardous waste disposal, CERCLA's legislative history is focused domestically. Absent contrary intent, Congressional legislation is meant to apply only to the territorial jurisdiction of the United States. This "presumption against extraterritoriality" prevents clashes between our laws and those of foreign nations, and reflects the idea that Congress is primarily concerned with domestic conditions when it legislates. The Philippines is an independent, sovereign nation, not a "territory or possession" over which the United States has jurisdiction.

Since the primary relief sought by the Plaintiffs was preliminary assessments of the two bases as called for by Section 105(d) of CERCLA, and since 105(d) applies only to releases or threatened releases in the United States and not foreign nations, the Plaintiffs failed to state a claim upon which relief can be granted and the District Court dismissed the complaint with prejudice. Therefore, CERCLA does not apply extraterritorially to properties located within another sovereign nation.

NATHAN A. STEIMEL

Green Atlas Shipping S.A. v. U.S., 2003 WL 23314452 (D. Or. 2003)

In *Green Atlas Shipping S.A. v. U.S.*, a District Court held that a captain of a ship was not an "operator" of the vessel within meaning of Oil Pollution Act (OPA). There were numerous claims and counterclaims arising from the February 4, 1999 grounding of the M/V NEW CARISSA near Coos Bay, Oregon. Oil spilled into the environment in harmful quantities after the vessel broke into pieces. The plaintiffs allege the U.S. was negligent by designating the area where the ship was anchored as a suitable winter months anchorage on the applicable nautical chart and Coast Pilot publication and sought $96 million. The U.S. asserted various counterclaims seeking compensation for pollution removal costs along with other costs associated with the spill under the Oil Pollution Act, general maritime law of negligence, and the Rivers and Harbors Act.

The U.S. also brought a complaint against Benjamin Morgado, the master of the NEW CARISSA. After dealing briefly with the other causes of action, the court focused on the third party action against Captain Morgado's Motion for Summary Judgment on the United States' OPA Claims. Captain Morgado argued that he

could not be a "responsible party" under OPA since he was not an "operator" of the NEW CARISSA. "responsible party" is defined under the OPA as "[i]n the case of a vessel, any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32) (2000). While "owner or operator" is "in the case of a vessel, any person owning, operating, or chartering by demise, the vessel . . . " 33 U.S.C. § 2701(26). Congress enacted the OPA to compensate victims of oil spills as well as provide quick clean up to minimize damage to the environment. Under OPA, each responsible party of a vessel is liable for removal costs and damages. *See* 33 U.S.C. § 2702(a).

Captain Morgado argued that OPA requires responsible parties to establish and maintain financial responsibility sufficient to meet the maximum possible liability under the statute. *See* 33 U.S.C. § 2716(a). The Captain argued that since this amount would be $22 million for the NEW CARISSA, it could not have been Congress's intent that he (Captain Morgado) would personally have financial assurance of $22 million. The captain also cited regulations put out by the Secretary of Transportation regarding financial responsibility requirements. The judge agreed with this financial responsibility argument, saying that he was "persuaded by Captain Morgado's arguments because the financial responsibility requirements in the statute indicate that Congress had a narrow view of which entities would be responsible parties in the context of a vessel, and because, likewise, the agency charged with implementing the statute did not appear to have interpreted Congress' intent as casting the OPA's liability net over vessel captains."

Captain Morgado also cited the "historical meaning of operator in the maritime context is the entity that controls the vessel and its captain and crew, not the captain himself." The government did not respond directly to this argument, it primarily relied on the word "person" in the statute and said that under the plain meaning of the OPA, "responsible parties" includes "[i]n the case of a vessel, any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32). Thus, Captain Morgado is a person, and he literally operated the NEW CARISSA as its captain.

The court declined to interpret the OPA analogously to previous decisions based on similar provision in the Comprehensive Environmental Response Compensation and Liability Act, and held that Congress did not intend to significantly vary "the general maritime understanding of operators as those entities that are ultimately responsible for the vessel's overall operation, including the direction of the captain and crew, abut not the captain himself." Therefore, Captain Morgado was not the Operator of the NEW CARISSA under the OPA and his motion for partial summary judgment was granted.

NATHAN A. STEIMEL

U.S. v. Earp, 2003 WL 23220083 (D.S.C. 2003)

Defendant George Earp owns and operates two seafood distribution companies in North Carolina. Mr. Earp was caught selling white bass to a seafood store in South Carolina in violation of a ban on the sale of white bass in South Carolina.

The United States filed a criminal information charging Mr. Earp (and his businesses) with violating the Lacy Act, 16 U.S.C. § 3372 (2000), which makes it a misdemeanor to import, export, or sell in interstate commerce any fish in violation of state law. In this case, South Carolina has a statute making it illegal to sell white bass in the state, which then triggered the Lacy Act when Mr. Earp sold his white bass in interstate commerce.

Mr. Earp moved to dismiss on the grounds that the South Carolina Statute violated the Commerce Clause of the United States Constitution. The State of South Carolina then moved to intervene in the case in order to protect its own interests as to the constitutionality of the statute. United States Magistrate Judge Bristow Marchant granted the motion to intervene. Ultimately, the Magistrate dismissed the charges against

Mr. Earp and his businesses; finding that the state statute banning the sale of white bass in South Carolina did in fact violate the Commerce Clause. The state and federal government appealed.

There was an initial argument over the appropriate standard of review to be applied in the case. The government wanted a de novo review, while Mr. Earp wanted the "clearly erroneous" standard to apply. Ultimately, the court of appeals held that the de novo standard would apply to the Magistrate Judge's legal determinations, while the "clearly erroneous" standard would apply to the Magistrate Judge's factual determinations.

In examining Commerce Clause cases, a court's first inquiry must be to the nature of the alleged violation. That is, the court must determine whether the statute in question affirmatively discriminates against interstate commerce or merely indirectly or incidentally burdens such transactions. This determination shifts, and increases, the burden of proof. If the statute indirectly burdens interstate commerce, it is only a violation if the burdens it imposes are clearly excessive in relation to the putative local benefit. If the statute affirmatively discriminates against interstate commerce, the burden is on the government to show both that the statute serves a legitimate local purpose, and that this purpose could not be achieved equally as well by other, less discriminatory means. The District Court agreed with the Magistrate Judge's determination that the statute in question only indirectly discriminates against interstate commerce. That is, the statute is uniform because it imposes a blanket ban on the sale of white bass regardless of where the fish were originally caught or purchased.

Continuing with the requisite analysis for indirect violations, Mr. Earp does not contest that the statute serves a legitimate local purpose in attempting to preserve the state's population of white bass. Mr. Earp does, however, argue that there are other less discriminatory means of accomplishing this goal. Mr. Earp argues that a ban only on the sale of *native* white bass would be just as effective as the current ban on the sale of any white bass. The Magistrate Judge agreed that this would be equally effective and less discriminatory. The government makes arguments in support of the total ban, but none adequately explain the necessity for such a total ban. The District Court held that there was nothing in the record to indicate that the Magistrate Judge's conclusion was clearly erroneous. Therefore, the District Court ultimately agreed with the Magistrate Judge's determination that there were in fact available less discriminatory means of preserving South Carolina's white bass population. The Magistrate Judge's dismissal on Constitutional Commerce Clause grounds was affirmed.

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UNITED STATES FEDERAL COURTS OF APPEALS

No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2d Cir. 2003)

In July of 2000, a group of individuals and environmental groups sought to enjoin the city of New York from spraying pesticides. To do so, the group filed a citizen's enforcement suit under the Clean Water Act ("CWA") in district court in New York. Plaintiffs alleged that the City had used the pesticides to kill mosquitoes in an attempt to combat the spread of West Nile virus without first obtaining the necessary permit as mandated by the CWA. The statute prohibits "discharge" of "any pollutant" into "navigable waters" without a permit issued by the United States Environmental Protection Agency ("EPA") under the National Pollution Discharge Elimination System ("NPDES") or under a federally approved state permit system ("SPDES").

The City admitted that it did not obtain the permit, but claimed its spraying was in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which is a regulatory statute that controls the

use and marketing of certain chemicals. The statute requires that such chemicals are used in accordance with the instructions on the label.

The district court granted defendants' motion for summary judgment in November of 2003, ruling that New York's use of the insecticides did substantially comply with the requirements of the FIFRA. The court did so because of its determination that "Congress intended FIFRA as the primary scheme governing pesticide use." The court reasoned that because FIFRA precludes enforcement by citizen suits, the Plaintiffs case could not go forward, despite the fact that the CWA does provide for such a remedy.

In December of 2003, the appellate court rebuked the district court's statutory interpretation and found that the district court's ruling "impermissibly modified" the CWA, which expressly permits enforcement by a citizen suit. The court said that it saw no reason to, "eliminate from CWA a remedy which it expressly provides" merely because the remedy is not provided for by FIFRA. The court therefore vacated the district court's decision and remanded the case.

CLARE N. MURPHY

Raymond Proffitt Found. v. U.S. Army Corps of Engineers, 343 F.3d 199 (3rd Cir. 2003).

In August of 1999, the Raymond Proffitt Foundation (the "Foundation") filed a twelve count complaint concerning the water control management for the Lehigh River at the Francis E. Walter Dam ("Walter Dam") against the Army Corps of Engineers.

Count one asserted that the Corps was unlawfully withholding or delaying agency action required by § 306 of the Water Resources Development Act of 1990 (WRDA). The Foundation disagreed with the Corps policy of matching the outflow of water from Walter Dam with its inflow, believing the WRDA required the Corps to use differing outflows of water during the year.

The District Court granted summary judgment to the Corps on all of the Foundation's claims. On the only count appealed, the court held that the "Corps' actions under the WRDA were unreviewable because the WRDA did not provide any 'law to apply' to this situation." The court reasoned that the WRDA gives a general environmental protection mission to the Corps, but leaves the Corps with discretion on how to apply this mission to specific water resource projects. Since the WRDA only provides a general statement establishing environmental protection as one of the Corps primary missions, but gives no guidance on how to carry out this mission, the District Court reasoned that the WRDA fit within the exception from reviewability.

The Appellate Court affirmed, reasoning that there was nothing discretionary in the WRDA's command that environmental protection should be a primary mission of the Corps and the District Court erred when it concluded that there was no "law to apply." Holding that Congress vested broad discretion in the Corps and the "deferential review that discretion requires of the judiciary," the District Court decision was affirmed when the Corps was able to show that it had made environmental protection one of its primary missions.

The Appellate Court first found that the District Court erred in applying § 701(a)(2) of the APA because the WRDA does not contain "law to apply." The agency discretion exception to judicial review is only applicable when a statute is written in terms so broad that there is no law to apply. The court came to the conclusion that even if the Corps had very broad discretion in its policy, that this is not the same as unreviewable discretion and thus the "allegations are amenable to judicial review."

While the Appellate Court disagreed with the District Court's decision of reviewability, it agreed with the District Court's finding that there is enough evidence of the Corp's implementation of § 306 of the WRDA, at least minimally, to satisfy the minimum amount of action required under the APA. The court came to this conclusion because the environment is just one of the primary missions of the Corps and it is up to the discretion of the Corps to decide what amount of environmental protection is appropriate in a given situation.

While the court is competent to determine if an agency has over-stepped its discretion, their scope of review of the agency is limited because Congress gave the Corps such broad discretion in its actions.

ELFIN NOCE

In re Needham, 2003 WL 22953383 (5th Cir. 2003)

The Oil Pollution Act (OPA) of 1990 was intended to streamline federal law and enhance the Environmental Protection Agency's (EPA) ability to prevent and respond to catastrophic oil spills in several ways. For one, the OPA created the national Oil Spill Liability Trust Fund to assist with cleanup costs when a responsible party is unable or unwilling to clean up oil spills. The OPA imposes strict liability upon parties responsible for discharging oil into "navigable waters." "Navigable waters" is defined in the statute to mean "the waters of the United States, including the territorial seas." The legislative history and the identical text strongly indicate that Congress intended that the meaning of "navigable waters" was to be the same in both the OPA the Clean Water Act.

An employee of Needham Resources, Inc., a company owned by the Needhams, pumped oil from an oil containment well into an adjacent drainage ditch. The EPA and the Coast Guard assumed control of the cleanup, an effort that was funded by the Oil Spill Liability Act. The United States Coast Guard sued the Needhams for reimbursement of their clean up expenses pursuant to the Oil Pollution Act (OPA). The Needhams claimed that the oil spill was not regulated by the OPA because the spill did not implicate any navigable waters that were subject to federal jurisdiction. The Needhams subsequently filed for bankruptcy.

The following day, the United States sued the Needhams and their company in federal bankruptcy court to recoup its cleanup costs. At the bankruptcy hearing, both parties stipulated that the oil was originally discharged into a drainage ditch, spilled into Bayou Cutoff, and then spilled into Bayou Folse. It is undisputed that Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico.

The bankruptcy court found that the spill was not subject to federal regulation. The court held that the OPA had no jurisdiction to compel the Needhams to pay for the cleanup, stating that the drainage ditch and Bayou Cutoff are not navigable waters and are not sufficiently adjacent to navigable waters as required in order for the Act to control. The district court affirmed, finding no basis to disturb the ruling of the bankruptcy court.

The Fifth Circuit Court of Appeals found error with the bankruptcy court's two critical findings of fact. The two findings of fact at issue are (1) that the oil spilled only into the ditch and the Bayou Cutoff and (2) that neither the ditch nor Cutoff were navigable waters. The appellate court concluded that the oil spill did in fact implicate navigable waters, triggering the OPA's federal regulatory jurisdiction. The bankruptcy court's decision was reversed and remanded.

In appealing the bankruptcy court's decision, the United States challenged the court's conclusion that the spilled oil did not contaminate waters regulated by the Oil Pollution Act (OPA). Specifically, the United States asserted that the oil was spilled into navigable-in-fact waters, or alternatively, into waters that were adjacent to navigable waters. The court ultimately agreed with the latter of the two arguments and divided its opinion into two parts: (1) defining the OPA's jurisdiction and (2) reviewing the bankruptcy court's findings of fact.

In reaching its decision, the court defined "navigable waters" narrowly, refusing to approve the broad regulatory definition of "navigable waters" as defined by the Act, although other circuits had recently done so. The 5th Circuit held that the United States was only permitted to regulate bodies of water that are actually navigable or adjacent to navigable waters.

LORRAINE C. BUCK

GDF Realty Investments, LTD v. Norton, 2004 WL 396975 (5th Cir. 2004)

On February 27, 2004, the Fifth Circuit denied a rehearing and rehearing *en banc* petition from GDF Realty Investments, LTD of the circuit's 2003 decision favoring the government. In that decision, the court held that the Endangered Species Act's ("ESA") "take" provision was not unconstitutional as applied to certain species of Cave Bugs found in two Texas counties. *GDF Realty Investments, LTD v. Norton*, 326 F.3d 622, 624 (5th Cir. 2003). Rather the court concluded that because these takes could be aggregated with all other endangered species takings it had a substantial effect on interstate commerce. *Id.* In the 2004 ruling, Circuit Judge Jones, joined by five other justices, dissented to the denials arguing that a rehearing *en banc* was necessary in order to be faithful to the Supreme Court's Commerce Clause decisions of *Lopez* and *Morrison*.

These Cave Bugs are found solely in limestone caves on a tract of land west of Austin, which landowners-appellants wish to commercially develop. Despite their retention of required permits, landowners were unable to build because the U.S. Fish and Wildlife Services ("FWS") held that six species of the Cave Bugs were endangered. Under the ESA, it is unlawful to 'take' a member of the endangered species. Take is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect." 16 U.S.C. § 1532(19) (2000). Federal regulations define harm broadly as "including significant modifications or degradations of a habitat which kill or injure protected wildlife 'by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.'" *GDF Realty*, 2004 WL 396975 at *2 (Jones, J., dissenting).

Following a suit by the landowners, the district court granted summary judgment to FWS finding the regulated activity to be the planned commercial development. Then the court of appeals affirmed the decision, but on other grounds. Judge Jones believes that although the court of appeals initially found the regulated activity under the ESA was the Cave Bug takes, and not the landowners planned development, the panel nonetheless incorrectly aggregated the Cave Bug takes with all takes of endangered species. The dissent argued that the panel's decision undercuts *Lopez* and *Morrison* because although it found the Cave Bugs to be non-economic in nature it still aggregated the Cave Bug "takings with all takes of all endangered species because (1) they are part of a larger regulation that is directed at activity that is economic in nature and (2) the intrastate activity [ ] is an essential part of the economic regulatory scheme." *Id.* at *5.

The dissent states that the panel offered little reasoning to support these notions. Instead, he insists the panel should have followed *Lopez* and *Morrison* to avoid the long "but-for-causal chain" approach. Thus, avoiding the finding that "the essential purpose of the ESA is to protect the ecosystems upon which we and other species depend" and that every take is essential because all species are interrelated and the extinction of one may lead to the extinction of all. *Id.* at *6. Moreover, Judge Jones contends that the panel's decision ignored that federal legislation under the Commerce Clause must have a limiting principle to avoid a federalism conflict. Finally, the dissent believes that the panel's holding that a 'link' between Cave Bug takes and a substantial commercial effect is not attenuated, contradicts its own precedent of Commerce Clause decisions. Although the dissent believes that while many ESA prohibited takings, which clearly effect commercially-related activities may be constitutional, the notion that Cave Bugs, who have no tourism, scientific, or agricultural purpose, can be regulated by the federal government by means of the Commerce Clause, "simply goes to far." *Id.* at *7.

JESSICA HULTING

Le-Ax Water District v. City of Athens, Ohio, 346 F.3d 701 (6th Cir. 2003)

Within the Sixth Circuit, a rural water district ("RWD") may seek federal protection under 7 U.S.C. § 1926(b) (2000) from the "curtailment or encroachment" of a municipal water association if 1) the rural water

district is an " 'association' within the meaning of the Act; 2) it has a qualifying outstanding FmHA loan obligation; and 3) it has provided or made service available in the disputed area." *Lex-Ax Water District*, 346 F.3d at 705. In 2000, Le-Ax, a RWD in Ohio, filed suit against the City of Athens alleging that its proposed arrangement with University Estates, a developer planning to place a golf-course community within a third of a mile from Le-Ax's boundary, violated § 1926(b). After cross motions for summary judgment and a hearing, the Southern District of Ohio granted summary judgement to Le-Ax issuing a declaratory judgment that the proposed water supply arrangement between Athens and University Estates would violate § 1926(b). The City of Athens followed with this timely appeal.

The Sixth Circuit reviewed the grant of summary judgment de novo. Since no dispute existed between the parties as to Le-Ax being an 'association', and its outstanding loans to FmHA's successor, the main issue at hand was whether Le-Ax had "provided or made service available" to University Estates. Due to the lack of explanation concerning this phrase from the statute, legislative history, Supreme Court, and Congress the court reviewed the decisions of other federal circuits along with its own precedent. The Sixth Circuit, hold that a RWD has "made service available" to a disputed area by having 1) the physical ability to do so and 2) a legal right under state law. The court found that Le-Ax met both requirements. First, Le-Ax met the "pipes in ground" test because it maintained an eight-inch water line immediately adjacent to the disputed area. This line would be able to provide more than enough water to University Estates. Secondly, Le-Ax had a legal right to serve University Estates under Ohio law, which allows a water district to supply water "within or without" its district. *See* Oho Rev. Code Ann. §6119.01(A) (2003). This established that Le-Ax had the right to supply water outside its boundaries. Thus, Le-Ax had both the physical ability and the legal right to serve University Estates, and were found to have "made service available" to the disputed area.

However, after reviewing the text and legislative history of § 1926(b), the court held that the Congressional intent was simply to provide a "shield" against the curtailment and encroachment from municipalities, and not provide a sword to RWDs to seek out new customers outside its boundaries. The court found that all relevant case history supported this notion. Moreover, the court stated that by allowing Le-Ax to take such an expansive view of § 1926(b), would allow it to gain a "monopoly status not only within its boundaries ... but also would extend that status to wherever Le-Ax could provide service." Therefore, the Sixth Circuit reversed the granting of summary judgment to Le-Ax and remanded the case to the district court to grant judgment in favor of Athens.

Judge Gibbions dissenting opinion finds the majority decision inconsistent with the court's own precedent concerning § 1926(b). Although he agrees that § 1926(b) was to be used as a shield rather than a sword, he disagrees with the majority's definition of the Le-Ax's boundaries. Instead, of the state defined political boundaries of Le-Ax, which the majority says is decisive, he believes that Le-Ax should be able to defend its boundaries where it is able to supply service. As a result, he believes that the majority is creating a new element to the § 1926(b) claim that has no basis in statute or precedent.

JESSICA HULTING

Center For Biological Diversity v. U.S. Forest Service, 349 F.3d 1157 (9th Cir. 2003)

In 1990, the United States Forest Service created the Northern Goshawk Scientific Committee to review the impact of logging practices on the habitat needs of the northern goshawk. In 1992 the Committee published its report, and concluded that the northern goshawk was a habitat generalist occupying a mix of forest types. The Forest Service used this information to prepare an Environmental Impact Statement to begin logging in Southwestern Region. In response to this study, the Arizona Game and Fish Department (AGFD) produced scientific evidence contradicting the Committee's study. The Forest Service included two options in its

Environmental Impact Statement (EIS) based on the AGFD's findings, but did not include the study itself in the statement. The Center for Biological Diversity sued the Forest Service claiming that the EIS was inadequate for failing to disclose studies contradicting its findings. The question before the court was whether simply listing alternatives that take into account opposing scientific evidence is enough to satisfy the requirements of the National Environmental Protection Act, or whether the opposing data itself must be published.

The court focused on the agreement between the parties that the concerns raised by the Appellants represented responsible opposing scientific viewpoints in regards to the northern goshawk being a habitat generalist. The Forrest Service argued the final impact statement adequately addressed these concerns because they included Alternative D, which was based entirely on the suggestions of the AGFD and the New Mexico Department of Game and Fish (NMDGF). The court held that this was not adequate, and as such the Forest Service failed to properly disclose and discuss all responsible opposing views. The court went on to say that even though the AGFD's Review Paper was included in the final EIS, this was not enough to satisfy NEPA requirements because the Forest Service redacted the final section of the paper, which contained the AFGD's concerns. Finally, the court held that NEPA requires specific disclosure of opposing scientific data, not just a general statement that some opposition exists.

JAMES C. CHOSTNER

County of Okanogan v. Natl. Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003)

Permit holders representing the County of Okanogan filed an action against the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and others seeking a declaratory judgment that the actions of the federal defendants related to water ditch permits were unconstitutional and exceeded their authority. Summary judgment was granted in favor of the defendants and the permit holders appealed.

The Skyline Irrigation Ditch and the Early Winters Ditch are the ditches at issue. "These ditches traverse the Okanogan National Forest and divert water to plaintiffs for agricultural and other purposes." A special use permit was granted in 1903 for the Skyline ditch and similarly for the Early Winter ditch in 1910 with a revocable and nontransferable restriction that may be terminated "at the discretion of the regional forester or the Chief, Forest Service." Additionally, the two permits were renewed several times. The permits stated that the permittees "shall comply with all the laws and regulations governing National Forests."

The United States Forest Service assessed these special use permits for the Chewuch River. The assessments led the Forest Service to conclude that continued operation of a ditch was likely to adversely affect the steelhead and chinook salmon. Under the Endangered Species Act ("ESA"), steelhead trout and salmon were listed as endangered species. 16 U.S.C. § 1531-1544 (2000). The Forest Service also found that a second ditch was likely to adversely affect the steelhead and chinook by "adversely affecting nesting and spawning areas."

The permit holders do not argue that the federal agencies violated any aspects of the ESA, but that compliance with the ESA was not authorized because such compliance would deny them their vested water rights under state law. The court on appeal did not agree with the permit holders. "The more recent permits expressly state that they do not convey water rights and are subject to amendment when, at the discretion of the authorizing officer, such action is deemed necessary or desirable to incorporate new terms, conditions and stipulations as may be required by law, regulation, land management plans, or other management decisions." The ESA and regulations thereunder require federal agencies to consult with designated consulting agencies whenever a federal action "may affect" a threatened or endangered species. 50 C.F.R. § 402.14(a) (2002). Furthermore, the regulations provide that this consultation is required for all discretionary federal involvement, "including the granting of permits or rights-of-way, pursuant to 50 C.F.R. § 402.02(c) (2002)." This court held

that the "permits themselves, from their inception provided the government with unqualified discretion to restrict or terminate the rights-of-way."

The Federal Land Policy and Management Act of 1976 authorized respective federal authorities to grant rights-of-way. Such rights of way, "shall contain . . . terms and conditions which will . . . minimize damage to...fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. § 1761(a)(1). The district court upheld the language of this as well as other enabling statutes, and also noted that the permits were revocable on their face. Ultimately, the defendants did not overreach their constitutional authority in restricting the permits. This court agreed with the district court that the placement of restriction on the right-of-way permits was within the authority of the Forest Service. The Forest Service has authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.

The court of appeals affirmed the district court decision.

DAVID RINGHOFER

Turtle Island Restoration Network v. Natl. Marine Fisheries Serv., 340 F. 3d 969, 972 (9th Cir. 2003)

Sea turtles were once abundant off the shores of the United States. Today all six species of sea turtles are listed as either endangered or threatened under the Endangered Species Act. The Ninth Circuit has taken a significant step forward in protecting the remaining fragile populations of sea turtles. *Turtle Island Restoration Network*, requires the National Marine Fisheries Service engage in the consultation process required by the Endangered Species Act to determine if the issuance of longline fishing permits will likely jeopardize the survival of the sea turtles.

The issue on appeal to the Ninth Circuit was whether the issuance of fishing permits as required by the High Seas Fishing Compliance Act, requires the consultation process of the ESA. The court began its analysis by answering the question of whether issuing fishing permits was an agency action that would implicate the ESA. Agency action has been interpreted broadly, encompassing essentially any agency action funded in full or in part by the Untied States. Relying on the broad interpretation that agency action has been given, the court found that issuing fishing permits was an agency action that could trigger ESA.

After determining the threshold question of agency action, the court was left to determine if there was sufficient discretion vested in the Fisheries Service to trigger Section 7 of the ESA. The test used by the instant court was whether the agency has the ability to "inure to the benefit of the protected species."

The court relied on a combination of traditional statutory construction doctrines to come to this conclusion. The court noted that "every clause and word of the statue" should be given effect and that the text should be viewed in light of the whole structure and scheme of the statute. The Compliance Act states that the Fisheries Service may condition the issuance of fishing permits and the lists two types of conditions that may be used. Noting that traditionally the language "including but not limited to" indicated a non-exclusive list, the court found that the language clearly indicated Congress' intent to instill in the Fisheries Service the ability to condition fishing permits for reasons other than those listed. Because Congress' intention was clear and the court must give effect to that intent, the court found that the National Marine Fisheries Service's interpretation was not entitled to *Chevron* deference.

The court held that under the plain language of the High Seas Fishing Compliance Act, the National Marine Fisheries Service had sufficient discretion to inure to the benefit of sea turtles. Thus, the court held that because the National Marine Fisheries Service had discretion, the National Marine Fisheries Service was required to engage in the consultation process to investigate the potential effects of the permits on the protected species.

On the heels of this decision, the U.S. Fisheries Service issued a new rule banning longline fishing for swordfish off the shores of California. With the ban in place, the Ninth Circuit's requirement that Fisheries Service engage in the consultation process is moot. However, this case is evidence of the extent to which the protection of endangered species is a national priority, even at significant costs to industry.

ELIZABETH P. MCNICHOLS

STATE COURTS

N.J. Dept. of Envtl. Protection v. Marisol, 845 A.2d 147 (N.J. Super. App. Div. 2004)

In *Marisol*, the appellate division of the Superior Court of New Jersey addressed whether the New Jersey Department of Environmental Protection could impose monetary penalties on Marisol corporation, a hazardous waste treatment and storage site, for violations of the Solid Waste Management Act. The Environmental Dept. cited Marisol for violating the Solid Waste Management Act when Marisol mislabeled and failed to make visible the labels on certain solid waste drums.

Marisol appealed the citation and received a hearing before the Administrative Law Judge. Marisol argued that the labelings constituted minor violations within the meaning of the statute because they were not purposeful, posed a minimum risk to public health, safety and natural resources, and did not undermine the regulatory goals. Marisol further argued that because the labelings were minor violations, which may be corrected within a period of time, the statute prohibited the Dept. from imposing monetary penalties on Marisol. Marisol, in other words, argued that it was entitled to the statutory Grace Period. Based on trial testimony, the Dept. argued that the labelings were major violations, not minor, and therefore penalties were proper. The Administrative Law Judge found that the grace period did not apply and ruled in favor of the Dept., assessing Marisol a $4,500 penalty for the violations. Marisol appealed the Administrative Law Judge's ruling to the Dept's Commissioner. The Commissioner affirmed the ruling in favor of the Dept. and Marisol appealed to the present court.

The New Jersey Superior Court vacated the monetary penalties against Marisol and held that the grace period applied to Marisol. The court ruled that the Dept's regulatory law was outdated and not based on the current statute. Accordingly, the court ruled that the Dept failed to provide adequate evidence to show Marisol's violation was major. Thus, the court ruled that Marisol's violation was minor. As such, the court ruled that Marisol could not incur a monetary penalty under the grace period statute since Marisol remedied the labelings within the appropriate time frame.

MARYA KATHRYN LUCAS

Found. for Independent Living, Inc. v. The Cabell-Huntington Bd. of Health, 2003 WL 22850010 (W.Va. 2003)

On December 12, 2001 the Cabell-Huntington Board of Health adopted the "Cabell County Clean Indoor Regulation of 2001," which prohibited smoking in all enclosed public areas within Cabell County. Soon after the Foundation for Independent Living filed suit in the circuit court seeking injunctive relief, declaring the Board had overstepped its authority, infringed upon the fundamental right to privacy, and that under West Virginia law bars did not constitute public places. The district court agreed and granted summary judgment for the Foundation. The Supreme Court of Appeals for West Virginia reviewed the case de novo.

The Court held that that the Board had not overstepped its bounds in passing the Clean Indoor regulation. The Court based its findings on the fact that the state legislature found smoking to cause lung

cancer, heart disease and other serious health problems, that the state's goal was to create a citizenry free from the use of tobacco, and that the Board was granted authority to promote and maintain clean and safe air, water, food and facilities. The Court went on to say that, to claim that an office or conference room was truly a private area created a heavy burden to show that it provided no risk of smoke exposure to the public or to employees, and constituted no infringement on constitutional privacy. Finally, the Court noted that despite the fact that West Virginia law designated bars as private clubs, they were still subject to state health and fire codes and as such were still subject to the Board's mandates. In upholding the county regulation, the Court limited its applicability to areas that had not already been preempted by state statute.

JAMES C. CHOSTNER

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