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Court Reports

COURT REPORTS

UNITED STATES COURT OF APPEALS

Seiber v. United States, 364 F.3d 1356, 1359 (Fed. Cir. 2004).

The Oregon Department of Forestry (ODF) designated seventy acres of Seibers' land as protected habitat for endangered species. The ODF rejected the Seibers' request for permission to log on the land. In response, the Seibers "sought a hearing at the Oregon Board of Forestry, arguing that the ODF rule should be withdrawn because it constituted a taking of their property." The Oregon Board of Forestry affirmed the ODF's denial and found the denial did not constitute a taking.

The Seibers then brought suit in the Court of Federal Claims asking the United States for compensation for the alleged taking. The Court of Appeals agreed with the Court of Federal Claims finding that the Seibers did not state a taking claim.

The court found that government protection of owls is not a physical taking. The court likewise found that the ban on logging was not a claim under *Agins v. City of Tiburon*, 477 U.S. 255 (1980), because the ban on logging served a legitimate purpose. The court also rejected the Seibers' claim that the permit denial constituted a categorical taking because a categorical regulatory taking can only occur "if the *whole* parcel of land is deprived of *all* beneficial use."

Finally, in the instant case the court also rejected the Seibers claim that a regulatory taking occurred. The court agreed with the Seibers that a party can be compensated for a partial temporary taking. However, the court found that there was no showing of economic injury as the result of the temporary taking and therefore no taking occurred. The court found the Seibers failed to provide evidence of the economic impact comparing the value that has been taken with the value that remains.

ANNE E. KERN

Carus Chemical Company v. United States Environmental Protection Agency, 395 F.3d 434 (D.C. Cir. 2005).

In a January 11, 2005 decision, the United States Court of Appeals for the District of Columbia denied the petition for review of the United States Environmental Protection Agency's decision to place property partially owned by Carus Chemical Company on the National Priorities List (NPL), pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

The EPA began studying the property at issue in 1988 by taking aerial photographs and compiling data taken from sediment, groundwater and soil samples located near large slag piles which accumulated as a result of an earlier smelter and rolling mill on the property. Based on these studies, the EPA determined that hazardous substances had been release into the Little Vermilion River. Due to the environmental and human health threats posed, the EPA proposed that the site be put on the NPL. Despite Carus' opposition to the notice, supplemented by recent data, the EPA issued a final rule to place the site on the NPL.

In contesting the EPA's decision to list the site, Carus provided the EPA with its own independent testing of the property, the sampling data of which Carus argued was more recent than the previously obtained government data. Carus argued that the EPA both misinterpreted and misapplied the Hazard Ranking System by disregarding the more recent data provided by Carus, thereby causing the HRS score of 50 to be too high and rendering the EPA's ruling, arbitrary and capricious.

The Hazard Ranking System (HRS) is the primary method for identifying sites to be placed on the NPL. The HRS is a comprehensive numerical system which uses the data collected during the preliminary assessment phase and the site inspection phase to assess the relative risk a site may pose to human health or the

environment. An HRS score greater than 28.5 on a scale from 0 to 100 may place a site on the NPL. Challenges to the HRS, as in this case, must be made to the United States Court of Appeals, District of Columbia Circuit and reviewed under an arbitrary and capricious standard.

The court found that the EPA did review the data provided by Carus which confirmed the hazardous substance previously found in the earlier studies; therefore, the EPA's interpretation and application of the HRS was reasonable and the decision was not arbitrary and capricious. As such, Carus' petition for review was denied.

JOSHUA N. CORMAN

United States v. Gurley, 384 F.3d 316 (6th Cir. 2004)

The Environmental Protection Agency ("EPA") began investigating a former landfill near West Memphis, Arkansas as early as 1982. As a result of the investigation and the detection of "various hazardous chemicals" at the site, the landfill was placed on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") National Priorities list on October 14, 1992. One of the contributors to the landfill was Gurley Refining Company ("GRC"), an oil refinery which used the landfill to dump an "oily waste" created as a by-product of the refining process.

Accompanied by a general notice letter, the EPA issued an information request to William Gurley ("Gurley") on February 6, 1992, in his role as president and majority stockholder of GRC. Among other things, the "information request sought Gurley's individual knowledge of . . . Gurley's assets, generators of material that [was] disposed of at the site, site operations, and the structure of GRC." For some time, Gurley refused to fulfill the request, including six additional questions posed by the EPA. The United States eventually responded by filing suit against Gurley on August 8, 1993. At this point, Gurley submitted answers to the initial information request, but failed to provide answers pertaining to his individual financial condition or to the six additional questions added to the initial request.

In their suit against Gurley, the EPA relied on their authority granted under CERCLA to issue information requests. The EPA moved for, and received, a grant of summary judgment on December 30, 1998. Liability for failing to comply with EPA information requests is determined by the court and can take the form of civil penalties up to $25,000 a day for each day of noncompliance. The EPA's motion to impose civil penalties on Gurley was granted on November 26, 2002. Based on the court's determination of the "varying levels of egregiousness Gurley demonstrated in failing to comply fully with the EPA's information requests," the court imposed three different levels of penalties. Gurley was fined $2,000 a day from February 28, 1992 through September 15, 1992; $1,000 a day from September 16, 1992 though July 29, 1994; and $500 a day from July 30, 1994 through February 2, 1999. In total, Gurley's fines reached $1,908,000.

Following the imposition of civil penalties, Gurley appealed the grant of summary judgment and the imposition of the penalties. In his appeal, Gurley challenged the amount of the fine, claiming that it was not proportional to his crime and thus violated the Excessive Fines Clause of the Eighth Amendment. He also challenged the verdict on *res judicata* grounds and questioned the constitutionality of the EPA's authority to issue information requests under CERCLA, claiming the requests violated the Due Process Clause of the Fifth Amendment.

On appeal, the Sixth Circuit upheld the rulings of the district court and failed to find the challenged provisions of CERCLA unconstitutional. In particular, the court noted that judicially-imposed fines were unlikely to violate the Excessive Fines Clause as long as the fine was within the statutory maximum imposed by the legislature. Because Gurley's fines could have totaled millions of dollars more than what the court imposed, the Excessive Fines Clause was not violated and the judgment was upheld.

JASON SCHERER

Ellis v. Gallatin Steel, 390 F.3d. 461 (6th Cir. 2004).

In April 1995, Gallatin Steel Company opened a large steel manufacturing facility on U.S. Highway 42 in Kentucky after more than two years of construction. At the same time and in the same general location, Multiserv, a division Harsco, opened up a slag processing plant to dispose of the slag produced by the steel plant.

About a half mile down the road from the plants, Vernon Ellis lives on a 168-acre farm in Gallatin. His two sons, Richard and Thomas, and their families also lived on the farm in separate residences. Laverne Brashear, the other private plaintiff in this action, lived across the street from the Ellises on a half-acre plot of land. In April 1995, the same month that Gallatin and Harsco began their operations, "the Ellises began to notice an unfamiliar dust on the farm, which they immediately attributed to Gallatin's and Harsco's operations." The arrival of the dust has allegedly caused many problems for the family including respiratory problems, headaches, itchy throats and infections.

In 1997, Richard and Thomas began recording the dust's effect on their property through photographs and other means. All in all, they spent more than 8,000 hours monitoring the steel manufacturing and slag processing operations and their combined effect on the property.

The Harsco and Gallatin operations resulted in seven different proceedings, all filed within a one year period. The plaintiffs filed two lawsuits against Gallatin and Harsco under the CAA. Brashear filed a similar citizen suit naming Harsco as the sole defendant. Both the Ellis's and Brashear later amended their complaints to include the state-law tort of nuisance. Finally, the federal government filed two actions against the corporations. On January 19, 2000, the district court dismissed all but three of Ellis's claims for failure to provide notice. The remaining claims were consolidated into the second citizen suit.

On June 22, 2002, the consent decree was finally entered with the district court. The decree included a civil penalty of $925,000 for Gallatin and various compliance measures to be followed by both Gallatin and Harsco. The Ellises and Brashear then proceeded with their citizen suit. The district court held that the *res judicata* effect of the consent decree had precluded a citizen suit under federal law for incidents prior to the consent decree. However, the district court allowed the nuisance claim to go forward. At the end of a bench trial, the court awarded $24,570 in compensatory damages and $750,000 in punitive damages with Gallatin paying 80 % and Harsco with 20 % of the liability. It also granted an injunction mirroring the consent.

In its analysis, the court focused on the relationship between the timing of the plaintiff's suit and date of entry for the consent decree between the government and the defendants. Since the plaintiffs had not refiled their suit after the consent decree, they had an insurmountable procedural hurdle to overcome. This fact ultimately led the court to side with the defendants.

The Sixth circuit next dealt with the district court's granting injunctive relief to the plaintiff's under the Clean Air Act. The injunction was exactly the same as the consent decree except for one caveat: the defendants were required to hire a "special master" in order to ensure compliance. The appeals court ruled that the district court had overstepped its bounds in two ways. First, since the plaintiffs had not refiled their suit and given new notice to the EPA, their suit was precluded under *res judicata*. Second, the court held that even if the requirement was met, the plaintiffs had not given the defendants ample time to effectuate the decree. The court ultimately overturned the injunction.

JON MORROW

Young v. United States, 394 F.3d 858 (10th Cir. 2005)

Plaintiff Jack Young and three others purchased a piece of property next to the Eagle-Picher Superfund Site in Henryetta, Oklahoma. The Eagle-Picher property housed a smelting plant in the 1960s and operations resulted in contamination of the property. The EPA cleaned up the property in 1998 with the help of state and local agencies. In 1999, plaintiffs bought the property at issue in this suit for much less than its appraised value. They surveyed the property after purchase and discovered there were several hazardous substances on the property. Plaintiffs did not take any action to clean up their parcel.

Plaintiffs filed several claims, including a cost-recovery claim under CERCLA § 107(a), in the district court. All claims were dismissed except for the cost-recovery claim. Defendants moved for summary judgment as to that claim, which was granted by the district court. The court concluded that plaintiffs were potentially responsible parties (PRPs) and could not assert a cost-recovery action under § 107(a). Plaintiffs appealed the summary judgment finding claiming they were not PRPs and thus could bring a § 107(a) claim.

The Tenth Circuit reviewed the appeal de novo and affirmed, but for different reasons. The court did not consider whether the plaintiffs might be PRPs. Instead, the court focused on the elements of a cost-recovery action under § 107(a). In order to prevail on a cost-recovery action plaintiff must prove (1) the site is a facility, (2) defendant is a responsible person, (3) the release or threatened release of a hazardous substance has occurred, and (4) the release or threatened release caused the plaintiff to incur necessary response costs consistent with the National Contingency Plan. The court noted that response costs generally include the costs of investigating and responding to a hazardous release. However, these costs must be necessary in order to be recovered. The court held that a necessary cost was one which was closely tied to the actual cleanup of a hazardous release. The court found that because the plaintiffs had not undertaken a cleanup and had no plans to initiate one in the future, the costs they incurred were not necessary and therefore could not be recovered under CERCLA § 107(a).

The Tenth Circuit rejected the plaintiffs' argument that because the hazardous substances were from the Superfund site, they were excused from clean up and could still recover the costs spent on surveying their property. The court concluded that the costs incurred in this case appeared to be related more to preparing for the litigation against the government than to containment of the hazardous substances. The court noted again that costs of investigation can be recovered if related to a clean up, but costs incurred for litigation are not recoverable. Plaintiffs could not establish that they had incurred necessary response costs consistent with the National Contingency Plan because they had not engaged in a clean up, a requirement for a successful CERCLA § 107(a) action. Therefore, the Tenth Circuit affirmed summary judgment for defendants.

MARISSA L. TODD

UNITED STATES DISTRICT COURT

United States v. Qwest Corp., 353 F.Supp.2d 1048 (D. Minn. 2005).

In 1984 the EPA determined the prior owners of property in New Brighton, Minnesota ("Site") had disposed of wood treatment process wastewater, process sludge, preservative drippage, and spent formulations from wood treating process using chlorophenolic process compounds, creosote, chromium and arsenic. These are considered hazardous substances under § 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). The EPA constructed wells for extracting groundwater via underground forcemains, consisting of buried piping, to an on-site water treatment unit. The EPA failed to install tracers that could detect the water lines from the surface. The EPA also failed to follow state law and register the underground water lines with the "One Call Center" utility locate program.

In October of 2000, the wastewater lines were ruptured by Defendant Qwest's utility contractor while attempting to install an underground communication line in a public right-of-way next to the Site. This accident resulted in hazardous substances in the untreated groundwater being exposed to the environment. The government paid approximately $ 130,030 to repair the ruptured line. The Government alleges Defendant Qwest is liable as operators under § 107 of CERCLA. Qwest filed a Motion to Dismiss, claiming it is not an "operator" under CERCLA.

The District Court examined the nature and purpose of CERCLA, finding that while the statute should be read liberally to accomplish its goals, there are limits that must be acknowledged. The court found the statute itself unclear, but relied upon the Supreme Court's interpretation. The Supreme Court limits "operators" to those managing, directing, or conducting operations specifically related to pollution.

The Government argued Defendant Qwest's drilling effectuated the leakage of hazardous waste was in fact the act of an "operator" because Qwest operated the drill. Qwest argued prior case law is limited to parties in a contractual relationship with the party who controlled the remediation efforts on the site. The District Court agreed with Qwest. The defendants did not conduct activities dealing with or "specifically" relating to pollution. Additionally, Defendant Qwest had no control over the unmarked forcemains, which were not even in a right-of-way on the Site itself. Qwest was not aware, nor had reason to be, of the forcemains. It was the EPA that designed and supervised the forcemains in relation to the Site. The District Court held that CERCLA was not intended to expose liability to anyone who came into contact with hazardous substances from a Superfund site. Neither Qwest nor its contractor had control over the Site or the EPA installed forcemains. Assigning liability for Qwest's indirect contact with the hazardous materials would be an unjust and inappropriate extension of CERCLA's definition of "operator." The District Court granted the Motion to Dismiss.

JOHN R. GRIFFITH

STATE COURTS

Alternate Fuels, Inc. v. Director of the Illinois EPA, 2004 WL 2359398 (Ill. 2004)

When empty agricultural chemical containers are shredded into chips, various types of plastic are generated. Prior to shredding the containers, a company named Tri-Rinse, Inc. rinses them according to Environmental Protection Agency and Department of Agriculture standards. Alternative Fuels, Inc. (AFI) then transported the resulting chips to Illinois Power to be used as fuel at one of its plants. On June 14, 1994, a former EPA Employee, and then President of AFI, sent a letter to the Agency to determine if AFI's product constituted waste under the Environmental Protection Act (the Act) and therefore required an Agency permit.

The Agency stated that the alternate fuel was "waste" according to section 3.53 of the Act and that AFI was in violation of the Act. Due to the violation, AFI's primary investors withdrew their support, and its primary supplier withdrew from their agreement. AFI then filed a complaint naming as defendants the Director of the Agency, and the Agency itself, requesting a declaration that the materials used by AFI were not "waste" because the materials were not discarded. Subsequently, both the District and Appeals Court of Illinois found that the materials produced by AFI were not "waste" according to the Act.

The Illinois Supreme Court reviewed the Agency's appeal *de novo* and affirmed the appellate courts decision. The Court held that the definition of discarded material did not apply in this case. The term "discarded" and "material" were not defined by the Act. Thus the court rejected the agency's contention that "discarded" is solely from the viewpoint of the supplier in that a material is discarded if "any material which is not being utilized for its intended purpose" is discarded. Rather, the court held the Act contemplates that materials that may otherwise be discarded by the supplier may be diverted from becoming waste and returned to the economic mainstream, thus not becoming "discarded." Since the aim of AFI was to process the materials

for subsequent use in the marketplace rather than to store, landfill, dispose, transfer, or incinerate the plastic, AFI's facilities were considered "recycling centers" and not "pollution control facilities." Because recycling centers do not require permits to operate their facilities, the court held that AFI was not required to obtain a permit.

SHOMARI L. BENTON

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