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UNITED STATES COURT OF APPEALS

United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006).

John Hubenka is a manager for the LeClair Irrigation District ("LID"). LID installed a diversion gate on the Wind River, which allows the water to flow into an irrigation canal that parallels the river. Hubenka and LID tried on several occasions to divert the flow of the river so the irrigation canal would not be harmed. In 1994, LID, with Hubenka's permission, constructed a dike downstream from the diversion gate using river cobbles, scrap metal, trees, cars, and a washing machine. LID also reinforced the river's bank with similar items. The United States Army Corps of Engineers ("Corps") issued a notice of violation to both Hubenka and LID and instructed them to remove all of the debris except for clean concrete. After they complied, the Corps issued a permit to stabilize the bank with more acceptable materials. In March of 2000, Hubenka had three dikes constructed in the north channel of the Wind River, none of which were authorized by the Corps. Hubenka was charged in 2004 with, and convicted of, three violations of the Clean Water Act ("CWA") for knowingly discharging pollutants into the Wind River.

On appeal, Hubenka made four arguments as to why he was erroneously convicted. He first claims the river was not navigable-in-fact nor adjacent to other navigable-in-fact waters and the dikes had no effect on navigable waters downstream; therefore the Corps had no jurisdiction to regulate. The Tenth Circuit declared the Corps has jurisdiction over dredge and fill activities in navigable waters, which are waters of the United States. Further, Corps regulations state that the CWA applies to tributaries of navigable waters, which includes the Wind River. Hubenka also argued that the Corps exceeded its statutory authority. The court applied the *Chevron* deference test and determined the Corps had not exceeded its statutory authority. "Navigable waters" is defined ambiguously by the CWA (the first step of the *Chevron* test) and the Corps' rule does not "invoke the outer limits of Congress' power or raise significant constitutional questions" (the second step). Court precedent has determined that the Corps' rule is a permissible construction of the

CWA, so the rule is to be given deference as a valid interpretation of the CWA. The court also determined that there is a significant nexus between the tributary (Wind River) and the navigable waters downstream, so the rule is not "arbitrary, capricious, or manifestly contrary to the [CWA]."

Second, Hubenka argued that he did not violate the CWA because he did not add pollutants to the Wind River. The CWA defines "pollutant" as (among other items) "rock" and "sand." The court stated that according to the plain language of the statute, using river cobbles to construct the dikes is a discharge of a pollutant.

Hubenka's third argument is that he did not violate the CWA because the Corps could not show a deleterious effect on downstream waters. The court made quick work of this argument, noting, "to state a violation . . . a plaintiff need only show that the defendant discharged a pollutant into a water of the United States . . . without a permit." Thus, there is no need to prove that the pollutants caused a deleterious effect on the navigable waters downstream.

Finally, Hubenka's last argument was that the district court violated Rule 404(b) of the Federal Rules of Evidence "by allowing the government to use . . . testimony to show that Hubenka acted in conformity with prior wrongful activities." The court agreed with the district court that the testimony was probative of whether he knowingly violated the CWA and therefore affirmed the district court's order.

ERIN C. BARTLEY

Utah Environmental Congress v. Bosworth, 439 F.3d 1184 (10th Cir. 2006).

In October 2001, the Forest Service approved a timber-harvesting project in Utah's Fishlake National Forest. After the project was approved, Utah Environmental Congress ("UEC"), an environmental organization, filed a petition for review. The petition was dismissed and UEC appealed. On appeal UEC contended that the Forest Service 1) did not properly select and monitor a Management Indicator Species ("MIS") in order to determine the effects of the project on other species and 2) it did not consider a reasonable range of alternatives to the project.

The actual preparation for the timber-harvesting project began in November of 1999. The project's main goal was to reduce the overall stand density of the Spruce and Aspen trees that were at the highest risk for beetle infestation. Before the project began, the Forest Service conducted a study that examined the project's potential impact on wildlife, soils, and vegetation. The study was completed in 2001, and the project manager issued a statement that there would be no significant impact on the surrounding area.

In order to determine whether the Forest Service properly selected and monitored the MIS, the court looked to 36 C.F.R. 219.19. The Code stated that in order to estimate the effects on wildlife populations, certain species that are present in the area shall be selected and monitored. The species should be selected based on their ability to indicate the effects of management activity. According to this provision, the Forest Service was required to select both an "ecological indicator" and a "high interest" species. The service selected elk, mule deer, Bonneville cutthroat trout, and Rydberg's milkvetch to represent the high interest species; sage-nester guild, Southwestern Willow flycatcher, cavity-nester guild, northern goshawk, and the Mexican spotted owl were selected for the ecological indicators. The UEC contended that the species chosen for ecological indicators were not proper representatives for the study. Further, the UEC contended that the Forest Service had not gathered the proper data regarding the species at the beginning of the study.

The district court found that when the Forest Service examined the sage-nester guild it did not make a good faith effort to confirm the presence of the species. As such, the agency did not comply with 36 C.F.R. 219.19. On appeal, the court stated that since the species did not technically have a population in Fishlake National Forest, the Forest Service did not have a duty to monitor the species. However, when the court looked at the Southwestern Willow Flycatcher it determined that a more stringent observation was necessary. The court stated that it was not enough to simply state that no population existed. The Forest Service needed to look closer because the flycatcher was an endangered species. In terms of the remaining species' observations, the court determined that the Forest Service had only properly monitored the northern goshawk. The court stated that in order to properly monitor species studies need to be conducted that provide current quantitative data on the species.

The court next turned to the UEC's second contention that the Forest Service did not consider a reasonable range of alternatives. The court found that when an agency conducts a pre-study and finds that the action will not significantly impact the environment, then the agency does not need to prepare a full environmental impact statement. However, because the Forest Service did not collect the proper data with regards to most of the species the court reversed the finding of the district court and vacated the Forest Service's approval of the project.

AMY OHNEMUS

Friends of the Boundary Waters Wilderness v. Bosworth, 437 F.3d 815 (8th Cir. 2006).

The Boundary Waters Canoe Area Wilderness ("BWCAW") Act prohibited the use of all motorboats within the BWCAW, except on specified lakes. The Secretary of Agriculture was given the task of issuing quotas that restricted the use of motorboats on these lakes to "less than or equal to the average actual annual motorboat use of the calendar years 1976, 1977, and 1978." In calculating the average use of motorboats by resort owners, homeowners and their guests were not counted. In response to the Eighth Circuit decision of Friends of the Boundary Water Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999), which concluded that not excluding the use of certain parties was contrary to the language of the BWCAW Act, the United States Forest Service ("USFS") recalculated the base period use and increased the number of motorboat permits issued by 290%.

Friends of the Boundary Waters Wilderness ("Friends") brought suit alleging that the USFS lacked the authority to recalculate its use figures, that its recalculation of these figures was arbitrary and capricious, and that the new quotas violated the BWCAW Act. The district court granted summary judgment in favor of Friends, holding that the USFS lacked authority to recalculate the base period use and that the USFS's recalculation was arbitrary and capricious.

On appeal the Eighth Circuit held that the BWCAW Act was silent on the issue of whether USFS had authority to recalculate the base period

use and that, as such, the USFS interpretation of the statute was to be given deference. After concluding that the USFS had the authority to recalculate the base period use, the court examined the recalculation of each lake separately. In examining the recalculated base period use on the Moose Lake Chain the court noted that USFS acknowledged that the homeowner and resort owner surveys were not conducted in a statistically valid manner. The court held that the USFS's reliance on deficient surveys was not reasonable and that the recalculation was arbitrary and capricious. The court also set aside the recalculation of the USFS for the Saganaga Lake, another lake in the BWCAW. The court found that in recalculating the base period use the USFS did not attempt to determine how many motorboat users obtained permits because it relied on unreliable data collected primarily from the county records. The court held that the USFS must recalculate the quotas so that they are in compliance with the BWCAW Act.

ERIK HOLLAND

New York v. EPA, 2006 WL 662746 (D.C. Cir. Mar.17, 2006).

In New York I, the D.C. Circuit court addressed the first of two rules promulgated by the EPA, which provided ways for stationary sources of air pollution to avoid triggering the New Source Rule ("NSR"). The court upheld in part and vacated in part the first rule. This case, New York II, addresses the second rule, entitled the Equipment Replacement Provision, which amends the Routine Maintenance, Repair, and Replacement Exclusion from the NSR requirements.

Under the Clean Air Act ("CAA"), air pollution sources that undergo "any physical change" that increases emissions are required to undergo the NSR permitting process. Historically, the exclusion provided that routine maintenance, repair, and replacement do not constitute changes triggering the NSR. Thus, this provision would allow pollution sources to avoid the NSR when replacing equipment under the twenty-percent pollution cap, even if there is a resulting increase in emissions.
The court vacated the second rule, the Equipment Replacement Provision, because it is contrary to the plain language of the CAA. The CAA defines

modification as any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted. Previously, maintenance, repair, and replacement had been excluded from the NSR, because the EPA found routine maintenance and repair was a *de minimus* circumstance and could be excluded from the rule.

However, the court held that routine maintenance, repair, and replacement was a modification under the Act. The court specifically rejected the argument that "modification" was an ambiguous term and, employing traditional tools of statutory construction, found that "any physical change" includes equipment replacements. Once the EPA determines that an activity constitutes a physical change, the court held, the statute is read broadly and the word "any" requires the activity be subject to the NSR requirements. The court held that "because Congress used the word 'any,' EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'" The court also said that the EPA offered no reason to conclude that the CAA supports the conclusion that "any physical change" does not mean what it says.

The court determined it was proper for Congress to have intended NSR to apply to any type of physical change that increases emissions. The EPA's interpretation would produce a "strange," if not an "indeterminate," result. It would result in a law intended to limit increases in air pollution but would allow sources operating below emission limits to increase the pollution they emit without government review. The court held that by adopting an expansive reading of the phrase "any physical change," it gave natural effect to the words used by Congress and reflected their common meanings and purpose. The court's interpretation was necessary to improve pollution control programs. The court held that the Equipment Replacement Provision violated § 111(a)(4) of the CAA, and because it violated the CAA, the court vacated the rule.

NATALEE M. BINKHOLDER

UNITED STATES DISTRICT COURT

Chattooga Conservancy v. Jacobs, 318 F.Supp 2d 1179 (N.D. Ga. 2004).

Environmental organizations, including The Chattooga Conservancy, Florida Biodiversity Project, Sierra Club, and the Wilderness Society, brought suit against Robert T. Jacobs, as Regional Forester of the Southern Region of the U.S. Forest Service, seeking a temporary restraining order and preliminary injunction to prevent the harvest of timber from National Forest land. The district court denied the requests because Plaintiffs failed to show a substantial likelihood of success on the merits. This ruling clarifies an ambiguous standard set by *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999).

In 1990, the National Forest Service began a study of flora and fauna believed to reside in the Ouachita Mountains. As a result of the studies the Regional Forester signed two Records of Decision ("RODS") regarding development of the forest which required inventory of species considered threatened, endangered, proposed, and sensitive. In 1999, the *Martin* decision seemingly forced forest services to complete a wholly new "inventory" of species for each proposed action if the ROD contained the word "inventory." To circumvent this requirement, Ouachita Forest Service altered their ROD so as not to include a required "inventory" of species, but rather an analysis of then "available information." This made collection of new information discretionary as opposed to mandatory for each project.

The immediate case began in 2003 when the Forest Service approved the *Wildhorse Creek Project*, a plan to harvest timber within a section of the Ouachita Mountains. As part of the "Environmental Assessment for Timber Harvest and Connected Actions" ("EA"), the Forrest Service prepared an analysis of effects of timber harvest on threatened, endangered, proposed, and sensitive species. Included in the EA was extensive available information about all species alleged to be in the area that met the qualifications. Some of the species such as the American Burying Beetle and the Bald Eagle were known to exist near the area, but there was no evidence of their presence within the *Wildhorse Creek Project*. The EA also indicated that the timber harvest would have

"No Significant Impact" or a "beneficial impact[]" on each of the examined species.

The plaintiffs were not convinced of the thoroughness of the Forest Service's investigation and sought an injunction. The court held that the Plaintiffs read too much into *Martin* in that they expected a "head count" of the all species prior to agency action, and thus, the court denied injunctive relief.

The court noted that *Martin* was ambiguous but wholly different than the immediate case in that the defendants in *Martin* produced an inadequate EA that fell far short of the *Wildhorse Creek Project* assessment. The Plaintiffs' interpretation of the requirements set forth in *Martin* was rejected by the court which held that, as a result, the Plaintiffs failed to show a substantial likelihood of prevailing on the merits. This decision clarifies *Martin* in that a "head count" inventory is not required as long as agencies perform credible analysis based upon available information. Regardless of this ruling, agencies should routinely make new findings, whether they are called "inventory" or not, to keep their available information accurate. Without such upkeep, the decisions of the Forest Service would likely not adequately safeguard the species the agency was created to protect.

G. MICHAEL BROWN

Mehl v. Canadian Pacific Ry., Ltd., 2006 WL 522435 (D.N.D. Mar. 6, 2006).

On January 18, 2002, a Canadian Pacific Railway freight train derailed near Minot, North Dakota. A number of tanker cars that derailed were seriously damaged resulting in the release of anhydrous ammonia into the air. Seven days later a group of individuals filed suit on behalf of themselves and a class of similarly situated individuals. The plaintiffs in the case allege that a section of the continuous welded rail track failed, resulting in the derailment and subsequent personal injuries and property damage. The complaint identified seven claims, including negligence, private nuisance, public nuisance, trespass on land, strict liability, intentional infliction of emotional distress, and negligence *per se*. On

May 4, 2005, the court granted, in part, the plaintiffs' motion for class certification. Then on August 16, 2005 the defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted. Canadian Pacific claimed that the Eight Circuit's federal preemption precedent required dismissal of the plaintiffs' suit, relying on *In re Derailment Cases*, 416 F.3d 787 (8th Cir. 2005).

The Federal Railroad Safety Act ("FRSA") was enacted in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." The Act provides for the institution of rules, regulations, orders, and standards for all areas of railroad safety. In order for FRSA to "pre-empt state law, the federal regulation must 'cover' the same subject matter, and not merely 'touch upon' or 'relate to that subject matter.'"

The Eighth Circuit discussed cases which pre-empted FRSA as well as state court decisions that found that state-law tort claims were not preempted by the FRSA. It also reviewed a number of cases decided by the Court of Appeals itself in determining FRSA preemption including the impact of *In re Derailment Cases*. This case resulted in a finding that the negligence claims were preempted by the FRSA and that the negligence *per se* and strict liability claims were not recognized by Nebraska law. The Eighth Circuit identified in *Mayor of Baltimore v. CSX Tranp., Inc.*, 404 F. Supp. 2d 869 (D. Md. 2005) that "there is no indication that the [Federal Railroad Administration] meant to leave open a state tort cause of action to deter negligent inspection." Thus, even in the case of a failure to inspect, plaintiffs' claims remain subject to preemption analysis. The Eighth Circuit also referenced a more recent federal case that cited to the *In re Derailment Cases* decision with approval and pointed out that the fact that other federal district courts in the Eighth Circuit had reached a contrary result with regard to preemption. However, each of those cases were decided prior to the *In re Derailment Cases* case issued by the Eighth Circuit on August 2, 2005.

The court also provided a summary of the other decisions relating to the Minot derailment to provide a more succinct understanding of the procedural and jurisdictional differences within each case.

The court then addressed each of the plaintiffs' claims individually: inspection, construction and maintenance, training, operation, negligence *per se*, strict liability, intentional infliction of

emotional distress, nuisance, and trespass. However, the court granted the defendants' motion to dismiss as to each claim. It noted that even if the court were to decide that the plaintiffs' claims were not preempted by the FRSA, allowing those claims to proceed would violate the exclusive enforcement provision of the FRSA. The Eighth Circuit's decision resulted in leaving the plaintiffs with no remedy for the Minot accident. While the court acknowledged the unduly harsh result of granting the defendants' motion to dismiss, it stated that it is the "province of Congress, not the judicial branch" to address the inequity in preempting a remedy for a wrong.

TRAVIS A. ELLIOTT

Int'l Ctr For Tech. Assessment v. Thompson, 2006 WL 556305 (D.D.C. Mar. 8, 2006).

After the court granted the motion to dismiss filed by Defendants, the United States Department of Health and Human Services and the Food and Drug Administration ("FDA"), Plaintiffs, International Center For Technology Assessment, filed a motion to alter or amend the court's decision. Plaintiffs challenged the USDA's decision not to regulate the commercialization of a genetically engineered fish and for failure to comply with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA").

Yorktown Technologies, L.P. ("Yorktown") engineered a line of genetically modified pet fish and received a trademark for its "GloFish." The fish was developed by inserting genetic constructs from sea coral which caused the fish to glow when exposed to certain types of light. After analyzing the legal, scientific and policy issues the FDA determined that GloFish would not be regulated because there was no clear risk to the public health. Plaintiffs objected to the possibility that GloFish could "enter the animal and human food chains through accidental or intentional releases."

Plaintiffs' complaint averred that the FDA's distinction between food and non-food uses in the GloFish Statement was arbitrary and capricious and that the FDA did not review Yorktown's GloFish request in

accordance with statutory mandates. Plaintiffs also alleged that the FDA's failures to prepare an environmental impact statement ("EIS") or an environmental assessment before the GloFish or other genetically modified animals were allowed to be sold violated NEPA. Plaintiffs also asserted that the FDA violated the ESA when it failed to prepare a biological assessment and did not consult with the Fish and Wildlife Service ("FWS") before allowing GloFish commercialization or the commercialization of genetically modified animals.

The court's dismissal of Plaintiffs' claim was not clear error because the FDA's determination not to take any enforcement actions in connection with any New Animal Drug Application ("NADA") filed by the manufacturer was discretionary and not subject to judicial review. The court also held that Plaintiffs failed to show Yorktown submitted a NADA. There was not plain error because the FDA's refusal to regulate GloFish or other genetically modified animals did not constitute a "major federal action" under NEPA. Additionally, there was no clear error because the FDA's decision not to regulate GlowFish did not amount to an "agency action" that required ESA compliance. The defendant's motion to alter or amend the court's decision was denied.

SETH D. OKSANEN

Employers Mut. Cas. Co. v. Indus. Rubber Prods., 2006 WL 453207 (D. Minn. Feb. 23, 2006).

In 2003, the Hibbing Chrysler Center ("HCC") claimed that its vehicles were sustaining damage due to toxic particulates from the blasting activity of Industrial Rubber Products, Inc. ("IRP"). A complaint was made to the Minnesota Pollution Control Agency, which later determined, after visiting the site, that a hazardous waste issue was non-existent.

Subsequently, HCC sent a cease-and-desist letter to IRP mentioning that a lab analysis was conducted on the particulate and that it identified IRP as the source of the damage. IRP asserted that the report was erroneously read and mischaracterized, in actuality it did not identify it as the source, but instead provided evidence that the damage was in

some portion due to a chemical found in film for automotive windows and car wax. Additional testing procedures were undertaken by both sides, each confirming for the retaining party that its assertions of liability or non-liability were correct.

During the course of the back-and-forth exchange between the parties, IRP tendered a defense to its insurer, Employers Mutual Casualty Company ("Employers"), which agreed to defend under a reservation of rights. Employers then commenced the action underlying the instant decision, seeking a declaration that the underlying claim by HCC was excluded pursuant to the pollution exclusion provision of the commercial general liability ("CGL") policy at issue. After analyzing the CGL, the district court found that the exclusion provision controlled and that the claims asserted against the insured fell within the exclusionary scope.

As a result, the U.S. District Court for the District of Minnesota granted summary judgment to the insurer, implicitly rejecting the argument of IRP that the pollution exclusion was not applicable because IRP had put forth evidence showing that the damage causing particulate did not originate from its property. Thus, the district court, citing Eighth Circuit precedent, held that the liability defenses were irrelevant to the determination of coverage, and the coverage scope analysis must be made by comparing the complaint allegations with the language contained in the insurance policy.

ERIC S. OELRICH

Great Am. Ins. Co. v. Helwig, 2006 WL 618590 (N.D.Ill. Mar. 9, 2006).

Great American Insurance ("Great American") issued a primary comprehensive general liability insurance policy ("CGLI") and an excess policy to Avtec Industries ("Avtec"). Later, Land Trust was added as an additional insured to the policy. William Helwig, as a beneficiary to Land Trust, sought insurance coverage from Great American in three actions, each of which involved claims arising from perchlorethylene ("PCE") and trichloroethylene ("TCE") pollution that allegedly emanated from the subject property of the land trust. In the *Precision* claim, the state of Illinois sought redress from Helwig and others for public nuisance.

The *Muniz* case was a class action that arose out of water contamination. Plaintiffs sought recovery for public nuisance and trespass. The *LeClerqc* case was a class action in which a fourth party sought contribution from Helwig and others under the Illinois joint Tortfeasors Contribution Act.

Great American filed an action seeking declaratory judgment that it had no duty to defend or indemnify Helwig in the three actions. Great American argued that the policies' pollution exclusions precluded claims for damages caused by the pollution. Helwig filed a counter-claim alleging that Great American owed a duty to defend him in the three actions because the underlying complaints alleged conduct that fell within the policy's personal injury coverage, which was unaffected by the pollution exclusion.

The United States District Court for the Eastern Division of Illinois addressed the issue of whether Great American owed a duty to defend Helwig. It did not consider whether Great American owed a duty to indemnify Helwig because it was unclear whether relief had been granted to Helwig in any of the litigations. First, the court determined that the exclusion was not applicable to the personal injury coverage of the policy. The exclusion's language did not indicate that it was meant to apply to every type of coverage within the CGLI. Because ambiguities in insurance policies are to be construed in favor of the insured rather than the insurer, the court interpreted this ambiguity in favor of Helwig. While the language did state that bodily injury and property damage were excluded, the policy's personal injury coverage provision provided coverage for conduct implicating rights distinct from bodily injury and property damage.

Next, the court addressed whether the complaints in the three litigations alleged conduct that amounted to personal injury. The insurance policy defined "personal injury" as "injury arising out of one or more of the following offenses committed during the policy period:
(2) wrongful entry or eviction or other invasion of the right of private occupancy. . . ." Nuisance and trespass can be characterized as personal injury under this definition. Therefore, the *Muniz* complaint constituted personal injury, and Great American was obligated to defend Helwig in that case. The court found that the facts of the *Precision* complaint could not be characterized as requesting relief for personal injury as it did not seek compensation for violation of any rights of private injury. This claim

for public nuisance alleged that the PCE and TCE contaminated a local water supply. The court held that Great American did not have a duty to defend Helwig in *Precision*. The *LeClerq* complaint did not explain the specific conduct for which contribution from Helwig was sought. Thus, the court did not determine whether there was a personal injury or whether Great American had a duty to defend or indemnify Helwig in it.

The district court granted in part and denied in part Helwig's motion for judgment on the pleadings. It granted in part and denied in part Great American's motion for judgment on the pleadings as well.

LEAH M. CLUBB