Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 12
Issue 1 *Fall 2004*

Article 7

2004

Court Reports

COURT REPORTS

UNITED STATES COURT OF APPEALS

United States v. Snook, 366 F.3d 439 (7th Cir. 2004)

A former partner of an environmental consulting firm. Ronald Snook was an "Environmental Manager" at Clark Refining & Marketing, Inc. (Clark). a petroleum refinery in Blue Island. Illinois between 1994 and 1997. Snook's duties included overseeing its wastewater treatment system and ensuring the refinery complied with environmental regulations. Under Snook's watch. Clark discharged more than a million gallons of processed wastewater directly into a sewer system connected to a water treatment plant of the Metropolitan Water Reclamation District of Greater Chicago (District). Snook and others failed to comport with District self-monitoring requirements by selectively reporting favorable test results. despite having test results Clark's wastewater violated the acceptable level of contaminates.

Snook was indicted for conspiring to defraud the federal government under the Clean Water Act (CWA), 18 U.S.C. § 371, 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A). and for five counts of concealing material information regarding a federal matter. 18 U.S.C. § 1001(a)(1). Snook was also indicted for telling an inspector for the Environmental Protection Agency (EPA) that Clark had collected no data outside the selectively reported data. A jury found Snook guilty of these charges.

On appeal, Snook raised several arguments. First. Snook claimed the district court erred in excluding evidence showing Clark had a prior practice of selectively reporting test results. which might have establish Snook believed selective reporting was acceptable. The court recognized that under the CWA Snook need only have knowledge of the underlying facts. which he did. and not that the conduct was illegal. Snook lacked evidence showing he was told such practices were legal. and thus. the district court did not error in excluding evidence of past Clark practices. Snook also raised two other evidence issues.

Snook's fourth, and perhaps most compelling contention. was that the district court erred in imposing a two-level increase in the offense level for abusing a "position of trust." With no formal categories for such a position, the court looked to the relationship between Snook. his victims. and Snook's level of responsibility *de novo*. The court found Snook's victims to be the District and the public via his responsibilities affecting public health and safety. Snook contended that he held a position of trust with Clark. but not the District or public. Despite Clark being a private company. the court held Snook's unique position regulating Clark's wastewater directly affected public health and concerned the CWA. a public-welfare act. As such. the court found Snook abused his position of trust and an increase in the offense level was not in error.

A strong dissent by Judge Coffey asserted Snook did not occupy a "position of trust" because he did not serve in a fiduciary capacity with the public. his supposed victim. Judge Coffey argues the public did not grant Snook such a position and that Snook was not a government employee. Snook was a private employee. and it was Clark, not the public, who placed their "trust" in Snook.

JOHN R. GRIFFITH

Shain v. Veneman, 376 F.3d 815 (8th Cir. 2004)

Robert Shain and James Sheetz (plaintiffs) brought suit against Ann M. Veneman, the Secretary of Agriculture, and others acting in their capacity as officials of the United States Department of Agriculture (USDA), challenging the USDA's decision to finance the implementation of a sewage treatment system in Kinross, Iowa.

After receiving a complaint from the State of Iowa, the City of Kinross decided that it needed a sanitary sewage treatment system that would effectively accommodate its small community. In 2000, Kinross entered into an agreement with the Regional Utility Service System (RUSS), whereby RUSS agreed to finance, construct, and jointly maintain a $585,000 sewer treatment system. To help finance this system, the USDA issued RUSS a $128,500 loan and a $367,500 grant. After securing the loan, Kinross condemned the necessary 4.74 acres of land to build the two retention ponds for the treatment facility. The ponds were located on a 100-year flood plain for an unnamed tributary, on land which was in close proximity to property that Mr. Shain owned and land that Mr. Sheetz rented and farmed.

The plaintiffs brought suit for declaratory and injunctive relief under the Administrative Procedure Act (APA), alleging that the USDA's decision to fund the sewage treatment facility would violate both the National Environmental Policy Act (NEPA) and Executive Order 11988. According to the plaintiffs, the USDA violated NEPA by not requiring Kinross to participate in the National Flood Insurance Plan, and further, the USDA violated the Executive Order by not considering alternatives to avoid adverse effects and incompatible development in a designated flood plain. To support their claim of standing to sue the government, the plaintiffs alleged that they faced two imminent injuries in the event of a 100-year flood. First, a flood would cause the waste matters to contaminate nearby lands, and second, a flood would cause the pond's embankments to shift, and thereby increase the likelihood of flooding on the plaintiffs' property. The district court dismissed plaintiffs' claim, concluding that the plaintiffs lacked standing in that they failed to show a sufficient injury, and in the alternative, because their alleged injury could not be redressed by a favorable court decision.

Upon appeal, plaintiffs' relied upon their second claim of imminent injury, alleging that the sewage ponds would increase the likelihood that their property would be flooded. The plaintiffs interpreted an "imminent" harm to mean certain, and not necessarily immediate. However, the Eighth Circuit Court of Appeals agreed with the district court and rejected plaintiffs' argument, holding that the plaintiffs lacked standing because they failed to allege a cognizable injury-in-fact. According to the court, the possibility of a 100-year flood even occurring was not only remote, but the probability that the plaintiffs would be alive and in ownership or occupancy of the land was speculative. Additionally, the court found that it was a stretch to conclude that had the ponds not been built and if a flood were to occur, the embankments would displace a certain amount of water, that water would move towards and reach the plaintiffs' property, and would cause a significant harm to the property. Furthermore, the court dismissed plaintiffs' claim that a heightened risk of future harm is itself a cognizable injury. The court found that an increased risk of future harm could only constitute a cognizable injury when the harm was no longer speculative or hypothetical. The court affirmed the district court's dismissal of the plaintiffs' suit for lack of standing.

LINDSAY COUNTE

Northern Natural Gas Co. v. Iowa Utilities Board, 377 F.3d 817 (8th Cir. 2004).

The State of Iowa attempted to regulate environmental effects of constructing and maintaining an interstate natural gas pipelines, as well as create private damage remedies for certain harms caused by natural gas companies. The Eighth Circuit held that the Iowa provisions were preempted by the Federal Energy Regulatory Commission (FERC), which exercised authority granted by Congress.

In 2001, Northern Natural Gas (Northern) wanted to upgrade a pipeline near DeWitt, Iowa. It had permission to do so under a blanket certificate of public convenience and necessity, which was granted by the FERC on September 1, 1982. A blanket certificate allows, with certain restrictions, the company to engage in activities without seeking further approval by the FERC, so long as such activities are consistent with environmental statutes like the Clean Water Act and Clean Air Act. Prior to proceeding with the project, Northern requested the Iowa Utilities Board (Board) waive certain land restoration rules in Iowa Administrative Code, because Northern agreed to comply with the FERC plan. The Board refused to grant the waiver because the FERC plan did not "require the restoration of the affected land to a condition as good as or better than provided in the Board's rules."

Northern Natural Gas brought suit seeking injunctive relief, and a declaratory judgment that the Iowa statutory provisions were preempted by federal law and violated the Contract Clause of the United States Constitution. Both sides filed for summary judgment. The district court granted the motion for summary judgment for Northern Natural Gas on the preemption claim and entered a permanent injunction which prohibited Iowa from enforcing the Iowa Administrative Code. The Eighth Circuit Court of Appeals affirmed.

The Eighth Circuit found that the Natural Gas Act gives the FERC the authority over issues that were addressed by the Iowa provisions. According to the court, many of the FERC regulations address environmental concerns by requiring compliance with many environmental statutes and regulations. Moreover, the FERC specifically addressed the issues of soil preservation and land restoration which the Board desired to regulate.

The court then looked to whether the Iowa provisions had a possibility of collision with the FERC. The court found "substantial potential for collision between the Iowa provisions and the FERC plan" due to the Iowa regulations imposing additional requirements in some areas. For example, the Iowa regulations required 36 inches of topsoil be removed where the FERC plan required at least 12 inches to be removed. This further demonstrated that the Iowa provisions regulated in an occupied field. Therefore, the Eighth Circuit held that the Iowa provisions were preempted by federal law.

LAURIE KNIGHT

Ocean Conservancy, Inc. v. National Marine Fisheries Service, 2004 U.S. App. Lexis 19153 (9th Cir. 2004)

Ocean Conservancy Inc. requested a preliminary injunction to enjoin the United States Department of Commerce, the Secretary of Commerce and the National Marine Fisheries Service (NMFS) from doing a scientific research project that looked into methods that might reduce the amount of endangered sea turtle bycatch. According to Ocean Conservancy the experiment itself would result in sea turtle bycatch.

Ocean Conservancy claimed the project was in violation of the Endangered Species Act. The district court did not grant the injunction because of unusual circumstances. The district court did, however, enjoin the NMFS from modifying or accelerating the research project in any way. The district court also ordered NMFS to issue an environmental impact statement and to serve the court and the parties involved monthly status reports about the research and the EIS.

Ocean Conservancy made an interlocutory appeal and the Court of Appeals for the Ninth Circuit temporarily enjoined the research pending the appeal. Meanwhile, the district court granted the Agency's request for an extension on filing the EIS until October 1, 2003. Eventually, NMFS withdrew permit 1303 and missed the October 1, 2003 extension deadline.

At the point the research stopped, the preliminary injunction was moot. No research was being conducted because NMFS interpreted the district court's ruling to prohibit them from conducting research until both an EIS and a new Biological Opinion and Permit were issued and completed. Although the court of appeals dismissed the appeal as moot, the district court's orders were not vacated and Ocean Conservancy was expressly permitted to amend its complaint if a new opinion was provided and a new permit were issued.

After the appeal was dismissed, NMFS appealed seeking costs. The court noted that when an appeal is dismissed, Federal Rule of Appellate Procedure 39 (a) (1) usually allows the appellate costs. However, the court noted the rule does not allow for costs if the law or the court provide otherwise. The court held that because the ESA overrides Rule 39, the law provides otherwise. Additionally the court held that even if the ESA did not override Rule 39 the court would.

The ESA entitles defendants to cost and fees only if the litigation brought by the plaintiff was frivolous. In this case, the court found the moot issue arose based on the plaintiff's lawsuit and therefore it was not frivolous. Additionally, the court found that Ocean Conservancy, despite getting a dismissal of their appeal, was the prevailing party, because the appeal was dismissed with instructions which provided the plaintiff with precisely the relief they requested. The court, therefore denied Defendant's motion for costs.

ANNE E. KERN

The Cetacean Community v. Bush, 2004 U.S. App. LEXIS 21754 (9th Cir. 2004)

A self-appointed attorney for all of the world's whales, porpoises, and dolphins brought suit against President George W. Bush and Secretary of Defense Donald Rumsfeld. The Cetacean Community ("Cetaceans"), was the name chosen by the attorney to refer to the whales, porpoises, and dolphins, who attempted to bring this case on their own behalf. The Cetaceans challenged the use of Surveillance Towed Array Sensor System Low Frequency Active Sonar ("Sonar") by the United States Navy.

The Navy uses the Sonar to detect quiet submarines over long distances. The Sonar operates through the use of low-frequency underwater transmitters which emit loud sonar pulses that travel hundreds of miles through the water. The Cetaceans alleged that the Sonar's noise cause tissue damage and disrupt feeding and mating behaviors. The Cetaceans sought to force regulatory review of Sonar use and requested an injunction under the Endangered Species Act ("ESA"), the Marine Mammal Protection Act ("MMPA"), and the National Environmental Policy Act ("NEPA").

The defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The district court held that the Cetaceans lacked standing under each of the named statutes and granted the motion to dismiss. The Ninth Circuit Court of Appeals took up the appeal, and reviewed the standing decision de novo.

The court first reviewed its decision in *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988), in which it wrote that the Hawaiian Palila, a bird on the endangered species list, "has legal status and wings its way into federal court as a plaintiff in its own right." The court, however, declined to find *Palila* binding, holding that the language relied on was mere dicta. The court also clarified that another named plaintiff had standing in *Palila* and that the court never actually reached the issue of whether the Hawaiian Palila had standing on its own.

The court finally turned to the issue of whether animals have standing to sue on the own behalf. The court explained that a question of standing involves two elements: (1) whether the plaintiff has suffered sufficient injury to satisfy the "case or controversy" requirement of Article III of the United States Constitution and (2) if the plaintiff has Article III standing, whether a statute has conferred standing on the specific plaintiff in the current situation. The court determined that Article III does not limit the ability to bring a claim in federal court to humans, noted that Congress has enacted statutes to let corporations, partnerships, ships, and cities file suit.

The court reviewed the statutes relied on by the Cetaceans (ESA, MMPA, and NEPA) and determined that nothing in the text of the statutes gave any indication of granting standing to animals. The court found the statutory language limited standing exclusively to humans to sue on the animals' behalf. The Cetaceans finally argued that if the didn't have standing as individuals: they qualified as an association under the Administrative Procedure Act. The court, however, held that a generic requirement for associational standing is that the members must otherwise have standing to sue in their own right, and because the animals did not have the right to sue as individuals, they did not have standing to sue as an association either. The court concluded that animals could be granted standing to sue on their own behalf. The right, however, had to be expressly granted by Congress and the President in the text of legislation.

JASON SCHERER

Ground Zero Center for Non-Violent Action v. United States Department of Navy, 2004 U.S. App. Lexis 19580 (9th Cir. 2004)

The Ninth Circuit considered a challenge under both the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). In 1989, the Navy began upgrading submarines so they could carry Trident II missiles. The Environmental Assessment (EA) for this program was based, in part, on an Environmental Impact Statement (EIS) from 1974, and resulted in a Finding of No Significant Impact (FONSI). In 1994, President Clinton ordered the Backfit Program to be reduced in scale, and the Navy reviewed the 1974 EIS and the 1989 EA. The Navy determined the environmental concerns were the same and found the FONSI was still appropriate.

In 1999, the National Marine Fisheries Service (NMFS) listed the Hood Canal Summer Run Chum Salmon and the Puget Sound Chinook Salmon as threatened under the ESA. The Navy analyzed the threat to these species in a series of Biological Assessments. The Navy concluded the Backfit Program would not have an adverse affect on the species and forwarded its conclusions to the NMFS. This suit by Ground Zero followed.

The district court granted partial summary judgment for the Navy, holding the Navy was not required to consider the environmental impacts of storing and handling Trident II missiles at the base, the risk of potential terrorist attacks on the base, and possible earthquakes or tsunamis. The court, after oral argument, also granted summary judgment for the Navy on all other claims. Specifically, the court held the Navy was not required to prepare a new EIS for the Backfit Program once it was reduced, and found the Navy had complied with ESA in considering the threat to the salmon species near the base.

Ground Zero appealed to Court of Appeals for the Ninth Circuit. It argued the Navy had to issue an EIS considering impacts from an accidental explosion, including the affect on the threatened salmon species. The court reviewed the case de novo. The Navy claimed the decisions concerning the Trident II missiles were presidential, and as such NEPA did not apply to the Navy's actions. The court agreed with the Navy that NEPA did not apply to presidential action and determined that the President was responsible for the decisions regarding the Trident II missile placement and Backfit Program. However, because the Navy had limited

discretion over the project, the court considered whether it had complied with NEPA concerning accidental missile explosions. The court held because this was a "remote and highly speculative" occurrence, NEPA did not require the Navy to consider the environmental impacts of an accidental explosion. According to the Court, NEPA only requires consideration of probable events or "reasonably foreseeable adverse effects" if there is incomplete information as to the likelihood of an event. Since the Navy had conducted studies to determine the risk of an explosion and found those probabilities to be "infinitesimal", the event was not probable and there was no lack of information requiring NEPA action.

The resolution of the ESA claim also rested on the fact the President, and not the Navy, had made the decisions concerning the missiles. Although the Navy had limited discretion, the likelihood of an accidental explosion was remote. The ESA requires agencies to ensure their actions will not jeopardize the existence of endangered or threatened species. The court held the possibility of harm was remote, so there was no jeopardy to the salmon species and consultation with the NMFS was not required.

MARISSA L. TODD

Parker v. Scrap Metal Processors, Inc., 2004 U.S. App. LEXIS 20381 (11th Cir. 2004)

The Parkers owned the property adjoining Scrap Metal Processors Inc. (SMP) for over 50 years. Around 1990, SMP began operating a scrap metal yard on their property, where they kept metal, plastic, and fiber drums, petroleum underground storage tanks, and other hazardous materials. Area residents also testified that SMP burned solid waste at the site, producing visible smoke and fumes. Contaminated surface water also ran from the SMP facility onto the Parker property as well as into an unnamed stream. In 1991, the Environmental Protection Agency (EPA) investigated SMP's property and found it to be an environmental threat. The Georgia Environmental Protection Division (EPD) inspected the property again in 1993 and found it unchanged.

The Parker property was tested for contamination in 2001, and tested positive for PCB's and heavy metals, including lead levels above the legal limits. The EPD determined that SMP was the source of the contamination. The Parkers subsequently filed suit against SMP for negligence, negligence per se, nuisance, trespass, violations of the Clean Water Act and the Resource Conservation and Recovery Act. At trial the jury rendered a verdict against SMP on all counts. SMP appealed only their liability under the Clean Water Act and the Resource Conservation and Recovery Act.

The Eleventh Circuit found the Parkers had standing because they were "directly confronted with the risks that the Resource Conservation and Recovery Act [and the Clean Water Act] sought to minimize." In order to establish a Clean Water Act violation, the Parkers had to establish that: "(1) there has been a discharge; (2) of pollutants; (3) into waters of the United States; (4) from a point of source; (5) without a NPDES permit." SMP challenged the findings that there was a discharge into waters of the United States from a point source. Under the definition of a point source from 33 U.S.C. § 1362(14), the court determined that the debris and construction equipment on the property qualified as a point source. It was shown at trial that the debris on SMP property collected water, which flowed into a stream. It was irrelevant whether SMP constructed the gullies wherein the water traveled. The court also found that SMP discharged into waters of the United States because "ditches and canals, as well as streams and creeks are navigable waters if they are tributaries of a larger body of water."

The court further held that SMP violated the Resource Conservation and Recovery Act by failing to have a permit for the disposal of hazardous waste. The act prohibits any open dumping of solid or hazardous waste. A facility can obtain a permit to allow the dumping of waste, but in order to do so must meet certain criteria, which SMP did not do.

The appellate court remanded the decision back to the district court due to a difference in the damages awarded. The Parkers were originally awarded compensatory and punitive damages. The appellate court held that because the jury did not take into account that the Parkers no longer lived on the property, the erroneously figured compensatory damages. Further, before the Parkers could be awarded punitive damages in Georgia, they had to first be awarded compensatory damages.

HALEY M. PEERSON

UNITED STATES DISTRICT COURTS

1325 "G" Street Associates, LP v. Rockwood Pigments NA, Inc., 2004 WL 2191709 (D. Md. 2004)

The Plaintiff, 1325 "G" Street Associates, LP ("G" street), and the Defendant, Rockwood Pigments NA, Inc. (Rockwood) sought a motion for summary judgment concerning the liability of Rockwood under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for costs incurred by "G" Street in remedying contaminated properties containing chromium, lead, and zinc.

The case arose when Rockwood merged with Mineral Pigments, who disposed of, or contracted for disposal of, chromium, lead, and zinc into several sand and gravel pits on tracts of land owned by Conte Sand and Gravel Company (CSG). In 1982, "G" Street acquired the tracts of land containing the CSG facilities, including the contaminated sand and gravel pits. Based on its environmental investigations of the property, the Maryland Department of the Environment (MDE) requested "G" Street conduct its own environmental assessments and investigations. Based on these findings, MDE required "G" Street to place a security fence around the exposed, and contaminated areas. "G" Street sought to recover $184,761.16 from Rockwood based on the cost of its own investigation and installation of the security fence.

The Court examined the case under CERCLA § 107(a) and (b), and found that "G" Street's costs were "necessary" as required by the national contingency plan because the retention of an environmental consulting firm (who conducted "G" Street's environmental investigation) and the instillation of the security fence were taken at the direction of the MDE.

The court also found that "G" Street was entitled to full recovery costs based on the "innocent landowner" defense. To establish the "innocent landowner" defense under CERCLA, "G" Street had to satisfy three requirements: (1) "G" Street was able to show, by MDE and EPA inspection reports, that the sole cause of the contamination was the dumping of hazardous materials produced by CSG before 1982, prior to plaintiff's acquisition of the property. (2) Plaintiff exercised "due care" because once it was known that the property was contaminated, "G" Street complied with the MDE and EPA orders and recommendations concerning the contaminated properties. (3) Plaintiff had "no reason to know" the property was contaminated and conducted an "appropriate inquiry" into the property before it purchased it and despite these measures, it did not obtain actual knowledge that hazardous substances were present on the property (some of the steps taken were inventories on the property, geological surveys, and plaintiff's flying over and driving around the property).

Finally, although the Business Relief and Brownfields Revitalization Act, enacted in 2002, changed the requirements for the innocent landowner defense, it could not be applied retroactively to plaintiff because there was no evidence of a clear intent by Congress that the changed requirements for the innocent landowner defense should be applied in that way.

The court entered a declaratory judgment against Rockwood for future response costs and granted Plaintiff's motion for summary judgment. Thus, Rockwood was responsible for all costs incurred by "G" Street in the cleanup of the contaminated properties plus it would be liable for future costs if they were to occur.

SHOMARI L. BENTON

Ursus Americanus v. Wildlife Services. 2004 U.S. Dist. LEXIS 19385 (D. Or. 2004).

Wildlife Services is a program operated by the United States Department of Agriculture (USDA), and designed to help landowners whose property has been damaged by animals. Among other services, Wildlife Services employees hunt and kill black bears in western Oregon for a fee at the request of landowners. If a landowner does not want to pay Wildlife to kill the bears, Oregon law also allows the landowner to do it himself.

In July 2002, Wildlife Services responded to landowner requests by publishing a Notice of Intent to prepare an Environmental Assessment ("EA") for management of black bear damage to timber property in western Oregon. After preparing the EA and allowing the public to review it, Wildlife Services issue the EA in April 2003 after determining that Wildlife Services' involvement in black bear management would have no significant impact on the black bear population in western Oregon. The next month, ten environmental groups brought suit under the National Environmental Policy Act ("NEPA") and the Administrative Procedures Act ("APA") seeking to enjoin Wildlife Services from taking any further action. Both parties filed cross-motions for summary judgment as to whether the environmental organizations had standing to bring their suit.

In *Ursus*, the plaintiffs attempted to prove injury-in-fact by submitting declarations of two of their members. The first member claimed that he would be injured by the Wildlife Services' actions because there would be fewer bears for him to hunt. The second member alleged that he would be injured because there would be fewer black bears to photograph. The court quickly held that there was no injury-in-fact because: (1) there was no evidence in the record that the black bear population in western Oregon would decrease if Wildlife Services was allowed to act, and (2) the plaintiffs' members failed to point to specific areas that they frequented where the black bear population would be affected. The court then held that even if there was an injury-in-fact, the plaintiffs did not have standing because a favorable decision was not likely to redress that injury. The court reasoned that because Oregon law allowed landowners to kill depredating bears without the Agency's help, preventing only Wildlife Services from killing black bears would not solve the plaintiffs' problem.

BEN MCINTOSH

STATE COURTS

Missouri Coalition for the Environment v. Herrmann. 142 S.W.3d 700 (Mo. 2004)

The Missouri Supreme Court held that the Clean Water Commission has subject matter jurisdiction to hear an appeal from the Missouri Coalition for the Environment (Coalition) for a renewal of a wastewater permit granted to the United States Army.

In 1995 the United States Army received a five year Missouri State Operating Permit (MSOP) to discharge wastewater into streams and rivers near Fort Leonard Wood. The MSOP is a state permit issued under the National Pollutant Discharge Elimination System. With the expiration date approaching, the Army requested modifications to its permit and was granted three modifications in an issuance signed by appointees of the department of natural resources. The Coalition appealed this decision directly to the Missouri Clean Water Commission but the Commission dismissed this appeal, stating that they lacked the subject matter jurisdiction to hear the appeal citing *Craven v. State ex rel. Premium Standard Farms, Inc.*, which held that "only an applicant for a permit is allowed to appeal from a decision of the [Commission]". 19 S.W.3d 160, 167 (Mo. App. 2000). The circuit court affirmed the Commission's decision stating that the Coalition was a third party to the permit and, therefore, not permitted to appeal the decision to the Commission.

On appeal, the Coalition argued that the Director had no authority to issue the permit, and the Commission had jurisdiction to hear the coalitions appeal. The appeals court held that the Director had authority to issue permit modifications and the Commission had the jurisdiction to hear the Coalition's appeal. By declining to follow *Craven* the appellate court created a split between the eastern and western districts of Missouri. In order to resolve this split, the Missouri Supreme Court reversed the original decision of the Commission and remanded the case back to the Commission. In doing so the Court expressly overruled *Craven*, both in that the Director has authority to issue modifications to a permit, and that the Commission has jurisdiction to hear appeals of parties with an interest that "is or may be adversely affected by a permit decision".

JAY D. HASTINGS