

NOTES

United States Army Corps of Engineers v. Hawkes Co.: The Supreme Court Determines that an Approved Jurisdictional Determination Is a Final Agency Action and Reviewable Under the Administrative Procedure Act

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I. OVERVIEW

Hoping to expand their business for ten to fifteen years, three companies in Minnesota applied for a Section 404 permit with the Army Corps of Engineers (Corps) to conduct peat activity on their property.¹ Peat is found in waterlogged grounds, including wetlands and bogs, and it can be used to improve soil or burned for fuel.² This Section 404 permit would authorize “the discharge of dredged or fill material into the navigable waters at specified disposal sites.”³ During the review process, the Corps issued an approved jurisdictional determination (JD) because the wetlands on this property were considered a “significant nexus to the Red River of the North.”⁴ A JD “definitively state[s] the presence or absence” of the waters of the United States.⁵ If a company is faced with an approved JD that determines that waters of the United States exist on the property, then the party either goes through a costly permitting process or is subject to substantial penalties for emitting pollutants without a permit.⁶

The plaintiffs appealed the Corps’ decision to the Corps’ Mississippi Valley Division, which remanded the decision to the Corps’

1. U.S. Army Corps of Eng’rs v. Hawkes Co., Inc., 136 S. Ct. 1807, 1812-13 (2016).
2. *Id.* at 1812.
3. *Id.* at 1813 (quoting 33 U.S.C. § 1344(a) (1987)).
4. *Id.*
5. *Id.* at 1812 (internal quotations marks omitted).
6. *Id.*

district office.⁷ The Corps agreed with its original JD decision and issued a revised JD to that effect.⁸ The plaintiffs then sought review of the revised JD under the Administrative Procedure Act (APA) in district court.⁹ The district court held that the revised JD was not a final agency action and that other options for judicial review existed.¹⁰ The United States Court of Appeals for the Eighth Circuit reversed, holding that it was a final agency action and was judicially reviewable under the APA.¹¹ On review, the United States Supreme Court *held* that the JD was a final agency action that had legal consequences, where the alternatives for remedy were inadequate, and thus, it was litigable in federal court under the APA. *U.S. Army Corps. of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016).

II. BACKGROUND

Under the Clean Water Act, the discharge of pollutants into navigable waters is prohibited without a permit.¹² These waters are defined as “waters of the United States, including the territorial seas.”¹³ In order to perform “the discharge of dredged or fill material into the navigable waters at specified disposal sites,” applicants must apply for a Section 404 permit with the Corps.¹⁴ Discharging pollutants into the waters without a permit from the Corps may result in criminal and civil liabilities.¹⁵

The Corps and the Environmental Protection Agency (EPA) entered into a Memorandum of Agreement regarding Section 404 of the Clean Water Act.¹⁶ This memorandum developed the policies and procedures to “determine the geographic jurisdictional scope of waters of the United States” related to Section 404 of the Clean Water Act.¹⁷ In addition, the memorandum allocated responsibilities for determining the jurisdiction under Section 404 of the Clean Water Act between the Corps and EPA.¹⁸

7. *Id.* at 1813.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. 33 U.S.C. § 1311(a) (1995); *Hawkes*, 136 S. Ct. at 1811.

13. 33 U.S.C. § 1362(7) (2014); *Hawkes*, 136 S. Ct. at 1811.

14. 33 U.S.C. § 1344(a).

15. *Hawkes*, 136 S. Ct. at 1812.

16. See ROBERT W. PAGE & REBECCA W. HANMER, U.S. ENVTL. PROT. AGENCY, MEMORANDUM OF AGREEMENT: EXEMPTIONS UNDER SECTION 404(F) OF THE CLEAN WATER ACT (1989); *Hawkes*, 136 S. Ct. at 1814.

17. PAGE & HANMER, *supra* note 16, at § I.

18. *Id.*

The APA allows a court to review a final agency decision if “there is no other adequate remedy in a court.”¹⁹ In the 1950s, the Supreme Court ruled certain agency actions were subject to judicial review.²⁰ Specifically, in *Frozen Food Express v. United States*, the Supreme Court held that the Interstate Commerce Commission’s (Commission) list of agricultural exemptions was justiciable.²¹ The Interstate Commerce Act contained a provision that required common carriers and contract carriers of motor vehicles to obtain a “certificate of convenience” or a permit from the Commission.²² However, motor vehicles that carried livestock, fish, or agricultural livestock were exempt from having to receive the certificate or permit.²³ The Commission then issued an order that explained what qualified as an agricultural commodity.²⁴ After hearings, including a public hearing, the Commission incorporated a list of agricultural commodities that were or were not exempt under the statute to the order.²⁵

A company filed suit against the government claiming that the Commission’s act of listing nonexempt commodities was unlawful.²⁶ The Court reasoned that under the Commission’s order, there was an “immediate and practical” effect on carriers.²⁷ The order also served as a warning by informing carriers that there were criminal penalty risks if the carrier transported nonexempt commodities without the proper permit or certificate.²⁸ Thus, the Court concluded that the consequences for not abiding by the order were “not conjectural.”²⁹ Therefore, the Court found that it was justiciable.³⁰

The Supreme Court later stated that “cases dealing with judicial review of administrative actions have interpreted the ‘finality’ element in a pragmatic way.”³¹ In *Abbott Laboratories v. Gardner*, the Court held that a promulgation of regulations was a final agency decision.³² Based on Congress amending a law that required prescription drug

19. 5 U.S.C § 704 (1966).

20. See *Frozen Food Express v. United States*, 351 U.S. 40, 44-45 (1956).

21. *Id.*

22. *Id.* at 41.

23. *Id.*

24. *Id.*

25. *Id.* at 41-42

26. *Id.* at 42.

27. *Id.* at 43-44.

28. *Id.* at 44.

29. *Id.*

30. *Id.* at 45.

31. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

32. *Id.* at 151.

manufacturers to include the proprietary name and established name labels as well as other printed materials, the Commissioner of Food and Drugs promulgated regulations that enforced the amended law.³³ Prior to the promulgation, the Commissioner published the regulations to allow comments from “interested parties.”³⁴ The Court reasoned that because the regulations were announced in the Federal Register and the Commissioner considered the interested parties’ comments, it was done in a “formal manner” and was “quite clearly definitive.”³⁵ In addition, the U.S. Food and Drug Administration expected compliance with the regulations after publication.³⁶ If manufacturers did not abide by the regulations, they faced serious potential criminal and civil penalties.³⁷

Three decades after *Abbott Laboratories*, in *Bennett v. Spear*, the Supreme Court established a two-prong test to determine whether an agency’s action is considered final.³⁸ “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process,” and it cannot just be “tentative” or “interlocutory.”³⁹ The second prong is that “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow[.]’”⁴⁰ In *Bennett*, the Court held that the United States Fish and Wildlife Service’s issuance of a Biological Opinion constituted a final action.⁴¹ The plaintiffs filed suit against the Fish and Wildlife Service challenging the Biological Opinion which detailed how the proposed action might negatively impact threatened or endangered species’ habitat.⁴² The plaintiffs argued that there was “a competing interest” for the water that the Biological Opinion considered “necessary” to preserve the endangered fish.⁴³ The Court applied the finality factors and found that the conditions were met because the Biological Opinion and the included Incidental Take Statement “alter[ed] the legal regime to which the action agency [was] subject.”⁴⁴

33. *Id.* at 138-39.

34. *Id.* at 138.

35. *Id.* at 151.

36. *Id.*

37. *Id.* at 152-53.

38. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

39. *Id.* (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

40. *Id.* at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

41. *Id.*

42. *Id.* at 158-59.

43. *Id.* at 160.

44. *Id.* at 178.

The Supreme Court then determined that an EPA compliance order met the *Bennett* test and was thus subject to judicial review.⁴⁵ In *Sackett v. Environmental Protection Agency*, the Court held that the EPA compliance order was a final agency action where no adequate remedy existed.⁴⁶ There, the plaintiffs brought suit against the EPA for issuing an order under the Clean Water Act, which stated that the plaintiffs violated the Act by putting fill material on their property.⁴⁷ Thus, as part of the order, the plaintiffs were required to restore the property by abiding by the EPA's work plan.⁴⁸ The Court applied the *Bennett* factors and found that the compliance order was the "'consummation' of the agency's decisionmaking process" because the finding and conclusions in the order "were not subject to further agency review."⁴⁹ The Court determined that the legal consequence flowed because the plaintiffs' penalties could increase in future proceedings.⁵⁰

Prior to the ruling in the noted case, other circuit courts have determined that a JD is not reviewable for APA purposes.⁵¹ For instance, the United States Court of Appeals for the Fifth Circuit held that a JD was not a final agency action and was not judicially reviewable under the APA.⁵² In *Belle Co. v. United States Army Corps of Engineers*, the court found that a JD did not meet the two-prong test set out in *Bennett*.⁵³ The plaintiff applied for a Section 404 permit with the Corps for its property and was issued a JD by the Corps that indicated that the property was considered wetlands and thus subject to the Clean Water Act.⁵⁴ The Fifth Circuit applied the conditions set out in *Bennett*, finding that the JD marked the consummation of the agency's decisionmaking process but that legal consequences did not flow from the JD.⁵⁵ The court reasoned

45. See *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

46. *Id.*

47. *Id.* at 1369.

48. *Id.*

49. *Id.* at 1372 (quoting *Bennett*, 520 U.S. 154, 178 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948))).

50. *Id.* at 1371-72.

51. See *Fairbanks N. Star Borough v. U.S. Corps of Eng'rs*, 543 F.3d 586, 589 (9th Cir. 2008) (holding that the approved JD was not a final action); *Greater Gulfport Props. v. U.S. Corps of Eng'rs*, No. 05-60243, 2006 WL 2460884, at *1 (5th Cir. August 23, 2006) (holding that the pre-enforcement JD was not a final action); *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 386 (5th Cir. 2014), *vacated*, 136 S. Ct. 2427 (2016) (the U.S. Supreme Court vacated the judgment and remanded it to the lower court because of its ruling in *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016)); see *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1002 (8th Cir. 2015).

52. *Belle*, 761 F.3d at 386.

53. *Id.* at 390-94.

54. *Id.* at 387.

55. *Id.* at 390-94.

that the JD was a consummation because it went through the administrative appeals process and the JD was “termed a ‘final’ JD.”⁵⁶

Moreover, the court distinguished the case from *Sackett* and contended that unlike the compliance order in *Sackett* that directed the property owner to restore the property, the JD did not force the plaintiff to refrain from taking certain actions on its property.⁵⁷ In addition, the court explained that the order subjected the *Sackett* plaintiff to a penalty scheme, but the court pointed out that the JD did not impose penalties on the *Belle* plaintiff and that using a JD to predict future penalties would be considered “speculative.”⁵⁸ Lastly, the court determined that the party was not restricted by the JD when seeking a permit nor did the JD provide a “regulatory opinion” on how the plaintiff could achieve its goal.⁵⁹ Because of the ruling from the noted case, the holding from *Belle* has been vacated and remanded to the lower court.⁶⁰

The Eighth Circuit held that a JD was a final agency action and judicially reviewable under the APA.⁶¹ The court determined that the approved JD met the requirements set out in *Bennett*⁶² and that the lower court and the Fifth Circuit “misapplied” *Sackett*.⁶³ The Eighth Circuit reasoned that legal consequences flowed because a JD requires a party to not pursue the project, “risk substantial enforcement penalties,” or sustain “substantial compliance costs” by following the permitting process.⁶⁴ In addition, a JD has a “coercive effect” on a specific property.⁶⁵

III. THE COURT’S DECISION

In the noted case, the Supreme Court followed the two-prong test set out in *Bennett* to determine whether the Corps’ action was considered final.⁶⁶ Then, the Court examined the legal consequences of the JD under the pragmatic approach to finality described in *Abbott Laboratories*.⁶⁷

56. *Id.* at 390 (citing 33 C.F.R. § 331.9; Peoples Nat’l Bank v. Office of the Comptroller of the Currency of the U.S., 362 F.3d 333, 337(5th Cir. 2004); Exxon Chemicals America v. Chao, 298 F.3d 464, 467 (5th Cir. 2002)).

57. *Id.* at 391.

58. *Id.* at 392.

59. *Id.* at 393-94.

60. Kent Recycling Services, LLC v. U.S. Army Corps of Eng’rs, 136 S. Ct. 2427 (2016).

61. Hawkes Co. v. U.S. Army Corps of Eng’rs, 782 F.3d 994, 1002 (8th Cir. 2015).

62. *Id.* at 999-1000.

63. *Id.* at 996.

64. *Id.* at 1000.

65. *Id.*

66. U.S. Army Corps of Eng’rs v. Hawkes Co., Inc., 136 S. Ct. 1807, 1813 (2016).

67. *Id.* at 1815.

Lastly, the Court reviewed whether the final action provided adequate judicial alternatives.⁶⁸

The Corps argued that the approved JD was not a final action.⁶⁹ However, the Court applied the *Bennett* test and concluded that the revised JD met the two prongs.⁷⁰ First, the Court examined the approved JD and concluded that it was the “‘consummation’ of the Corps’ decisionmaking process.”⁷¹ The Court reasoned that the Corps has indicated that approved JDs are considered “‘final agency action’.”⁷² In addition, although the Corps issued a revised JD, which allows the Corps to revise the JD if there is new, additional information, the court determined that “[did] not make an otherwise definitive decision nonfinal.”⁷³

Then, the Court determined that legal consequences flowed from the approved JD regardless if the JD was negative or affirmative.⁷⁴ The Court relied on the Memorandum of Agreement between the Corps and EPA, and the Court noted that JDs would be “‘binding on the Government and represent the Government’s position in any subsequent Federal action or litigation concerning that final determination.’”⁷⁵ Therefore, when a negative JD is issued, which occurs when a JD does not include jurisdictional waters, this binds the Corps and EPA from “bring[ing] civil enforcement proceedings under the Clean Water Act” for five years, which produces a “safe harbor” for property owners.⁷⁶ The property owners can still be liable for citizen suits, but these suits “cannot impose civil liability for . . . past violations.”⁷⁷ This limits the potential plaintiffs and liability for violating the Clean Water Act without a permit.⁷⁸ According to the Court, these instances demonstrated that legal consequences existed.⁷⁹ Moreover, affirmative JDs also have legal consequences because the “safe harbor” for negative JDs is not

68. *Id.*

69. *Id.* at 1813.

70. *Id.* at 1813-14.

71. *Id.* at 1813 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

72. *Id.* at 1814 (quoting 33 C.F.R. § 320.1(a)(6)).

73. *Id.* (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)); *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)).

74. *Id.*

75. *Id.* (quoting *PAGE & HANMER*, *supra* note 16, at § VI).

76. *Id.*

77. *Id.* (citing 33 U.S.C. § 1319(d); 33 U.S.C. § 1365(a); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 58-59 (1987)).

78. *Id.*

79. *Id.*

provided.⁸⁰ Therefore, the Court concluded that approved JDs are final agency actions because legal consequences flow.⁸¹

Secondly, the Court looked to see if the legal consequences followed the “pragmatic” approach, which was discussed in *Abbott Laboratories*.⁸² The Court used *Frozen Food Express* as an example.⁸³ In *Frozen Food Express*, the Court order warned carriers about the civil penalty risks for transporting commodities without the proper permit or certificate.⁸⁴ Similarly, in the noted case, the Court reasoned the JD warns property owners about the criminal or civil penalty risks for placing pollutants in water without a permit.⁸⁵

Lastly, the court determined whether adequate judicial alternatives existed for the final JD and concluded that the alternatives were inadequate.⁸⁶ The Corps argued that two adequate alternatives existed.⁸⁷ First, the plaintiff could place fill material without a permit, which would risk EPA enforcement.⁸⁸ Second, the plaintiff could apply for a permit and pursue judicial review if the results are unfavorable.⁸⁹ The Court disagreed, finding instead that the first alternative was not adequate because if the risk of criminal and civil penalties are high for enforcement proceedings, a party should not have to wait for such proceedings before having the ability to challenge a final agency action.⁹⁰ The Court reasoned that parties “need not assume such risks while waiting for the EPA to ‘drop the hammer’ in order to have their day in court.”⁹¹ Moreover, the Court concluded that the Corps’ second alternative of applying for a permit then waiting to pursue judicial review was not adequate because although the permitting process is expensive, it does not modify the “finality of the approved JD” or impact “its suitability for judicial review.”⁹² Thus, the Court stated that “the permitting process adds nothing to the JD.”⁹³

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1815.

84. *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956).

85. *Hawkes*, 136 S. Ct. at 1815.

86. *See id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)).

92. *Id.* at 1816.

93. *Id.*

In Justice Anthony Kennedy's concurrence, he noted that the Clean Water Act's "ominous reach" would be unchecked if the Court did not rely on the Memorandum of Agreement between the Corps and the EPA.⁹⁴ Thus, he rejected the Corps' argument that JDs lack a "binding effect" and thus the Agency can revoke or amend based on the Agency's discretion.⁹⁵ In Justice Ginsburg's partial concurrence and concurrence in judgment, she did not agree with the Court's use of the Memorandum of Agreement between the Corps and EPA as a basis for the Court's reasoning.⁹⁶ Justice Ginsburg explained that the Court's briefing about the memorandum was "scant."⁹⁷ Moreover, she argued that the Court's reading of the Memorandum differed from the government's stance.⁹⁸ However, Justice Ginsburg agreed with the majority's opinion that the JD was final because it was "'definitive,' not 'informal' or 'tentative,' . . . and [had] 'an immediate and practical impact.'"⁹⁹ In Justice Elena Kagan's concurrence, she disagreed with Justice Ruth Ginsburg's statement regarding the Memorandum.¹⁰⁰ Justice Kagan determined that the Memorandum was "central to the disposition of this case."¹⁰¹ She agreed with the Court's assessment of the Memorandum, and thus, contended that the "safe harbor" that was created was "a 'direct and appreciable legal consequence[]' satisfying the second prong of *Bennett*."¹⁰²

IV. ANALYSIS

The Supreme Court's decision is sound, but it is inconsistent with the Fifth Circuit's decision regarding this issue. Prior to the Court's ruling, there was a circuit split between the Fifth Circuit and the Eighth Circuit.¹⁰³ The circuit courts' decisions turned on the second prong of the *Bennett* finality test. The Fifth Circuit held that a JD was not a final agency action and was not judicially reviewable under the APA.¹⁰⁴ In *Belle*, after applying the *Bennett* factors, the Fifth Circuit concluded that

94. *Id.* at 1817 (Kennedy, J., concurring).

95. *Id.*

96. *Id.* at 1817 (Ginsburg, J., concurring in part and concurring in the judgment).

97. *Id.*

98. *Id.*

99. *Id.* at 1817-18 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967)); *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956).

100. *Id.* (Kagan, J., concurring).

101. *Id.*

102. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

103. *See Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 386 (5th Cir. 2014); *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1002 (8th Cir. 2015).

104. *See Belle*, 761 F.3d at 386.

a JD did not meet the second prong.¹⁰⁵ The court reasoned that a JD did not impose legal obligations because it did not order the plaintiff “to do or refrain from doing anything to its property.”¹⁰⁶ In addition, the court concluded that a JD was not a penalty scheme because it did not impose penalties on the plaintiff.¹⁰⁷

The Eighth Circuit held that a JD was a final agency action and judicially reviewable under the APA.¹⁰⁸ The court found that the JD met the second *Bennett* factor because a JD would force a party to either acquire high costs for pursuing the permit or risk penalties.¹⁰⁹ Though the Supreme Court agreed with the Eighth Circuit’s holding, finding that the second *Bennett* factor was met, the Court focused its reasoning on the Memorandum of Agreement between the Corps and EPA,¹¹⁰ which was not mentioned by the circuit court. The Court determined that the memorandum would bind the government and thus be representative of the government’s position in future federal litigation or action that is related to the final determination.¹¹¹ Therefore, legal consequence flowed because for negative JDs, this created a five year “safe harbor” from civil enforcement proceedings pursuant to the Clean Water Act.¹¹²

The Corps contended that this memorandum only applies to special circumstance JDs instead of normal cases like the present one.¹¹³ Conversely, the Court determined that the memorandum applies to “all final determinations.”¹¹⁴ However, in order to meet the second prong of the *Bennett* test, which dealt with the flow of legal consequences or whether “rights or obligations have been determined,” the Court relied on the memorandum, but this may not have been necessary because the Court could have reached that decision without the memorandum.¹¹⁵ Justice Ginsburg’s part concurrence and concurrence in judgment is most persuasive. Although Justice Ginsburg opposed the Court’s reliance on the memorandum, she still agreed with the Court’s decision that the JD was final because the JD was “‘definitive,’ not ‘informal’ or

105. *Id.* at 390-94.

106. *Id.* at 391.

107. *Id.* at 392.

108. *Hawkes*, 782 F.3d at 1002.

109. *Id.* at 1000.

110. *U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016).

111. *Id.*

112. *Id.*

113. *Id.* at 1814 n.3.

114. *Id.* (quoting *PAGE & HANMER*, *supra* note 16, at § VI).

115. *See id.* at 1817 (Ginsburg, J., concurring in part and concurring in the judgment).

'tentative,' . . . and [had] 'an immediate and practical impact.'"¹¹⁶ In addition, the Eighth Circuit decided the case without the memorandum. The Court's reliance on the memorandum can also pose issues in the future because a memorandum between two agencies is not always a permanent document and can change.¹¹⁷

V. CONCLUSION

The holding in the noted case may be considered a win for property owners because it allows them to contest an agency's final decision through judicial review under the APA. Although this decision is inconsistent with the Fifth Circuit's holding in a similar case, the Court correctly determined that the JD met the test set out in *Bennett*. However, in reaching the Court's decision, the Court relied on the Memorandum of Agreement between the Corps and EPA, which may not have been necessary. In examining the second prong established in *Bennett*, the Court's analysis of whether legal consequences flowed may have been reached regardless of the memorandum.

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116. *Id.* (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967); *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956)).

117. PAGE & HANMER, *supra* note 16, at § VI (The Memorandum of Agreement replaced a 1980 Memorandum of Understanding).

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