RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Sierra Club v. EPA, 322 F.3d 718 (D.C. Cir. 2003)

The Sierra Club and the New York Public Interest Research Group (Sierra Club) brought suit for attorney's fees against the Environmental Protection Agency (EPA) under section 307(f) of the Clean Air Act (CAA). The Sierra Club was seeking attorney's fees even though the suit was dismissed after a favorable settlement between the parties. This settlement stemmed from the EPA's continuous granting of extensions for deadlines to approve state and local programs designed to allow the state or locality to issue stationary air pollution sources operating permits under the CAA. Under Title V of the 1990 Amendments to the CAA, the EPA may authorize states or localities to implement such programs so long as those programs adequately further the congressional intent of the

CAA. If a program "substantially meets the requirements [for approval], . . . but is not fully approvable," the EPA may grant the program interim approval. CAA § 502(g), 42 U.S.C. § 7661a(g) (2002). This approval expires no later than two years after the granting of approval. Starting in 1992, the EPA began granting itself, and consequently the states and localities participating in this program, a series of extensions ultimately requiring the EPA to fully approve or disapprove of these programs by December 1, 2001.

The Sierra Club filed suit on this final extension contending that it was contrary to Title V of the CAA. After the Sierra Club filed its brief with the United States Court of Appeals for the District of Columbia Circuit, and six days before the EPA's brief was due, both parties agreed to a settlement and filed a motion to stay proceedings. The terms of the settlement required the EPA to grant no more interim approval extensions, remove language from its regulations allowing the EPA to grant approvals beyond two years on a case-by-case basis, start a ninety-day notice-and-comment period to allow for proper response from interested parties to identify concerns and problems with fully approved and interim programs, and require the EPA to respond to all comments generated through this notice-and-comment process. The settlement agreement further provided that if the EPA failed to abide by the agreement, the Sierra Club could reinstate its claim and start a new briefing period. If the EPA complied with this agreement by December 1, 2001, both parties would seek a joint dismissal of the claim, though the Sierra Club retained its ability to seek attorney's fees from the court.

In January 2002, pursuant to the settlement, the parties requested dismissal after the EPA abided by all terms of the agreement. The Sierra Club then filed a motion requesting attorney's fees pursuant to CAA section 307(f). Section 307(f) provides: "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." Since there was no dispute as to what the attorney's fees would be if the Sierra Club prevailed, the only issue before the court was whether a fee award in this instance was appropriate.

While the Sierra Club argued they were the "catalyst in halting the EPA's practice of serially extending the interim approvals," the EPA contended that "section 307(f)'s 'whenever . . . appropriate' standard does not authorize fee awards to parties . . . whose litigation produces no court-awarded relief." The court found that the result of this case turned on the interpretation of two United States Supreme Court cases, *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), and *Buckhannon*

Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001). While neither is directly on point, they both shed light on the issue of when awards of attorney's fees are appropriate and were determinative in the court's conclusion that fees were appropriate in this matter.

Ruckelshaus ultimately concluded that the "whenever . . . appropriate" standard for attorney's fees in section 307(f) of the CAA prohibited awards to parties who lose on the merits of their case. The Court began with the basic notion that the "American Rule" specifies that "parties [ordinarily] bear their own attorney's fees." While the Court recognized that Congress has often departed from this rule, the Court will only recognize such a departure when it is clear that Congress intended such a result. In addition, because section 307(f) affects awards against the United States, as well as against private individuals, waivers of immunity must be strictly construed in favor of the United States and be considered no larger than statutorily required. Thus, the Court concluded that section 307(f) modifies the "American Rule" in that parties need not totally prevail on the merits of a case to be awarded attorney's fees, but some semblance of victory must be apparent to warrant attorney's fees, i.e., losing on the merits will not allow the granting of attorney's fees. Predicating its decision on a 1977 House Report stating the legislative intent behind this expansive view of awarding attorney's fees was to "encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest," H.R. REP. NO. 95-294, at 377 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1416, the Court stated, "Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties—parties achieving some success, even if not major success." Significantly for the case at hand, the Supreme Court in footnote eight of *Ruckelshaus* mentioned that Congress's use of "whenever . . . appropriate" in modifying award of attorney's fees extends to "suits that forced defendants to abandon illegal conduct, although without a formal court order." Thus, the District of Columbia Circuit interpreted *Ruckelshaus* to stand for the proposition that in instances where plaintiffs bring judicial action to stop illegal behavior and defendants abate the behavior before there is a judicial decision on the merits of the case, the defendants will be liable for attorney's fees.

The other influential case in this matter was *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). In *Buckhannon*, the Supreme Court

dealt with the issue of whether attorney's fees are appropriate under a different statutory scheme—the Fair House Amendments Act, 42 U.S.C. §§ 3610-3614, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. These two statutes authorize courts to award attorney's fees to the "prevailing party." Latching onto this key phrase, the Court required "some degree of formal success" in order for attorney's fees to be appropriately awarded under these statutory schemes. Recognizing that there are likely to be instances where a defendant will voluntarily alter its conduct to be in accordance with the demands being placed on it by the plaintiff filing the lawsuit, the Court stated that when dealing with "prevailing party" statutory schemes, attorney's fees are only appropriate when there is an "alteration in the legal relationship of the parties." Therefore, the Court in *Buckhannon* rejected plaintiff's claims for attorney's fees because they had not prevailed in any judicial proceeding, though the conduct complained of had been abated.

In the instant case, the EPA argued that *Buckhannon* was controlling, standing for the position that attorney's fees were not appropriate in the instant case because Sierra Club had not prevailed in a judicial proceeding. The EPA further argued that *Ruckelshaus*'s footnote eight was dicta and therefore not binding on the appellate court. The EPA argued that the *Buckhannon* Court's rejection of the catalyst theory—that a lawsuit spurring the agency to abate its illegal behavior required attorney's fees—was sufficient evidence to support the EPA's position that since there was no final judicial determination on the merits of the case, the Sierra Club should not be granted attorney's fees.

The D.C. Circuit recognized the validity of the EPA's argument, going so far to say that if the slate were clean, a different result would be likely. However, it ultimately rejected these arguments because of the clarity in which the Supreme Court dealt with this issue in *Ruckelshaus*. In *Ruckelshaus*, the Court extended the CAA section 307(f) attorney's fees provision to suits that forced defendants to abate illegal actions, but specifically rejected the interpretation of the Act extending the award of attorney's fees to those who lose on the merits of the case. The D.C. Circuit was unpersuaded that there was any other logical interpretation of CAA section 307(f) and noted that the Supreme Court's interpretation of it in *Ruckelshaus* was binding precedent and thus the court was required by law to uphold the Supreme Court's interpretation.

In addition, the D.C. Circuit looked to another Supreme Court decision, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), where the Supreme Court determined a nearly-identical "whenever . . . appropriate" statutory scheme of the pre-1987

Clean Water Act granted attorney's fees even in the absence of court-awarded relief. Furthermore, the fact that *Ruckelshaus* specifically addressed the issue at hand, paired with *Buckhannon*'s failure to expressly overrule or even mention *Ruckelshaus*, indicated that *Ruckelshaus* was controlling precedent binding the D.C. Circuit.

The court also considered other courts of appeals interpretations of the interplay of *Ruckelshaus* and *Buckhannon* in finalizing its decision as to whether attorney's fees are appropriate when there is a "whenever . . . appropriate" statutory scheme with no judicial decision on the merits. The two courts to deal with this issue, the United States Court of Appeals for the Eleventh Circuit in *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002), and the United States Court of Appeals for the Tenth Circuit in *Center for Biological Diversity v. Norton*, 262 F.3d 1077 (10th Cir. 2001), both concluded that *Buckhannon* only applies to "prevailing party" statutes and *Ruckelshaus* applies to "whenever . . . appropriate" statutes.

In a last ditch effort to avoid paying attorney's fees, the EPA argued that awarding fees in this instance will create an "unnecessary patchwork among fee-shifting statutes" and such a decision will "embroil courts in a second major litigation" even though the true issue of the case had been settled by the parties without litigation. Both of these arguments were summarily rejected by the D.C. Circuit as congressional policy decisions which were not for courts to second-guess.

Having determined that section 307(f) of the CAA authorizes courts to award attorney's fees to parties even in the absence of a final judicial decision, the court next addressed whether, based on the facts of this case, such an award was appropriate. In order to grant attorney's fees based on a catalyst theory, the court noted that a three-part test as recognized by all nine justices in *Buckhannon* (though the decision was split five to four) was useful. According to *Buckhannon*, a plaintiff must show that the claim was colorable rather than groundless, that the lawsuit was a substantial rather than insubstantial cause of the defendant's change in conduct, and that the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense.

In the instant case, the EPA did not question the colorability of the Sierra Club's claim, nor that the lawsuit caused the EPA to accept the settlement. The EPA did question, however, whether the settlement provided the Sierra Club with "some of the benefit sought." The court was quick to dispose of this question answering in the affirmative because the EPA was precluded from granting any more interim approvals past December 2001 and was required to amend the language

of 40 C.F.R. § 70.4(d)(2), thereby forbidding a case-by-case approval of extensions. The Sierra Club's "basic goal of ending the agency's serial interim approval [of] extensions" was met by this binding settlement. Therefore, since section 307(f) of the CAA allows for attorney's fees to be awarded to catalyst parties and the Sierra Club had a favorable settlement towards its cause, attorney's fees were determined to be appropriate in this case.

Douglas McLand

New York Public Interest Research Group v. Whitman, 321 F.3d 316 (2d Cir. 2003)

The New York Public Interest Research Group (NYPIRG) challenged final decisions by the United States Environmental Protection Agency (EPA). Did the EPA properly respond when it was alerted to deficiencies in New York's program for issuing permits to major stationary sources of air pollution?

The EPA approved the program administered by the State of New York and the New York Department of Environmental Conservation (DEC) despite having been alerted that there were deficiencies in the program. The EPA gave final approval because the DEC had corrected all the deficiencies originally identified by the EPA when the program was granted interim approval.

NYPIRG challenged this, stating that a state's permitting program could not be finally approved if it was defective, regardless of when the deficiencies were identified. NYPIRG also contended that, even if full approval was proper, the EPA was required by the Clean Air Act (CAA) to issue a Notice of Deficiency (NOD) to the DEC based on the deficiencies. Finally, NYPIRG contended that the EPA violated its statutory obligation to object to defective permits issued by the DEC to three stationary facilities.

The United States Court of Appeals for the Second Circuit, in a decision authored by Circuit Judge B.D. Parker, Jr., affirmed the EPA's decision to approve New York's Title V permit program, as well as its decision not to issue a NOD, but vacated and remanded the EPA's decision not to object to the three draft permits.

New York submitted its Title V program to the EPA for approval in November 1993. In November 1996, the EPA granted New York "interim approval" for its program. When the EPA granted interim approval, it identified eight deficiencies that needed to be addressed for a

fully approved program to be in place by the expiration of the interim approval.

The EPA extended New York's interim approval repeatedly. In another case, NYPIRG and the Sierra Club filed a petition to review this practice before the United States Court of Appeals for the District of Columbia, challenging the legality of these extensions. The EPA settled the case and agreed to start operating permitting programs under its own regulations in each state not fully approved by December 1, 2001.

On December 5, 2001, the EPA published a notice granting contingent full approval to New York's program, despite NYPIRG's identification of a number of deficiencies raised in its comments from March 11, 2001. The EPA acknowledged that any additional issues from those that were listed in the November 1996 interim approval may exist in the New York program, but concluded that they did not prohibit full approval.

The EPA and NYPIRG disagreed with the interpretation of statutory provisions in CAA section 502(g), which governed interim approval, and CAA section 502(d), which governed full approval. NYPIRG contended that if the EPA was aware of any deficiencies, it could not fully approve a program, regardless of whether it became aware of the deficiencies before or after interim approval. The court summarized NYPIRG's position that there was only one path to full approval of a permit program.

The EPA disagreed, contending that there were two ways to have a program reach full approval. Full approval could be granted by CAA section 502(d). However, if a state had been granted interim approval, to receive full approval it needed to only remedy deficiencies identified by the EPA at the time of interim approval under section 502(g).

The Second Circuit then discussed NYPIRG's complaint against the EPA's determination not to issue a NOD. NYPIRG concluded that the EPA needed to use the formal NOD procedure after it determined that New York's program was deficient. The EPA relied upon an informal commitment by the DEC to address its deficiencies.

The CAA mandates that "[w]henever [the EPA] makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, [the EPA] shall provide notice to the State." CAA § 502, 42 U.S.C. § 7661a(i)(1). The mandatory "notice" is the NOD.

After the publication of contingent full approval, the EPA responded to NYPIRG's March 11, 2001, request for a NOD due to deficiencies in

the New York program. The EPA replied that these deficiencies had been addressed by the DEC in a November 16, 2001, letter in which the DEC committed to make changes that would rectify the concerns identified by NYPIRG. The EPA promised to monitor the DEC's compliance over the next six months and agreed that no NOD would be issued if the changes were made.

During its interim approval status, the DEC issued three draft permits in the summer of 1999 which were challenged by NYPIRG. NYPIRG identified the same deficiencies in the draft permits for the three facilities that it contended were present in New York's program as a whole. DEC rejected most of those objections, and the EPA made none before the review period expired. NYPIRG then directly petitioned the EPA to object to each permit, but the EPA claimed that it was justified in not objecting because it was entitled to a "harmless error rule" implicit in the statutory scheme.

The court derived jurisdiction under CAA section 307(b)(1) because the appeal followed from final agency action. However, because the CAA does not set a standard of review, the court reviewed the case under the Administrative Procedure Act, where the court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2002).

NYPIRG presented a new ground for standing before the Second Circuit basing injury on increased health-related uncertainty due to the EPA's failure to enforce the CAA. The Second Circuit had never weighed whether that was sufficient.

The Second Circuit found that although NYPIRG grounded its claims on an increased health-related uncertainty, it did not change the injury-in-fact analysis. The court wrote:

> In other words, the distinction between an alleged exposure to excess air pollution and uncertainty about exposure is one largely without a difference since both cause personal and economic harm. To the extent that this distinction is meaningful, it affects the extent, not the existence, of the injury. To be sure, an individual may well be more likely to live with uncertainty as opposed to certainty about exposure to excess levels of air pollution. Such marginal differences are not meaningful in assessing allegations of injury-in-fact since "the injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice."

NYPIRG, 321 F.3d at 326 (citations omitted).

The DEC raised ripeness and mootness challenges to NYPIRG's claims, but the court found no reason to question the ripeness of the EPA's decision not to issue a NOD. The court also refused to find that

the claims by NYPIRG were mooted by the DEC's letter of commitment to changing its program. As set forth by *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 174 (2000), voluntary cessation of an illegal activity is not enough to moot a case.

The EPA and NYPIRG each have a different interpretation of CAA sections 502(d) and (g). Section 502(d) governs full approval of a state program that has not received interim approval. Section 502(g) governs interim approval. The EPA claims that once a state has received interim approval under section 502(g), it need only make the changes specified at the time of interim approval to gain full approval. NYPIRG maintains that the only path to full approval is set forth in section 502(d), which prohibits full approval of a deficient program, regardless of when the deficiencies are identified.

The Second Circuit found that these provisions were ambiguous. "[T]he text of [section] 502(g), governing interim approval, did not clearly describe the process by which a permit program that had received interim approval could receive full approval." The EPA claimed that because of this ambiguity, they were permitted, under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to receive deference to their interpretation of the statute.

The court found that the EPA should receive *Chevron* deference for several reasons. First, the EPA found "textual support in CAA [section] 502(g), which provides that in the notice of final rulemaking granting interim approval, the EPA must 'specify the changes that must be made before the program can receive full approval.'" The court thought that this could suggest fixing the problems identified under interim status would trigger full approval.

Second, the court thought that the EPA's approval was timely with congressional deadlines. Interim status only lasts two years, and is nonrenewable. If a state were required to correct any problems that arise between the granting of interim status and full approval, it could take even longer for a state to receive a program, or for a state to even resubmit its plan for full approval.

Finally, Title V has mechanisms to correct problems with a fully approved program. The court thought Congress had provided the EPA with these measures in order to fix problems after the interim status had been completed. The court found that these reasons were a strong enough interpretation of ambiguous provisions and affirmed the decision to approve New York's Title V permit program fully.

NYPIRG claimed that the EPA needed to issue a NOD to the DEC because of the deficiencies in the newly approved Title V program. The

EPA asserted that issuing a NOD was a discretionary duty under the CAA. The NOD provision was found in CAA section 502(i). NYPIRG believed that the language "shall order" in the statute took this out of the EPA's discretion.

The EPA's position, with which the court agreed, was that this key phrase was the opening of section 502(i)(1), which began, "[W]henever the Administrator makes a determination . . . ." This language gives discretionary power to the Agency.

The court conceded to NYPIRG that certain parts of section 502(i) were nondiscretionary for the EPA. Among these was the obligation to provide notice once the EPA used its discretionary power to determine that a state program was deficient.

Under the doctrine of *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), an agency's decision not to invoke an enforcement mechanism provided by statute was not typically subject to judicial review.

NYPIRG contended that under CAA section 505(b)(2), the EPA had to object to draft permits if the petitioner demonstrated to the EPA that the permit was not in compliance with the requirements of the Act. The EPA contended that although the three draft permits did not comply with Title V, objections were unnecessary because it was entitled to rely on a "harmless error rule" and the lack of compliance caused no harm.

The court stated plainly that they could not find a "harmless error rule," and concluded that it did not exist. The court believed that the EPA was confusing the discretionary and nondiscretionary parts of section 505(b). Since the EPA had already made a determination that the petition demonstrated noncompliance, they had exercised their discretionary duty. Therefore, the EPA had to carry out its nondiscretionary obligation to make an objection to the deficiency. Once NYPIRG demonstrated to the EPA that the draft permits were not in compliance with the CAA, the EPA was required to object to them. Its failure to do so required the court to vacate the denial of NYPIRG's petitions seeking objections to the draft permits.

The court refused to give specific direction to the EPA as suggested by NYPIRG regarding the three draft permits. The court left the specifics of the objections to the draft permits to the EPA's expertise. The court also deferred the issue of NYPIRG's costs to the district court on remand.

Edward Dimayuga

II. CLEAN WATER ACT

Lockett v. EPA, 319 F.3d 678 (5th Cir. 2003)

The United States Court of Appeals for the Fifth Circuit recently handed down a decision that will significantly affect the Environmental Protection Agency (EPA), the federal Clean Water Act (CWA), and the disposition of violations of the CWA provisions by state and local governments throughout the jurisdiction. The crux of the issue is under what circumstances may a plaintiff avail himself or herself of the citizen-suit provision of the CWA when the state environmental agency is simultaneously attempting to enforce similar regulations.

The appellants, Carl and Beryl Lockett, Aaron and Maria Asevedo, and others, were landowners in and around the village of Folsom, Louisiana. The village of Folsom owned and operated a sewage treatment facility that discharged processed effluent into a culvert that crossed through or near the properties of the appellants. Appellants complained for many years that the discharge into the ravine was often under-treated, or completely untreated sewage, which caused terrible odors, refuse buildups, and generally created an unsanitary condition on their properties. The property owners alleged that the discharge violated the plant's National Pollutant Discharge Elimination System (NPDES) permit.

On August 12, 1999, the property owners sent a notice of violations and a sixty-day intent to sue letter to Folsom, as required by the CWA. On November 4, 1999, the Louisiana Department of Environmental Quality (LDEQ) issued a compliance order to Folsom for the violations alleged by the property owners. On December 7, 1999, the property owners sent another notice letter and finally filed suit under the citizen-suit provision of the CWA in the United States District Court for the Eastern District of Louisiana.

The district court granted a motion by Folsom to dismiss for lack of subject matter jurisdiction. Folsom relied on the central statutory provision of this decision, CWA § 309(g)(6), 33 U.S.C. § 1319(g)(6) (2002), which preempted a federal citizen suit with state action when a state was found to be diligently prosecuting the action under a state law "comparable" to that of the federal government. Plaintiffs argued that the state provision was not, in fact, "comparable" to the CWA and, therefore, their citizen suit should be allowed to proceed.

On appeal, the central issue remained the comparability of Louisiana enforcement provisions with those of the CWA. After

dismissing appellees claim that appellants lacked Article III standing to challenge the district court's ruling as misleading and virtually unintelligible, the court proceeded to outline the applicable provisions of the CWA. Section 505(a)(1) of the CWA provides that any person allegedly in violation of their NPDES permit could be sued by a citizen, subject to two restrictions. First, no action could proceed if the state has "commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard." CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B). This limitation did not apply as no court action had been commenced by the LDEQ. Second, section 309(g)(6) provides that a citizen suit could not proceed if the state had commenced and was diligently prosecuting an action under a state law comparable to section 309(g). This restriction does not apply if notice has been given to the alleged violator, the state environmental agency, and the EPA, and a citizen suit is then filed after such notice, but within 120 days of its issuance.

The court, per Circuit Judge Patrick Higginbotham, began by addressing the central argument of the appellants—that the state law under which the LDEQ was enforcing its action against Folsom was not comparable to the provision of section 309(g). The district court had determined that Louisiana law was "comparable" to the relevant provisions of the CWA; the Fifth Circuit agreed.

Higginbotham first noted that it was the congressional intent to place the bulk of the responsibility for eliminating pollution on the states, and thus, the citizen-suit provision of section 505(a)(1) was only intended to come into play when both federal and state agencies were unwilling or unable to act. In light of this, the court held that the requirement that a state law be "comparable" to the federal law "should be read broadly to permit the states flexibility in deciding how to enforce anti-pollution laws."

Following the reasoning of the United States Court of Appeals for the Eighth Circuit in *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), the Fifth Circuit held that the central determination to be made in such a comparison was whether the overall regulatory scheme of the state law provides citizens with some participation, even if the participation allowed was not identical to that allowed under the federal CWA. Further, the state law had to contain similar, though not identical, penalty provisions, public notice-and-comment provisions, have the same overall enforcement goals as the CWA, and protect the interests of citizens' rights during the process.

The appellants argued that Louisiana law failed because it lacked sufficient public notice-and-comment provisions, thus undermining the rights of interested and/or affected parties. The Fifth Circuit disagreed with the appellants, writing a side-by-side comparison of these provisions in both Louisiana law and the CWA.

The primary point of contention for appellants was the Louisiana process for providing public notice of administrative proceedings. Under Louisiana law, the Secretary of the LDEQ was required to maintain a list of all violations reported and actions taken, and periodically compile and mail them to parties who had notified the LDEQ of their interest in receiving them. However, under federal law, any person who had commented on an administrative proceeding was automatically mailed notice of further actions or hearings. Appellants claimed the Louisiana provision undermined the rights of interested parties. The Fifth Circuit disagreed, holding ultimately that although the LDEQ was given greater discretion concerning notice and comment, the administrative framework was similar enough to the CWA to make it comparable.

With this decision, the Fifth Circuit joins a growing number of circuits that have interpreted section 309(g)(6) broadly in favor of state enforcement over citizen utilization of section 505(a)(1).

Ryan Jenness

III. ENDANGERED SPECIES ACT

Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250 (10th Cir. 2003)

The bald eagle has been and remains perhaps the preeminent endangered species in North America. In February 2003, the Greater Yellowstone Coalition and the Jackson Hole Conservation Alliance (collectively, the plaintiffs) appealed to the United States Court of Appeals for the Tenth Circuit in order to protect three of the bald eagle's largest natural nesting and foraging habitats within the United States.

During the summer of 2002, Richard Edgcomb, owner and proprietor of the River Bend Ranch, a ranching operation neighboring the Snake River in Wyoming, sold a portion of his land to the Canyon Club for the development of a residential golf course (the development). In addition to being a business partner, the Canyon Club also employed Edgcomb as the President and General Manager of the club. Adjacent to the territory allotted by Edgcomb to the Canyon Club were three bald eagle nesting territories: Martin Creek Nest, Dog Creek Nest, and Cabin

Creek Nest. The latter two were responsible for providing shelter to approximately twenty-one bald eagle fledglings from 1992 to the present. The primary concerns of the plaintiffs involved the impact of the development on these natural nesting and foraging habitats.

Regardless of the potential impact of the development on these nests, the Canyon Club sought a section 404 permit under the Clean Water Act (CWA) from the United States Army Corps of Engineers (Army Corps) allowing it to proceed with a plan to build an eighteen-hole golf course, complete with fifty-four residential homes. The Canyon Club needed the section 404 permit in order to "discharge dredge or fill material into . . . navigable waters." CWA § 404, 33 U.S.C. § 1344(a) (2000). The golf course proposal included two holes built on dredge material extending into the Snake River. After an initial denial of the section 404 application, the Canyon Club submitted a revised proposal that eliminated the two Snake River holes, but expanded the overall size of the necessary parcel from 286 acres to 359 acres. In response to the revised application, the Army Corps requested that the Canyon Club submit a biological assessment of the development. The biological assessment included a section stating that "[t]he proposed project may affect and is likely to adversely affect bald eagles."

In addition to the biological assessment, the Canyon Club submitted an environmental assessment that summarized the purpose of the project and evaluated several alternatives in light of the stated purpose. The alternatives would possibly reduce the impact on the bald eagle habitats. Given the very specific goals of developing a world-class golf course and supplementing the River Bend Ranch with additional income from the golf course, the Canyon Club refused to accept any proposed alternatives to the project, thus cementing the potential damage to the habitats.

When notified of the potential impact of the Canyon Club project, the Fish and Wildlife Service (FWS) agreed to prepare a biological opinion (BO) on the proposal's potential effects on species classified as endangered or threatened under the Endangered Species Act (ESA). The FWS' BO specifically concluded that the project would increase human disturbance in the area, adversely affecting the three nesting territories and directly harming the bald eagles. Regardless, on June 14, 2002, the Army Corps gave the Canyon Club permission to begin construction on the project by issuing the section 404 permit.

The plaintiffs in the instant matter filed a petition for review of the issuance of the section 404 permit. In addition, they sought a temporary restraining order preventing any construction of the project. After a hearing on the motion for a preliminary injunction against the project,

the United States District Court for the District of Wyoming ruled in favor of the Canyon Club, allowing the project to move forward. The plaintiffs immediately filed an interlocutory appeal to the Tenth Circuit.

The Tenth Circuit reviewed the denial of the preliminary injunction under the "abuse of discretion" standard of review. Specifically, the court looked to the factors required for the issuance of a preliminary injunction: "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction, if issued, will not adversely affect the public interest." The district court found that the plaintiffs failed to provide evidence of a substantial likelihood of prevailing on the merits and a failure to show that irreparable harm was likely to occur. In failing to provide evidence of these two factors, the district court refrained from making a determination on the remaining two factors.

In reviewing the district court's decision, the Tenth Circuit centered its focus on the second factor, the district court's finding that irreparable harm was not shown. In its decision to deny the preliminary injunction, the district court claimed that the plaintiffs made no showing that the bald eagle *species* would be jeopardized as opposed to individual bald eagles. The district court demanded a showing of irreparable harm to the species in order to rationalize the grant of the preliminary injunction. In rendering its decision, the district court cited *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1976) where the United States Court of Appeals for the District of Columbia Circuit required proof that the harvesting of waterfowl would irretrievably damage the species before granting the severe remedy of a preliminary injunction. However, the Tenth Circuit immediately seized upon the nonendangered or threatened status of the waterfowl in *Frizzell* as a distinguishing factor from the bald eagle. Consequently, the Tenth Circuit dismissed the district court's reliance on *Frizzell*.

In addition, the Tenth Circuit addressed a decision from the United States District Court for the District of Massachusetts, *Bays' Legal Fund v. Browner*, 828 F. Supp. 102 (D. Mass. 1993), in which the district court combined language from the ESA and a finding of "irreparable harm" in a preliminary injunction case. The Tenth Circuit distinguished *Bays' Legal Fund* by illustrating that the district court failed to create a substantive definition of "irreparable harm," instead relegating its inquiry to whether proof of some ambiguous form of "irreparable harm" would satisfy an action under the ESA. The district court stated that a finding of this ambiguous "irreparable harm" to a species would satisfy the

ESA's requirement that an action "jeopardize the continued existence of an endangered species . . . or result in the destruction or adverse modification of habitat of such species." Thus the district court surmised that jeopardizing an entire species would result in "irreparable harm." The Tenth Circuit, however, dismissed any interrelation between the ESA's language and a finding of "irreparable harm."

Alternatively, the Tenth Circuit sought a specific definition of "irreparable harm" in order to determine the validity of issuing a preliminary injunction against the Canyon Club development. The court explicitly stated that the ESA's language provided no definitions applicable to the "irreparable harm" finding required for a preliminary injunction. Consequently, the Tenth Circuit found the district court's denial of the preliminary injunction, on the grounds of no harm to the species as a whole, an abuse of discretion.

The court then addressed the Canyon Club's argument that the injuries to the bald eagle were too speculative to warrant the issuance of a preliminary injunction. Instead of accepting the defense contention that any injury not certain to occur would be speculative, the court looked to applicable case law. In interpreting this case law, the court determined that a "significant risk" of harm would be sufficient to define the harm as nonspeculative. The court then cited the BO prepared by the FWS and the biological assessment prepared by the Canyon Club as ample evidence suggesting a "significant risk" of harm to the bald eagle. In addition, the court cited the hearing testimony of Robert J. Oakleaf, a wildlife biologist employed by the Wyoming Game and Fish Department; Patricia Ann Deibert, a biologist in the Wyoming office of the FWS; and Roy Hugie, a biologist called by the Canyon Club. All three testified that human intrusion could adversely affect the bald eagle. Consequently, the Tenth Circuit unequivocally determined that the plaintiffs satisfied the burden of finding "irreparable harm" for the purpose of issuing a preliminary injunction.

The court then addressed the district court's finding that the plaintiffs were unlikely to win on the merits. The court quickly cited its amended standard for issuing preliminary injunctions, adopted in *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964). In *Continental Oil*, the Tenth Circuit determined that a plaintiff establishing the three factors necessary for a preliminary injunction, other than success on the merits, would receive very strong consideration for the preliminary injunction. However, when the district court found an absence of irreparable harm, it refrained from allowing an inquiry into the two remaining factors. Given its clear finding of

"irreparable harm," the Tenth Circuit remanded for a factual determination of the remaining factors necessary for the issuance of a preliminary injunction.

Collin Williams

IV. NATIONAL ENVIRONMENTAL POLICY ACT

Northwoods Wilderness Recovery, Inc. v. United States Forest Service, 2003 U.S. App. LEXIS 5466 (6th Cir. Mar. 21, 2003)

The United States Court of Appeals for the Sixth Circuit ruling in favor of Northwoods Wilderness Recovery, Inc. (Northwoods), an environmental activist group based in Marquette, Michigan, prevented the U.S. Forest Service from allowing widespread hardwood logging in the Ottawa National Forest in Michigan's Upper Peninsula. In reversing the district court, the Sixth Circuit explained that the Forest Service's approval of the Rolling Thunder timber harvest project did not adhere to the statutorily mandated environmental analysis and was therefore arbitrary and capricious. The court remanded the case and ordered the district court to uphold a motion for summary judgment on behalf of Northwoods.

The Ottawa National Forest covers approximately one million acres of primarily hardwood forest in the western Upper Peninsula, Michigan. In 1986, the Forest Service enacted a forest plan, accompanied by a National Environmental Policy Act (NEPA) required Environmental Impact Statement, NEPA § 2, 42 U.S.C. § 4321 (2002), for Ottawa National Forest. This plan divided Ottawa National Forest into sixteen different management areas, one of which encompassed the Rolling Thunder project, the subject of the litigation at hand. In the Rolling Thunder area, the Forest Service plan called for "uneven-aged management." Uneven-aged management involves both single tree selection as well as group tree selection, and should result in multiple stands of trees made up of trees differing in age. When the Forest Service initially issued its plan, it envisioned for this area an annual harvest of 1440 acres via clear cutting as well as 2800 acres through selection cutting. Selection cutting requires cutting individual trees from a large area in a scattered pattern while maintaining the canopy of the forest.

However, the Forest Service issued a Scoping Letter on December 8, 1997, in which it proposed a drastically different timber sale for the

Rolling Thunder area. This letter called for an additional selection cutting of 1391 acres of northern hardwoods, as well as the additional clear-cutting of 176 acres of aspen stands. The Forest Service completed an Environmental Assessment that evaluated the effects of this new plan, and opened the draft Environmental Assessment for public comment. Northwoods opposed the project because it would have allowed for the selection cutting of over 4800 acres, whereas the initial Forest Plan called for the cutting of only 2800 acres. However, in spite of Northwood's objections, the District Ranger issued a Finding of No Significant Impact, and ultimately granted approval for the individual tree selection cutting of 1055 acres of northern hardwoods, as well as the clear-cutting of 95 acres of aspen trees.

Northwoods filed an administrative appeal of the Rolling Thunder plan, but the Appeal Deciding Officer upheld the plan. Northwoods then sued in federal court, arguing that the Forest Service violated its own management plan guidelines when it approved Rolling Thunder, and therefore was in violation of the National Forest Management Act (NFMA), 16 U.S.C. § 1604 (2002), as well as the NEPA. The district court found in favor of the Forest Service on its motion for summary judgment. Giving broad interpretation to the section of the Forest Service's plan on vegetation management, the district court exempted the Forest Service from a limitation on the acreage of sugar maple harvests. As a result, the district court explained, it did not need to decide whether the initial plan's acreage projections set limitations on the overall annual harvesting for subsequent projects, for which environmental assessments would need to be prepared. The court found that Northwoods had not shown that the additional proposed harvesting would involve any species of tree other than the sugar maple, and therefore, they had not properly made a case that the Forest Service had violated its initial plan. Northwoods then filed an appeal with the Court of Appeals for the Sixth Circuit.

Northwoods argued in its appeal that the acreage projections envisioned in the Forest Service's initial management plan should be read as firm limitations on the overall tree harvest in the Ottawa National Forest, and that the district court improperly granted summary judgment. Northwoods alleged that the Forest Service's approval of the Rolling Thunder project violated NFMA because, as a result of the approval of the project, the Forest Service would permit the harvest of trees in the area at a rate nearly twice as great as that contemplated in the initial plan. The Forest Service responded by arguing that the approval of the Rolling Thunder timber harvest project was proper, and that the approved tree

cutting was not in excess of the amount contemplated by the initial plan. The Forest Service expanded upon its position, explaining that in its initial plan, the Allowable Sale Quantity, the maximum limit on the total amount of wood that can be harvested, for the forest was 780 million board feet per decade. Both parties agreed that the total harvest within the entire forest stayed within the Allowable Sale Quantity, with an average harvest of only 694 million board-feet.

Northwoods responded that the Forest Service incorrectly relied upon the Allowable Sale Quantity as the only limit placed upon the timber harvest. Northwoods explained that while the Allowable Sale Quantity is a limit on the overall timber production of an area, it is distinct from the actual logging activity. The two activities, Northwoods argued, should be considered individually. The Sixth Circuit agreed.

The court explained that the Allowable Sale Quantity was not supposed to be the sole limitation on overall timber production, because it cannot measure the environmental impacts on the forest as a whole, which logging necessarily causes. Further, the Sixth Circuit explained that the Forest Service's position that a board-feet maximum is the sole limitation on a given timber harvest contradicts statements that the Forest Service had made in its Environmental Impact Statement. Originally, the Forest Service had focused upon a mix of even- and uneven-aged management techniques, but its alleged new focus was solely on the maximum output of the forest, which was inconsistent with its previous position. Because the focus of the plan and its accompanying Environmental Impact Statement considered multiple factors, the Sixth Circuit reasoned that it should not be able to focus solely upon forest output after the plan had been challenged, and that this should be considered a deviation from their initial plan.

The Sixth Circuit concluded that because the Forest Service was deviating from its initial plan, there had been in effect no proper Environmental Impact Statement considering the logging proposed under the Rolling Thunder project. As a result, the court found that the approval of the project was arbitrary and capricious, and remanded the case to the district court with instructions to enter summary judgment for Northwoods Wilderness Recovery, Inc.

Rob Erickson

V. SAFE DRINKING WATER ACT

City of Waukesha v. EPA, 320 F.3d 228 (D.C. Cir. 2003)

The United States Court of Appeals for the District of Columbia Circuit recently upheld a rule promulgated by the Environmental Protection Agency (EPA) under the Safe Water Drinking Act (SDWA) setting standards governing radionuclide levels in public water systems. The D.C. Circuit held that the EPA was not required to engage in a cost-benefit analysis with regard to pre-1986 limits it left unchanged, that the EPA used the "best available science" when setting the limits, and that the EPA adequately responded to comments submitted during the rulemaking.

The SDWA generally applies to "each public water system in each State," and authorizes the EPA to set standards for drinking water contaminants. SDWA § 1411, 42 U.S.C. § 300g (2002). For a given contaminant, the SDWA directs the EPA to first establish the maximum contaminant level goal (MCGL), which is "the level at which no known or anticipated adverse effects on the health of persons occurs and which allows an adequate margin of safety." SDWA § 1412 (b)(4)(A), 42 U.S.C. § 300g-1(b)(4)(A) The EPA is then directed to set the maximum contaminant level (MCL) "as close to the MCLG as is feasible." SDWA § 1412(b)(4)(B), § 300g-1(b)(4)(B).

In 1976, the EPA promulgated interim regulations that established MCLGs and MCLs for radionuclides, which are materials that emit radiation as they decay from one elemental form to another. These regulations established an MCL of 5 picocuries/Liter (pCi/L) for the isotopes radium-226 and radium-228; a combined MCL of 4 millirems (mrem) for all beta/photon emitters; and no MCL for naturally occurring uranium. In 1991, the EPA proposed amending the MCLs for certain radionuclides. Particularly, the amended regulations set an MCL of 20 pCi/L for radium-226 and radium-228 and 30 pCi/L for naturally occurring uranium.

In 1996, Congress approved several significant amendments to the SDWA. First, it added an "anti-backsliding" provision requiring that any water regulation revision "maintain, or provide for greater, protection of the health of persons." SDWA § 1412(b)(9), 42 U.S.C. § 300g-1(b)(9). The 1996 amendments also required the EPA to consider the relative costs and benefits in setting each MCL.

In response to the 1996 amendments to the SDWA, the EPA, in April 2000, issued a "Notice of Data Availability" (NODA) proposing

that the 1991 radionuclide levels be revisited. The 2000 NODA proposed maintaining the 1976 MCLs for radium-226 and radium-228 and setting the MCL for naturally occurring uranium at either 20, 40, or 80 ug/L. In December 2000, the EPA issued its final radionuclides rule. As proposed, the EPA retained the 1976 standards for radium-226 and radium-228 and for beta/photon emitters. For naturally occurring uranium, however, the final rule pegged the MCL at 30 ug/L.

The petitioners—the City of Waukesha and its water utility customer Bruce Zivney, the Nuclear Energy Institute (NEI), the National Mining Association (NMA), and Radiation, Science & Health (RSH)—challenged the 2000 final rule on several grounds. First, petitioners argued that the EPA failed to adequately conduct a cost-benefit analysis for the radium and beta/photon MCLs as required by the SDWA. Second, the petitioners attacked the MCLs promulgated in the final rule on their merits. Finally, the petitioners claimed that the EPA, in violation of the Administrative Procedure Act (APA), failed to adequately respond to comments when promulgating the 2000 final rule.

In response, the EPA challenged the petitioners' standing to bring suit. The court found that all petitioners, with the exception of RSH, had standing to challenge the final rule. RSH, however, was unable to demonstrate with specificity and concreteness that any of its members would suffer any injury, i.e., increased drinking water costs, resulting from the implementation of the rule.

Petitioners attacked the final rule's radium and beta/photon MCLs on the ground that section 1412 of the SDWA allegedly requires the EPA to conduct a cost-benefit analysis for each MCL, which the Agency failed to do when promulgating this rule. The EPA responded that no cost-benefit analysis was required for the MCLs established by this rule because section 1412(a)(1) of the SDWA exempts pre-1986 MCLs from its cost-benefit requirements, and the rule under review simply left the preexisting MCLs for radium and beta/photon emitters unchanged.

Petitioners raised three challenges to the EPA's view that cost-benefit analyses are not required when it retains pre-1986 MCLs. First, petitioners contend that section 1412(a)(1)'s grandfather clause does not apply to section 1412(b)(4)(C)'s cost-benefit determination requirement because that requirement is not a "standard." The EPA, however, correctly responded that the term "standards" in section 1412 is ambiguous. The court found that there is "nothing unreasonable" about the EPA's view that whether the benefits of an MCL justify its costs qualifies as a "standard" for the purposes of the SDWA's grandfather clause.

Second, petitioners contend that even if the grandfather clause does apply to the cost-benefit determination requirement of section 1412(b)(4), it does not expressly apply to the cost-benefit analysis requirement of section 1412(b)(3)(C)(i). The court held that, although technically correct, the EPA is justified in describing this as an instance where the "statute is silent . . . with respect to the specific issue," and therefore warranting judicial deference to the Agency's interpretation.

Third, petitioners argued that, because the EPA could not have known when it published its 2000 proposal to retain the preexisting MCLs that the EPA would ultimately decide to keep them, the SDWA's grandfather clause inapplicable. The court, however, did not find this position consistent with the statutory language of section 1412. Section 1412(a)(1) states that "no" preexisting regulation is required to comply with the standards of section (b)(4) "unless such regulation is amended." Therefore, the court found the EPA's conclusion that the cost-benefit requirement is not triggered by a proposal to do nothing more than retain preexisting MCLs to be reasonable and consistent with section 1412.

Unlike the 2000 radium and beta/photon regulations, the uranium MCL contained in the final rule represented a "new" standard. The EPA, pursuant to section 1412, was required to prepare and publish a cost-benefit analysis, which it did. Petitioners, however, contended that the EPA's analysis failed to satisfy the requirements of both the SDWA and the APA.

The petitioners argued that the EPA failed to comply with section 1412(b)(3)(C)(i) because it did not analyze the costs and benefits associated with compliance with the uranium MCL in contexts other than the SDWA. In particular, petitioners claim that the EPA failed to evaluate the costs and benefits arising from compliance with the MCLs at hazardous waste sites governed by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The EPA, however, argued, and the court agreed, that the statutory language did not permit the agency to consider costs associated with compliance with other regulatory regimes other than the SDWA itself. The purpose of the MCLs, the court reasoned, is to protect the public, as much as feasible, from the adverse health effects of drinking contaminated water. That purpose would be undermined if the cost-benefit balance were skewed by consideration of the additional costs imposed by other uses of the MCLs, unrelated to protecting consumers of drinking water.

The petitioners also challenged the merits of the MCLs established in the final rule. When reviewing the rulemaking process and the final rule under the APA, a court "will [only] reverse an EPA action if it is

'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Int'l Fabricare Inst. v. U.S. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992). Further, the court "will give an extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise.'" *Huls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996). After considering the petitioners' arguments, the court concluded that the EPA neither failed in its obligation to use the "best available science" nor acted arbitrarily or capriciously in promulgating the 2000 final rule.

Finally, the petitioners argued that the EPA did not adequately respond to comments submitted in opposition to using the linear nonthreshold (LNT) model. Section 553 of the APA requires that an agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentations." The agency "need not address every comment, but it must respond in a reasoned manner to those that raise significant problems." *Reytblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir 1997). Nevertheless, the failure to adequately respond to comments is significant only to the extent that it demonstrates that the agency's decision was not based on a consideration of all the relevant factors. In the instant case, although the petitioners characterized the EPA's responses to comments questioning the science being employed by the agency as "general and generic," the court found that the record did not support a claim that the EPA failed to consider all relevant factors.

Timothy Parr

VI. WATER RIGHTS AND THE TAKINGS CLAUSE

Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003)

In this case, the United States Court of Appeals for the Federal Circuit found a limit to the ever expanding Fifth Amendment takings doctrine. The court held that the federal government did not effect a taking when it refused to allow owners of water rights to build a pipeline over the federal government's land. This case is thus not only important for its immediate holding, which kept agricultural water from being diverted to meet the insatiable needs of a desert city, but also because the court here provided a respite from the trend in the federal courts to

expand private property rights via the Takings Clause thus truncating the government's ability to regulate land use to protect the environment.

Washoe County, Nevada, (County) controlled the ground and surface water rights of Fish Springs Ranch (Ranch) in Nevada's Honey Lake Valley under a 1988 option to purchase agreement. The County planned to divert the water from the Honey Lake Valley to the Reno-Sparks metropolitan area. Pursuant to Nevada law, the County applied to the State Engineer to change the use of the Ranch's water from agricultural to municipal and industrial. The Engineer approved the application in a 1989 ruling. The Ranch's neighbors—including the United States Army (Army), which controls a nearby depot, and the Pyramid Lake Tribe of Indians (Tribe)—challenged this ruling in state court. Ultimately, the Nevada Supreme Court upheld the Engineer's ruling. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 918 P.2d 697 (Nev. 1996).

However, this victory did not immediately give the County the power to use the Ranch's water to quench Reno's thirst. First, the County would have to divert the water from the ranch to the city thus requiring a pipeline owned by the United States Bureau of Land Management (BLM). The County applied to the BLM for a right-of-way permit to construct the pipeline, and the BLM drafted an Environmental Impact Statement to determine if it should grant the County's application. Meanwhile, both the Army and the Tribe objected to the granting of the permit, and the BLM—through the Secretary of the Interior—announced that it would stop considering the County's application until the Army, the Tribe, and the United States Geological Survey concurred with, inter alia, the diversion of water from the Honey Lake Valley.

The Army and the Tribe did not concur, and the County filed suit against the federal government in the United States Court of Federal Claims. The County claimed that the BLM had taken its water rights without just compensation, in violation of the Fifth Amendment Takings Clause, by not granting its application for the right-of-way permit. The Court of Federal Claims granted the government's motion for summary judgment as to the takings claims, and the Federal Circuit affirmed.

Before reaching the merits, the Federal Circuit determined that the case was ripe for adjudication. The government argued that the claim was not ripe because the Secretary of the Interior never made a final decision regarding the County's application for the right-of-way permit. The court rejected this claim. Relying on the United States Supreme Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the court found that the County's claim was ripe because the County had

taken all "reasonable and necessary steps" to obtain the permit. Moreover, because of the Army and the Tribe's objections to the permit, it was "known to a reasonable degree of certainty" that the BLM would not grant the permit.

Turning to the merits, the court rejected the County's takings claims. The County made three claims under the Takings Clause: (1) that the government restricted the County's water rights to the point that they were valueless by preventing the County from using the water for Reno-Sparks; (2) that the government had rendered the County's property valueless by effectively giving the Army and the Tribe veto power over the County's use of the water rights; and (3) that by not granting the County's permit, the government physically took the water rights in that the water will remain in the Honey Lake Valley for use by the Army and other landowners.

Addressing these in reverse order, the court first rejected the County's physical takings claim. The County had relied on *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), in which the Federal Claims Court held that federal and state agencies, seeking to protect endangered species, had effected a taking by limiting the amount of water holders of water rights could use. The court distinguished *Tulare*, noting that in this case, the government did not restrict the amount of water the County could use pursuant to its water rights, nor did the government divert any of that water. In any event, the court further noted that *Tulare* was not binding precedent on the court.

The court similarly disposed of the County's claim that the government effected a taking by denying the County all "meaningful access" to its water. The court defined the County's property interest as the right to use the water on the ranch. The court held that the government did not render the water rights useless because the government did not take any action affecting the water rights. The government did not restrict this right—it merely declined to allow the County to move the water over the government's land.

Finally, the court rejected the claim that the government had effected a regulatory taking by depriving the County of all value of the County's water rights. The court simply held that a regulatory takings claim was not viable because the government was not acting in its regulatory capacity when it refused to allow the County to transport its water over the government's land. The government was acting as a landowner and did not restrict the County's property rights. The

government was merely managing its land, and the County had no property interest in the government's land.

Lemuel Thomas