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

Kathleen Ott

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found Corps' methodology for measuring economic impact deeply flawed and prejudicial. Because of these deficiencies, the dissent urged for reversal of the judgment.

Despite the dissent's arguments, the majority agreed with the trial court that the Corps took the required hard look and affirmed the judgment of the trial court.

*Tim Cronin*

## TENTH CIRCUIT

**United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006)** (holding that the United States Army Corps of Engineers regulated tributaries to navigable waters under a permissible interpretation of the Clean Water Act because there was a sufficient nexus where pollution discharged in tributaries had a potential to move downstream and pollute navigable waters).

The Tenth Circuit Court of Appeals reviewed a ruling by the United States District Court for the District of Wyoming which found Edward Hubenka ("Hubenka") guilty of three counts of discharging pollutants into the Wind River in violation of the Clean Water Act ("Act"), 33 U.S.C §§ 1311(a) and 1319(c)(2)(A). Hubenka sought to divert the flow of the Wind River, which was a braided stream, to prevent the erosion of its banks from threatening an irrigation channel supplying his nearby property. The Wind River, after joining the Little Wind River and the Popo Agie River, eventually becomes the Big Horn River which joins the Yellowstone River in Montana and ultimately flows into the Missouri River.

On appeal, Hubenka alleged that the Army Corps of Engineers ("Corps") unconstitutionally interpreted the Act to apply to a non-navigable tributary. Further, Hubenka alleged that he did not violate the Act by discharging pollutants because he did not add materials from outside the river's banks. The court reviewed the construction and the applicability of the Clean Water Act *de novo*.

The court first considered the constitutionality of the Corps' interpretation of the Clean Water Act. Under the Act, the Corps has the authority to regulate dredge and fill activities on "navigable waters." The statute defines "navigable waters" broadly as "waters of the United States." The issue in the case was whether the Corps, which originally applied the statute only to navigable-in-fact waters, could revise its regulations to include tributaries of navigable waters under the broad language of the statute.

In answering this question, the court utilized the two-step approach prescribed in *Chevron v. Natural Resources Defense Council, Inc.* for reviewing an agency's interpretation of the statute it administers. Under this test, the court must first determine whether Congress specifically ad-

dressed the question at issue and if so, it will give express congressional intent deference. However, if the statute is silent or ambiguous, the court will give the agency's interpretation deference as long as it is permissible. Here, the court found that under the broad language of the statute, along with its definition of navigable waters, Congress intended to regulate at least some non-navigable waters. However, because Congress did not delineate the extent of that regulation, the court deemed the statute ambiguous and proceeded to the second step of the analysis to determine whether the Corps' interpretation was permissible.

The court evaluated the Supreme Court's decision in *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), to determine whether it had bearing on the Corps' interpretation. In SWANCC, the United States Supreme Court struck down the Corps' regulation of isolated, intrastate waters used as habitats for certain migratory birds on the premise that there was not sufficient "nexus" between the regulated waters at issue and navigable waters under the Act. The SWANCC Court distinguished the holding in *United States v. Riverside Bayview Homes, Inc.* because the wetlands in that case were adjacent to navigable waters, and thus had sufficient nexus for regulation. In this case, the court concluded that although the tributaries that the Corps sought to regulate were not adjacent, any pollution or fill dumped in the tributaries had the potential to move downstream and affect the quality of navigable waters, and thus sufficient nexus between the tributaries and the navigable waters existed as required by the Supreme Court. The court held that the Corps' interpretation of the Act's applicability to non-navigable tributaries was, therefore, permissible.

Finally, the court considered whether Hubenka violated the Act. Hubenka argued that he did not add pollutants to the Wind River because he only disturbed the waters' banks. However, the Act prohibits the discharge of any pollutant into waters of the United States and defines pollutant to include "dredged spoil," "rock," and "sand." The court held that disturbing particulate matter on the banks without a permit fell within this definition and affirmed the trial court's holding regarding Hubenka's violations.

The court affirmed the ruling of the district court and held that the Army Corps of Engineers' interpretation of the Clean Water Act was permissible, that tributaries of navigable waters were within the scope of regulation, and that Hubenka violated the Act.

*Kathleen Ott*