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N. Penn Water Auth. v. BAE Sys., No. 04-4446, 2005 U.S. Dist. LEXIS 14773 (E.D. Pa. July 19, 2005)

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The court enjoined Pacific Surimi from beginning summertime production until Pacific Surimi could obtain a NPDES permit allowing discharges to the Columbia River.

Alexandra Farkouh

N. Penn Water Auth. v. BAE Sys., No. 04-4446, 2005 U.S. Dist. LEXIS 14773 (E.D. Pa. July 19, 2005) (holding section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act prevents an injunction under the Resource Conservation and Recovery Act for treatment of a public well when the Environmental Protection Agency considered and rejected installing treatment in their Record of Decision).

The United States District Court for the Eastern District of Pennsylvania reviewed BAE Systems's motion to dismiss all claims brought by North Penn Water Authority ("NPWA"). BAE Systems argued that the court lacked subject matter jurisdiction over NPWA's claims because section 113(h) of CERCLA eliminates the court's ability to review federal government response actions until the cleanup is complete. The Environmental Protection Agency ("EPA") had ongoing activities at the North Penn Superfund Site; therefore, section 113(h) would prohibit any challenge to the EPA's activities at that site.

The court found no jurisdiction under section 113(h) of CERCLA over NPWA's RCRA claim. NPWA sought a declaration of liability under RCRA that BAE Systems's contamination of groundwater created an imminent and substantial endangerment to the public health. NPWA also sought an injunction requiring BAE Systems to abate the violations and provide treatment of a public well to put it back into service for public water. The court determined that subject matter jurisdiction over the RCRA claim depended on whether the claim was a challenge to the ongoing federal cleanup at the North Penn Superfund Site. The EPA's Record of Decision, issued before cleanup began at the site, showed that the EPA considered and rejected installing a treatment system on the public well. The EPA's ongoing cleanup activities included restoration of the groundwater quality in the public well. The court noted that although treatment on the public well may not obstruct the EPA's clean up activities, the section 113(h) prohibition of judicial review is not dependent on the facts of each case. Since the EPA considered and rejected treatment of the well, an injunction issued by the court for treatment of the public well would be a challenge to the current cleanup of the Superfund site. The court found it lacked subject matter jurisdiction and dismissed the RCRA claim. The court also dismissed NPWA's claims under Pennsylvania state hazardous waste laws seeking treatment of the public well. The court found these claims were also challenges to the current cleanup of the Superfund site, and therefore the court lacked subject matter jurisdiction.

However, the court found that it had subject matter jurisdiction over the CERCLA claim because NPWA's claim was to recover response costs under section 107, and section 113(h)(1) permits judicial review of this type of action. BAE Systems also argued that NPWA failed to state a claim under CERCLA section 107 because their response costs were inconsistent with the National Contingency Plan. The court found this was a question of fact for trial. The court also permitted NPWA's claims under the Pennsylvania Hazardous Sites Cleanup Act since that statute permitted a private party to bring a claim for recovery of response costs.

BAE Systems challenged the timeliness of NPWA's state tort law claims, claiming NPWA was aware of the contamination 25 years ago and there is a two-year statute of limitations on tort claims. Pennsylvania law allows for tolling of the statute of limitations until a plaintiff knows or reasonably should know that he or she has sustained an injury caused by another person. When there is a continuing violation, Pennsylvania law also tolls the statute of limitations until the contamination ceases. Although the court questioned whether the statute of limitations would bar the state law claims, the court would not dismiss the claims without more of a record.

The court dismissed BAE Systems's claim for injunction under RCRA, but permitted its recovery of response costs and state tort law claims to continue.

Heather Heinlein

United States v. Washington, Dep't of Ecology, 375 F. Supp. 2d 1050 (W.D. Wash. 2005) (holding: (1) water rights are impliedly reserved to fulfill the primary purpose or purposes of an Indian reservation; (2) the practicable irrigable acreage method is an appropriate means of quantifying impliedly reserved agricultural water rights, but impliedly reserved domestic water rights are to be quantified independently of the agricultural rights; (3) under these circumstances, the quantification of impliedly reserved water rights does not necessitate the quantification of those rights for the entire Reservation or the inclusion of sources beyond the Reservation, except as they pertain to the practicable irrigable acreage calculation; (4) an Indian is able to transfer impliedly reserved water rights, even to a non-Indian successor, but the non-Indian successor may lose the rights through non-use, and the rights are then lost to the tribe).

In 1855, the Treaty of Point Elliot ("Treaty") created the Lummi Reservation ("Reservation") which covers two peninsulas in Washington. Both the Treaty and deeds conveying parcels of land to non-Indian successors in interest made no mention of water rights. The portion of the Lummi Reservation involved in this dispute ("Case Area") comprises just over half of the reservation, and the parties