

1-1-2006

United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005)

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standing of the issue. Based on this reasoning, the court affirmed the district court and held that the Tribe was only allocated the amount it would have applied to irrigation, and not those amounts meant to compensate for transportation losses.

Charles Sweet

TENTH CIRCUIT

United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005) (holding knowledge of a pollutant's path is irrelevant in determining whether an individual is guilty of negligently discharging a pollutant into a protected waterway).

At trial in the United States District Court for the District of Colorado, a jury found David Ortiz guilty of violating the Clean Water Act ("CWA") because he negligently discharged industrial wastewater into a protected waterway. Following the guilty verdict, Ortiz moved for an acquittal. The district court granted the acquittal finding that Ortiz did not knowingly pollute a protected waterway. The government appealed to the Tenth Circuit Court of Appeals by arguing that the CWA does not have a *mens rea* provision.

Ortiz manufactured airplane wing de-icing fluid. The manufacturing process creates a substantial amount of wastewater that requires either treatment or a National Pollution Discharge Elimination System ("NPDES") permit for legal release into the environment. Ortiz did not treat the water or obtain a NPDES permit. Instead, Ortiz dumped the wastewater down a toilet at his manufacturing facility. Once in the toilet, the wastewater traveled through the municipal water system until it reached the Colorado River. The wastewater did not receive any treatment as it traveled through the municipal water system from Ortiz's toilet to the Colorado River. Investigators discovered the wastewater dumping after they responded to complaints about unusual odors downstream from Ortiz's business.

The district court jury found that Ortiz violated the CWA by negligently discharging a pollutant, from a point source, into the navigable waters of the United States, without a permit. The district court acquitted Ortiz, finding that Ortiz could not have negligently dumped wastewater since he did not know the wastewater would end up in a protected waterway.

The court reversed the acquittal because the district court improperly applied the term "negligently" as a *mens rea* provision. Under the CWA, negligently means a "failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." Since Ortiz did not use ordinary prudence when he

dumped wastewater, he violated the CWA. The court remanded the case after reversing the acquittal for further sentencing.

Thomas Jantunen

DISTRICT OF COLUMBIA

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 440 F.3d 459 (D.C. Cir. 2006) (holding challenge to a rule promulgated under the Clean Water Act was ripe for review as (1) legality of the challenged provisions would not vary case by case and (2) the regulation was a substantive rule that required parties to adjust their conduct immediately).

In 2001, the Environmental Protection Agency and the United States Army Corps of Engineers (collectively "Agencies") jointly promulgated a new rule known as "Tulloch II" regarding the discharge of dredged material under section 404(a) of the Clean Water Act ("CWA"). The framework rule "regards" any dredging using mechanized earth-moving equipment as always resulting in a discharge, requiring a permit, unless project-specific evidence shows only incidental fallback results. Additionally, the new rule incorporates a definition of incidental fallback as the redeposit of "small volumes" of dredged material.

The National Association of Home Builders; the National Stone, Sand and Gravel Association; the American Road and Transportation Builders Association; and the Nationwide Public Projects Coalition (collectively "Industry") brought suit against the Agencies in the United States District Court for the District of Columbia. The Industry challenged Tulloch II as exceeding the statutory authority of the Corps and the EPA under the CWA. Specifically the Industry argued that adding "regards" to the rule creates an impermissible rebuttable presumption that all dredging results in unlawful discharge. The Industry also challenged defining incidental fallback in terms of volume.

The district court held the Industry's challenge was not ripe because (1) until the Agencies actually applied the rule in concrete factual situations the issues were not fit for review and (2) delaying such a review would not impose hardship on the Industry plaintiffs.

The United States Court of Appeals for the District of Columbia Circuit found, as had the district court, that under the first prong of the ripeness doctrine the issues raised were both final and purely legal. The court, however, determined that the legality of the issues would not change on a case by case basis. The court concluded the Industry's claim rested not on if the Agencies would exercise discretion unlawfully in the future but that any faithful application of the rule would exceed the Agencies' statutory mandate. Under the second ripeness