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United States v. Thorson, 2004 U.S. Dist. LEXIS 5927 (W.D. Wis. Apr. 6, 2004)

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attention after the filing. To preserve the mining industry's ability to operate while applying for individual permits pursuant to the CWA, the court enjoined only those projects not already under construction.

In addition, the court stated that any attempt to revise the Revision 5 mitigation plan amounted to an application for authorization pursuant to NWP 21 and since the court enjoined all NWP 21 authorizations, the Corps could not authorize Revision 5.

Thus, the court supplemented the initial order enjoining all permits for projects that had not commenced as of July 8, 2004 to include permits not initially identified and granted the Coalition's motion to clarify the permanent injunction on Revision 5 and denied as moot the Coalition's motion to amend its complaint.

Story Washburn

United States v. Thorson, 2004 U.S. Dist. LEXIS 5927 (W.D. Wis. Apr. 6, 2004) (holding: (1) wetlands hydrologically adjacent to navigable waters of the United States fall within the purview of the Clean Water Act; and (2) the Clean Water Act does not exceed congressional authority to regulate channels of interstate commerce under the Commerce Clause).

Peter Thorson, president of both Managed Investments, Inc. ("Managed Investments") and Construction Management, Inc. ("Construction Management"), purchased and pursued development of a 5.8-acre tract of land in Tomah, Wisconsin. The site was adjacent to a drainage ditch that flowed into Deer Creek, a watercourse that flowed to the Lemonweir River. The Lemonweir River is a tributary to the Mississippi River, a navigable watercourse of the United States. Upon purchase of the land, Thorson and Managed Investments submitted water quality certification applications describing plans to develop the site to both the United States Army Corps of Engineers ("Corps") and the Wisconsin Department of Natural Resources ("DNR"). Pursuant to water quality concerns raised by both the Corps and the DNR, Thorson and Managed Investments revised the site plan, retained a consultant to assist with the permit application, and provided additional environmental information. The DNR subsequently denied the water quality certification and the Corps denied the permit application. However, despite lacking a permit, Thorson directed Gerke Excavating, Inc. ("Gerke") to place fill material in the wetlands site. Gerke proceeded to fill and grade the site with stumps, roots, and other spoil material using a bulldozer and trucks. The Corps issued a cease and desist order to prevent Thorson, Managed Investments, Construction Management, and Gerke (collectively "Thorson") from completely filling the site. The United States sought injunctive and monetary relief against Thorson for violations of the Clean Water Act ("CWA"). The Corps contended that Thorson discharged a pollutant from a point

source into navigable waters without a permit. Thorson objected to the Corps' wetlands determination methods, arguing that the CWA applied only to wetlands immediately adjacent to waters navigable in fact, and that the Corps exceeded its authority under the Commerce Clause. Thorson also filed a counterclaim seeking declaratory judgment that the wetland in question was not a wetland as defined by the CWA and therefore did not constitute a "water of the United States."

Pursuant to the CWA, a person cannot discharge a pollutant from a point source into navigable waters unlawful unless authorized by a permit or exemption. Pollutants include stumps, roots, and spoil material. Additionally, point sources, defined as discernible, defined, and discrete conveyances, include bulldozers and other construction equipment. While Thorson's actions unquestionably met the "pollutant" and "point source" elements, significant questions arose regarding the filled and graded wetlands' "navigable waters" status.

Thorson challenged the site's classification as a wetland, contending the wetland was not such, and provided expert testimony based on other hydrology theories. The United States District Court for the Western District of Wisconsin found the Corps' methodology of following the Corps own interpretation of the CWA enjoyed deference because that methodology was not plainly erroneous or inconsistent with the CWA. Thus, the court held the Corps' method for determination of wetlands sufficient.

Thorson further disputed whether the wetlands in question were navigable waters subject to the CWA. The CWA regulates only interstate wetlands or those wetlands adjacent to navigable waters. Thorson argued the site in question was not immediately adjacent to a navigable watercourse and thus was not "adjacent" under the CWA's definition. However, the court held the term "navigable waters" extended to wetlands hydrologically connected to waters "navigable in fact." Because the CWA purports to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the court found that the CWA's protection of tributaries ultimately protected navigable waters. Therefore, the court held the CWA regulated wetlands that were hydrologically adjacent to navigable waters.

Thorson contended designation of the wetland as a "water of the United States" violated the Commerce Clause, because authority over regulation of interstate commerce channels extended only to activities that affected a watercourse's use as a commerce channel. Thorson claimed discharge of a pollutant into a tributary did not bear on the Mississippi River's ultimate capacity as a channel of interstate commerce. The court disagreed, holding that the CWA did not violate the Commerce Clause. The tributary watercourse's relationship to traditionally navigable waters allowed for regulation of such a tributary. The court stated that, even if the discharge of a pollutant did not threaten a commerce channel's capacity, Congress retained the au-

thority to regulate harmful substances that flowed through that channel.

Pursuant to the court's findings, the court ordered partial summary judgment for the United States on the claim that Thorson violated the CWA. The court denied the United States' motion for partial summary judgment against Construction Management for lack of evidence. The court further dismissed Thorson's counterclaim for declaratory judgment.

Suzanne Knowle

STATE COURTS

CALIFORNIA

Acosta v. Big Bear Cmty. Servs. Dist., No. EO33363, 2004 Cal. App. LEXIS 2253 (Cal. Ct. App. March 10, 2004) (holding the exaction of groundwater rights in exchange for extending water services was not a regulatory taking).

Andy Acosta appealed the dismissal by the Superior Court of San Bernadino County of his claim that the exaction of water rights in exchange for the extension of water services to his property was a regulatory taking. Acosta obtained a conditional use permit ("CUP") from San Bernadino County allowing him to construct two buildings to use for recycling and storage for a wood-chipping and stockpiling business. The CUP imposed several conditions including the requirements that Acosta install three fire hydrants on his property and procure any water needs from Big Bear Community Services District ("District").

The District agreed to extend a water main on Acosta's property for fire hydrant purposes and provide water services so long as Acosta conveyed his groundwater rights on the property to the District. Acosta argued the conditional taking of water rights from the property was a regulatory taking in violation of the Fifth and Fourteenth Amendments. He filed for a writ of mandate or an administrative mandamus to compel the District to extend a water main on his property without requiring a conveyance of his groundwater rights. The trial court dismissed Acosta's writ and Acosta appealed to the Court of Appeal of California, Fourth Appellate District, Division Two.

The court first addressed the ripeness of Acosta's claim. The District argued because the CUP denied Acosta the right to use water extracted from wells on his property, there was no controversy and Acosta's case was, therefore, not ripe. However, while the CUP required Acosta to procure his water from the District thus making his water right useless, at the time Acosta brought this action, the CUP was no longer binding. Therefore, because Acosta possessed the right to access his water right, there was a controversy and the case was ripe for consideration.