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McAbee v. City of Fort Payne, 318 F.3d 1248 (11th Cir. 2003)

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pesticide drift, and also failed to sufficiently analyze potential mitigation measures.

Jared Ellis

ELEVENTH CIRCUIT

McAbee v. City of Fort Payne, 318 F.3d 1248 (11th Cir. 2003) (holding that the limitation on actions provision of the Clean Water Act may preclude a citizen suit only if the state laws under which the state is bringing or has brought the enforcement action contain public participation provisions that are roughly comparable to the analogous Clean Water Act provisions).

Kim McAbee commenced a citizen suit under the Clean Water Act ("CWA") against the City of Fort Payne, Alabama ("City") for violation of their state issued National Pollutant Discharge Elimination System Permit ("NPDES"). The United States District Court for the Northern District of Alabama denied the City's motion for summary judgment, holding that the public participation provisions of the Alabama Environmental Management Act and the Alabama Water Pollution Control Act were not comparable to the CWA provisions, and did not preclude McAbee from bringing a citizen suit. The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court, holding the statutes were not comparable as a matter of law.

McAbee alleged that the City violated its NPDES issued by the State of Alabama. At the time McAbee filed suit, the City was already operating under an enforcement order issued by the Alabama Department of Environmental Management for a number of previous permit violations. The final order provided for a monetary penalty to be assessed against the City and ordered the City to provide notice of the violations and penalties in the newspaper. The City's news article stated the name of the plant and the penalties imposed, but did not provide notice that citizens wishing to appeal the penalties and findings stated in the enforcement order had only fifteen days to raise such appeals.

The "Limitation on Actions" provision in the CWA precludes citizens from bringing citizen suits for CWA violations provided the state is diligently prosecuting an action or has issued a final order under state law comparable to the analogous CWA provisions. Therefore, the issue on appeal was whether the district court erred in holding that the Alabama statutes were not comparable to the CWA provisions. The court rejected the City's argument that the statutes need only be comparable as a whole, and held that each provision in the state law should be "roughly comparable" to the equivalent CWA provision. Applying the test of rough comparability, the appellate

court found that the state statutes regarding public participation in enforcement actions were inadequate to warrant precluding a citizen suit. The court reasoned that the ex post facto nature of the Alabama notice provisions were not comparable because the analogous CWA provisions provided notice to the public and the ability to present evidence in hearings prior to issuance of the final order. The court of appeals additionally held that fifteen days was an unreasonable time for the public to make proper requests for a hearing to appeal the decision on the final order. Consequently, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of summary judgment and held that the public participation and notice sections of the statute were not comparable with the analogous CWA provisions. Thus, McAbee's citizen suit could proceed as a matter of law.

Holly Shook

FEDERAL CLAIMS COURT

Hage v. United States, 51 Fed. Cl. 570 (Fed. Cl. 2002) (holding that continual beneficial use of water for ranching established vested water rights and that because plaintiff possessed rights-of-way to ditches under the 1866 Ditch Rights-of-Way Act, he need not prove that the ditches remained in the same beds).

E. Wayne Hage and the Estate of Jean N. Hage ("Hage") sued the United States in the United States Court of Federal Claims seeking damages for unconstitutional takings of: (1) vested water rights in the Southern Monitor Valley; (2) vested water rights in the Ralston and McKinney allotments; (3) ditch rights-of-way; (4) grazing permits; and (5) a surface estate. The United States moved to dismiss. The court deferred claims regarding takings and compensation, and focused solely on whether Hage demonstrated a property interest, and the scope of that interest. The court found that Hage possessed vested water rights in both the Southern Monitor Valley and the Ralston and McKinney allotments and rights-of-way to three ditches and therefore denied the United States' motion to dismiss with regard to these claims. The court found that Hage possessed no rights to grazing permits or a surface estate and granted the motion to dismiss with regard to these claims.

Hage owned the Pine Creek Ranch in Nevada, and filed suit alleging takings in 1991 because the government revoked his grazing permits; diverted the water on his grazing allotments; blocked access to ditches; allowed other species to use the water reserved for his cattle; impounded his cattle; deprived Hage of the economic use of the ranch; and owed Hage for improvements made to the rangeland. In 1996, the court partially granted the United States' motion for