

1-1-2003

Ozark Soc'y v. Melcher, 229 F. Supp. 2d 896 (E.D. Ark. 2002)

James Siegesmund

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

James Siegesmund, Court Report, *Ozark Soc'y v. Melcher*, 229 F. Supp. 2d 896 (E.D. Ark. 2002), 6 U. Denv. Water L. Rev. 598 (2003).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Ozark Soc'y v. Melcher, 229 F. Supp. 2d 896 (E.D. Ark. 2002)

granted the motion to the extent the complaint sought monetary damages against the Officials acting in their official capacity and to the extent the complaint sought to require the Officials to comply with Wyoming state law. The court denied the Officials' motion in all other respects.

Staci A. McComb

Ozark Soc'y v. Melcher, 229 F. Supp. 2d 896 (E.D. Ark. 2002) (denying defendant's motion to dismiss for lack of subject matter jurisdiction, holding that defendant's issuance of conditioned dam construction permit was a final agency action; plaintiffs had standing to bring suit against defendant; and plaintiffs' claims were ripe).

This case arose when several river advocacy groups ("Ozark Society") sued the United States Army Corps of Engineers ("Corps"). The Ozark Society claimed the Corps, in issuing a conditioned construction permit for a dam on Arkansas' Bear Creek, failed to follow certain procedural mandates. These mandates were found in the Buffalo National River enabling legislation, the National Environmental Policy Act, and the Federal Water Pollution and Control Act. The Corps filed a motion to dismiss for lack of subject matter jurisdiction, alleging that: (1) no final agency action had occurred; (2) the Ozark Society lacked standing to bring this suit; and (3) Ozark Society's claims were not yet ripe. The District Court for the Eastern District of Arkansas disagreed with each of the Corps' allegations and denied the motion to dismiss.

Under the Administrative Procedure Act ("APA"), only final agency actions are subject to judicial review. On August 3, 2001, the Corps issued a permit to the Searcy County Regional Water District ("Searcy County") for construction of a dam on Bear Creek. Generally, the issuance of such a permit is a final agency action. However, the Corps conditioned the permit given to Searcy County, requiring further action by the Corps, other federal agencies, and Searcy County before construction could begin. The conditions had not yet been met at the time of this suit. The Corps argued that a final agency action would only occur upon fulfillment of these conditions, as until then the permit could still be revoked for noncompliance. However, the court held that it is issuance of a permit, not the meeting of attached conditions, which comprises a final agency action. As the Corps issued the permit, it had taken a judicially reviewable final action.

The Corps also argued that the Ozark Society lacked standing because it had not yet suffered an injury in fact, and because its injuries were not redressable by the court. In support, the Corps noted that the proposed dam might never be built. However, the court stated that the procedural requirements ensured that any proposed dam would not have an adverse effect, either on Bear Creek

or further downstream. The Ozark Society frequently enjoyed the waters downstream from the proposed dam site. Essentially, the procedural requirements ensured that people in Ozark Society's position were considered when dam construction was proposed. By alleging the procedures were not followed, the Ozark Society alleged an injury in fact—the Corps' failure to consider the impact of the dam upon Ozark Society when it was approved. Furthermore, the court found this injury redressable, noting that under the APA, courts have the ability to set aside agency actions, findings, or conclusions. Thus, the court held that the Ozark Society had standing to bring this suit.

The Corps also argued that the Ozark Society's claims were not yet ripe, again because the dam might never be built. However, the court pointed out that the cause of the Ozark Society's injuries was the Corps' failure to follow proper procedure, not the (speculative) construction of the dam itself. These injuries had already occurred, thus suits based on these injuries were ripe for review.

The Corps had taken a final agency action. The Ozark Society had standing to bring a suit for injuries arising from that action, and any such claims were ripe for review. Accordingly, the court denied the Corps' motion to dismiss for lack of subject matter jurisdiction.

James Siegesmund

Knaust v. City of Kingston, 193 F. Supp 2d. 536 (N.D.N.Y. 2002)

(holding that lack of ownership rights to water in subterranean caves without proof of actual or imminent injury to reasonable use rights is insufficient to establish standing).

Mark and Barbara Knaust ("Knausts") sought injunctive relief and compensatory damages against the City of Kingston ("City") in the United States District Court for the Northern District of New York, alleging Fifth and Fourteenth Amendment takings, as well as state law causes of action, including New York State Environmental Quality Review Act violations and common law nuisance. The Knausts claimed that storm water originating on the adjacent City of Kingston-funded Business Park contaminated water in subterranean caves beneath their property, interfered with their reasonable use, and constituted a taking. In an earlier decision, the New York State Supreme Court, Ulster County held that the Knausts owned the caves and rights to use the water, but not the water itself. The district court initially denied the Knausts' motion for a preliminary injunction to prevent the Business Park's construction, because absent evidence that their property suffered a physical invasion, they could not demonstrate injury in fact sufficient to support standing. The United States Second Circuit Court of Appeals dismissed the Knausts' appeal on this issue, and on remand, the City contended that the Knausts failed to establish standing, and that even if they could, the City nevertheless deserved summary judgment. The Knausts' failure to show the Business Park