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Sierra Club v. El Paso Gold Mines, Inc., 198 F. Supp. 2d 1265 (D. Colo. 2002)

Merc Pittinos

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that significantly compromises the appropriative rights of present or future water users.” Based on the legislative intent and the statute itself the court concluded that, under Colorado law, water quality standards only apply to discharges of pollutants and not to appropriations of water. Colorado Wild’s claim, which was based solely on the allegation that withdrawals of water from the North Fork would increase the pollutants in the Snake River, failed to show any violation of Colorado state water quality standards, and therefore failed.

Next, Colorado Wild argued the Forest Service violated NFMA by failing to comply with the CWA. The court rejected this argument and observed the distinct roles the federal government and state governments have under the CWA. Under the CWA, the EPA monitored point source discharges of pollutants into navigable waters while states were responsible for implementing water quality standards for intrastate waters. The court found that the appropriation of water was not a discharge of pollution within the meaning of the CWA, and thus rejected Colorado Wild’s claim that the Forest Service violated NFMA by failing to comply with the CWA.

In its second cause of action, Colorado Wild argued the Forest Service violated section 313 of the CWA. The Forest Service challenged this claim, contending the United States’ sovereign immunity deprived the court of subject matter jurisdiction. In response, Colorado Wild asserted section 313 of the CWA waived the United States’ sovereign immunity. The court examined the text of section 313 and recognized a federal agency waived sovereign immunity only when one of its facilities or activities resulted in the discharge of pollutants. However, the court held section 313 did not waive sovereign immunity where, as here, the federal agency was not itself the polluter in violation of the CWA. Since the United States was immune from suit, the court was without subject matter jurisdiction.

The court held Colorado water quality standards only apply to discharges of pollutants and not to appropriations of water. Thus, the court dismissed Colorado Wild’s cause of action alleging violations of NFMA for failure to state a claim. The court further held the Forest Service was immune from suit, since it was not the actual polluter in violation of the CWA.

Lucia Padilla

Sierra Club v. El Paso Gold Mines, Inc., 198 F. Supp. 2d 1265 (D. Colo. 2002) (holding judicial resolution of a claim that a mining company violated the Clean Water Act would not interfere with the company’s discharge permit application pending before a state administrative agency).

El Paso Gold Mines, Inc. (“El Paso”) operated a gold mine in Teller County, Colorado. Sierra Club brought suit against El Paso in

the United States District Court for the District of Colorado alleging the company violated the Clean Water Act (“CWA”) by discharging pollutants into navigable waters without a permit. Sierra Club filed a partial motion for summary judgment based on its compliance with the statutory prerequisites for initiating a citizen suit under the CWA. El Paso, in response, filed both a motion to dismiss or to stay and a cross-motion for partial summary judgment. The former motion challenged the court’s subject matter jurisdiction under the doctrines of primary jurisdiction and the *Buford* abstention. The latter motion claimed Sierra Club failed to meet the statutory prerequisites to sue. El Paso also filed a second motion for partial summary judgment alleging it was neither the owner nor operator of the mine shaft discharging the pollution. The court granted Sierra Club’s motion for partial summary judgment and denied all of El Paso’s motions.

El Paso’s mine was located in the Cripple Creek watershed and Mining District. Cripple Creek was a tributary of Fourmile Creek that was tributary to the Arkansas River. The Mining District contained a series of underground drainage tunnels. One of those tunnels, the Roosevelt Tunnel, lay directly underneath El Paso’s mine and discharged into Cripple Creek. El Paso, at the time of the suit, did not have a National Pollution Discharge Elimination System (“NPDES”) permit to discharge pollutants into, or from, Roosevelt Tunnel into Cripple Creek. As a result, Sierra Club brought suit against El Paso, claiming the mining company violated the CWA by discharging zinc and manganese into the Roosevelt Tunnel and Cripple Creek without a permit.

El Paso’s motion to deny or to stay the case alleged the court did not have subject matter jurisdiction, under the doctrines of primary jurisdiction and the *Buford* abstention, because the company had a discharge permit application pending before the Colorado Water Quality Control Division (“CWQCD”).

Under the doctrine of primary jurisdiction, a court can stay an ongoing judicial proceeding so that an administrative agency, rather than the court, may resolve issues that fall within the special competency of that agency. In analyzing El Paso’s claim that the doctrine of primary jurisdiction precluded subject matter jurisdiction, the court distinguished the facts of this case from two federal cases where the courts declined jurisdiction. In both cases, an administrative agency issued either an order or a permit while the citizen suit was pending. In the first case, the court declined jurisdiction because the court might have subjected the defendants to conflicting orders. In the second case, the court declined jurisdiction because the agency’s resolution of technical issues might preclude the need for federal action.

In this case, the court did not decide an issue within the special competency of the CWQCD; the court only decided whether El Paso discharged pollutants from a point source into navigable waters. The court found that resolution of Sierra Club’s claim would neither

require the resolution of technical issues within the special competency of the CWQCD nor interfere with the orders of the CWQCD. As a result, the court found the doctrine of primary jurisdiction inapplicable.

Under the *Buford* abstention, a federal court must decline to interfere with administrative proceedings if state court review is available and: (1) the court must decide difficult and especially important questions of state law whose resolution transcends the case then at bar; or (2) the court's review would disrupt state efforts to establish a coherent public policy. El Paso argued a court decision regarding the permitting of mining tunnel discharges could create a conflict in statutory interpretation, interfere with CWQCD proceedings, and undermine the State of Colorado's attempt to establish a policy for the regulation of mining tunnel discharges. The court rejected El Paso's argument and denied the company's motion to dismiss or stay because there was no evidence in the record about action CWQCD took on the permit, nor state or federal orders regarding the discharges.

The court next decided the parties' cross-motions for partial summary judgment regarding the statutory prerequisites to initiating a CWA citizen suit. Sierra Club asked the court to affirm its compliance with the jurisdictional prerequisites. El Paso alleged Sierra Club failed to identify the pollutants discharged, the point source, or how El Paso added pollutants to the Roosevelt Tunnel.

The court's analysis addressed two issues. First, El Paso claimed Sierra Club's notice was not specific enough in its description of the pollutants, their sources, and how the discharges increased pollution in the Roosevelt tunnel. The court, citing *Public Interest Group of New Jersey, Inc. v. Hercules, Inc.*, dismissed El Paso's claim holding that Sierra Club's failure to identify specific pollutants did not deprive the court of jurisdiction. The court found Sierra Club's notice adequate because the organization told El Paso what the point sources were and explained how pollution from those sources migrated into navigable waters. Second, the court addressed El Paso's understanding of Sierra Club's notice, by analyzing El Paso's actions after Sierra Club gave notice. Relying on two federal decisions which held that notice was adequate when an alleged violator took specific remedial action in response to notice of the alleged violation, the court found that El Paso's formation of a limited liability corporation and application for an NPDES permit constituted sufficient understanding of the allegations and remedial action sufficient to deem the notice adequate. As a result, the court denied El Paso's motion and granted Sierra Club's.

El Paso's second motion for partial summary judgment claimed the company was neither the owner nor operator of the mine shaft because the company sold the property to a third party two months prior to receiving notice from Sierra Club. In response, Sierra Club alleged El Paso retained an easement over and through the property.

The organization's response cited El Paso's application to CWQCD, which stated that the company's property included a mineshaft connecting to the Roosevelt Tunnel. As a result, the court found there remained a genuine issue of material fact regarding El Paso's ownership interest in the mineshaft and denied El Paso's motion.

Merc Pittinos

United States v. Lamplight Equestrian, No. 00 C 6486, 2002 U.S. Dist. LEXIS 3694 (N.D. Ill. Mar. 8, 2002) (holding that the Army Corps of Engineers has the authority to regulate wetlands with an intermittent connection to interstate or navigable waterways).

The United States Army Corps of Engineers ("Corps") filed suit in Federal District Court for the Northern District of Illinois against Lamplight Equestrian ("Lamplight") for using fill material to build a road in a wetland area without a permit. Lamplight claimed the Corps lacked authority to regulate the area due to the United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"), which reduced the scope of the Corps' authority. Lamplight also claimed that an earlier permit entitled it to build the road. Each party filed a motion for summary judgment. The court granted the Corps' motion for summary judgment against Lamplight.

The disputed wetland was located on Lamplight's property north of the headwaters of Brewster Creek. The creek connected to the Fox River, which flowed into other interstate waterways. In considering the motions for summary judgment, the district court decided that the only relevant issue pertained to the jurisdiction of the Corps.

The Corps argued that despite the Supreme Court's ruling in *SWANCC*, the Corps' authority to regulate the wetland remained intact. Six lower court decisions holding that *SWANCC* only narrowly reduced the Corps' power substantiated this argument. The Corps claimed that administrative regulations included wetlands within the scope of the Corps' authority, so long as they could affect interstate commerce. To affect interstate commerce, a wetland or like area must lie adjacent to a navigable waterway. In this case, an unbroken line of water connected the wetland area and Brewster Creek, a tributary of the Fox River, which in turn fed other waterways, crossing state boundaries. Thus, the Corps possessed the necessary authority to regulate the wetland.

The district court agreed with the Corps. Its analysis of the Supreme Court's decision in *SWANCC* followed other narrow readings in the reduction of the Corps' authority. Significantly, the district court decided that the crucial distinction between this case and the *SWANCC* case was the degree of isolation of the regulated area. In *SWANCC*, the waters in question lacked a direct connection to a