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## Bailey v. United States Army Corps of Eng'rs, Civ. No. 02-639, 2002 U.S. Dist. LEXIS 23272 (D. Minn. Nov. 21, 2002)

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the wetlands would have on the river, the court denied FD&P's motion for summary judgment.

On the second count regarding the violation of the Commerce Clause of the United States Constitution, the court stated that Congress may regulate three categories of activity under its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. Although FD&P asserted filling its wetlands would not "substantially affect" interstate commerce, the court found FD&P's plan to fill their wetlands to build a commercial facility to further interstate freight transportation to suffice as "substantially affecting" interstate commerce. Therefore, the court held the Corps' jurisdiction over the FD&P Property would not violate the Commerce Clause of the United States Constitution.

*Jessica L. Grether*

**Bailey v. United States Army Corps of Eng'rs, Civ. No. 02-639, 2002 U.S. Dist. LEXIS 23272 (D. Minn. Nov. 21, 2002)** (holding that a restoration order, after the denial of an after-the-fact permit for the building of an access road which included dredging and filling wetlands, does not give rise to pre-enforcement judicial review until all existing state procedures are exhausted).

Gary Bailey ("Bailey") sought judicial review in the United States District Court for the District of Minnesota of decisions made by the United States Army Corps of Engineers ("Corps"), state agencies ("MPCA") and Lake of the Woods County ("County"), as well as compensation for the alleged taking of property in violation of the Fifth Amendment. The Corps, MPCA and the County brought motions to dismiss and the court granted each.

Bailey owned a parcel of lakefront property in northern Minnesota. The land included wetlands adjacent to navigable waters and fell under the jurisdiction of the Corps pursuant to the Clean Water Act ("CWA"). Bailey submitted a plat to the County for a residential development and before the plat was approved, he began building an access road across the land by dredging and filling wetlands. He then applied for an "after-the-fact" permit for the project from the Corps and submitted a wetland "replacement" plan because the project would drain and fill the wetlands. The Corps rejected the permit because the lots did not have sufficient areas of upland and the land was insufficient for locating individual sewage treatment systems that would comply with state regulations. The Corps directed Bailey to remove the road and the Department of Natural Resources directed Bailey to restore the wetlands to the lot. Bailey did not comply with the order and the Corps did not seek enforcement of the order.

Pursuant to the CWA, it is unlawful for any person to discharge a pollutant into navigable waters unless that person has a permit. "Pollutant" included the rock, sand and dirt Bailey used to construct the road. The CWA authorizes the Corps to issue permits for the discharge of dredged or fill materials into wetlands. Minnesota also enacted the Wetland Conservation Act ("WCA") prohibiting draining and filling of wetlands unless the person replaced the impacted wetlands by restoring or creating other wetland areas. The WCA required MPCA to approve any restoration proposal.

After several applications for a permit, proposals for wetland replacement and subsequent modifications to the road, the Corps approved the permit and MPCA approved the restoration project. After completion, the Corps conducted an on-site wetland delineation for the plat and found the impact of the road project much more substantial than originally approved. MPCA revoked the certification for the project and issued a restoration order directing Bailey to remove the access road, fill in the ditches, and return the land to its natural state.

The Corps moved to dismiss two of Bailey's claims. First, the Corps argued that sovereign immunity precluded the court from deciding Bailey's challenge to the restoration order. The court held pre-enforcement judicial review was not available to Bailey for a restoration order because review of the order before the Corps brought an action to enforce the order would negate the discretion Congress gave the agency to decide whether or not to bring an enforcement action. Second, the Corps argued the court lacked subject matter jurisdiction to consider Bailey's claim that the Corps violated Executive Order 12,630 because no private right of action exists to enforce that order. The court agreed with this argument and dismissed Bailey's takings claim because the Executive Order did not intend to create any right at law by a private party against the United States.

MPCA moved to dismiss Bailey's claims seeking judicial review of the revocation of certification of the road project and the restoration order. MPCA moved to dismiss these claims, arguing immunity under the Eleventh Amendment. Bailey argued MPCA waived its immunity through its conduct of reliance on the Corps' decisions. The court held Bailey failed to meet the stringent requirements necessary to establish waiver and dismissed the claim. Bailey, in the alternative, also claimed MPCA's actions caused a taking without just compensation. MPCA moved to dismiss this claim on the grounds that Bailey failed to pursue all available state condemnation remedies and found them to be inadequate. The court agreed with MPCA and held the claim was not ripe until Bailey failed to exhaust existing state procedures.

The County moved to dismiss Bailey's claim that he relied to his detriment on statements made to him about the county's possession and ownership of the access road. Bailey asserted the County was to take control of the access road and take responsibility of the permit applications. Bailey asserted harm due to his reliance because the County failed to follow through on its application for a permit from

the corps. The court dismissed this claim because claim preclusion barred common law claims against the County regarding the access road. The County also moved to dismiss Bailey's taking without just compensation claim. The court reached the same conclusion as the MPCA takings claim and decided the claim was not ripe for adjudication.

*Julie S. Hanson*

**Johnson v. Calpine Corp., No. 02-2242, 2002 U.S. Dist. LEXIS 22580 (E.D. La. Nov. 20, 2002)** (holding federal courts have original jurisdiction over the Clean Water Act).

Jewel Junior Johnson and Ina Mae Carter Johnson ("Johnsons") brought an action against the Calpine Corporation ("Calpine") under the Federal Water Pollution Act, as amended by the Clean Water Act of 1977 ("CWA"), in Louisiana state court. Calpine removed the matter to the United States District Court for the Eastern District of Louisiana based on federal question jurisdiction and diversity jurisdiction. The Johnsons moved to remand the case back to state court. The district court held that federal jurisdiction was proper and denied the Johnsons' motion to remand.

The Johnsons objected to the removal on several grounds. First, they stated removal was improper because the mere grant of jurisdiction to a federal court does not preclude a state court from concurrent jurisdiction. Also, the Johnsons contended that for removal to be proper a federal court must have exclusive jurisdiction. In addition, they argued that a section of the CWA mandates claims to be held in state court. Further, the Johnsons asserted that there was no factual basis for federal question jurisdiction over their pond to establish subject matter jurisdiction. Lastly, they claimed that their state claims predominated.

The district court determined that Calpine could remove a civil action filed in state court if the federal court has original jurisdiction. Further, the district court found that the CWA expressly provides for federal jurisdiction. While the Johnsons contended that a section of the CWA mandated that such claims be held in state court, the district court held that this section only preserves rights and remedies under other available laws, but does not restrict federal court jurisdiction. The district court did not express any opinion as to the Johnsons' subject matter jurisdiction claim, and did not find sufficient support for the Johnsons' claim that their state claims predominated. Thus, the district court held that its federal jurisdiction was proper and denied the Johnsons' motion to remand.

*Natalie Lucas*