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United States v. Mango, 199 F.3d 85 (2d Cir. 1999)

The Second Circuit Court of Appeals affirmed the decision of the district court. At issue was the proper standard, and its application, for determining navigability necessary to exercise federal admiralty jurisdiction. The court cited the test established by the United States Supreme Court regarding whether a tort action falls within the federal courts' admiralty jurisdiction. This two-part test required that "[f]irst, the alleged tort must have occurred on or over 'navigable waters.' Second, the activity giving rise to the incident must have had a substantial relationship to traditional maritime activity such that the incident had a potentially disruptive influence on maritime commerce." Since the United States Supreme Court had declared that "pleasure boat accidents have a significant relationship to traditional maritime activity," LeBlanc and Ossen assigned error only to the district court's definition of "navigable waters."

The court agreed with the district court's use of the basic navigability test for purposes of admiralty jurisdiction as set forth in the *Daniel Ball* case. The test designated those rivers as navigable in fact and in law when they might be used, in their ordinary condition, as highways for commerce with other states or foreign countries. The district court found that the part of the Hudson River where the accident took place was not navigable because it was disconnected from any interstate or international waterway by numerous impassable rapids, falls, and artificial dams. LeBlanc and Ossen did not dispute the applicability of the *Daniel Ball* test. Instead, they argued that the test required navigability to be determined by the waterway's historic, unimproved state, rather than its present, improved state. If the historic navigability test were applicable, then the logging industry's regular use of the portion of the river at issue, use which occurred prior to 1951 and the construction of several impassable dams, rendered the district court's finding of non-navigability error.

The court rejected LeBlanc and Ossen's argument in light of subsequent United States Supreme Court case law and the policies served by federal admiralty jurisdiction. Thus, the court held that a waterway was "navigable for jurisdictional purposes if it is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water. Natural and artificial obstructions that effectively prohibit such commerce defeat admiralty jurisdiction." In applying this legal standard, the court found that the Hudson River at the accident site did not support commercial maritime activity, and therefore, the court lacked jurisdiction over LeBlanc and Ossen's claims.

Vanessa L. Condra

United States v. Mango, 199 F.3d 85 (2d Cir. 1999) (holding that the Clean Water Act allows the Secretary of the Army Corps of Engineers to delegate authority to issue discharge permits to district engineers in the Corps).

The United States appealed a judgment by the Northern District of New York dismissing numerous counts of an indictment. The United

States brought the indictment pursuant to the Clean Water Act (“CWA”) against defendants Mango, Austin, Dominske, and Phoenix Environmental, Inc. (collectively “Mango”).

The project at issue involved construction of a natural gas pipeline running from Ontario, Canada to Long Island, New York. Mango prepared an economic impact statement (“EIS”) pursuant to regulations set by the Federal Energy Regulatory Commission (“FERC”). FERC approved the project provided that Mango complied with certain conditions involving stream and wetland construction, mitigation procedures, erosion control, revegetation, and establishment of a maintenance plan for disturbed areas. Mango also applied to the Army Corps of Engineers (“Corps”) for a discharge permit pursuant to the CWA. The Corps issued a discharge permit, signed by Lt. Col. Boston, acting on behalf of Col. Danielson, the Corp’s New York District Engineer. The permit required Mango to implement the environmental mitigation measures contained in the FERC permit.

The United States charged Mango with one count of conspiracy to defraud the United States. Counts two through thirty-one alleged “knowing and negligent violations of the permit conditions.” The district court dismissed counts two through thirty-one on the grounds that the CWA forbade delegation of permit issuing authority to anyone other than the Chief. The district court indicated that even absent the delegation problem, it would have dismissed counts eight through thirteen and twenty-six through thirty-one because they did not relate to the discharge of dredge or fill materials into navigable waters.

The Second Circuit Court of Appeals first considered the delegation authority. It stated that by regulation, the Secretary clearly provided for the delegation of his CWA permitting authority to district engineers and their designees. The district court had concluded that the delegation was invalid because the CWA “unambiguously demonstrates that Congress intended to limit the Secretary’s delegation authority to the Chief of the Engineers.” The court relied on principles of statutory construction and found that if “congressional intent is not clear, we ordinarily will defer to an agency’s construction of a statute it is charged with enforcing if it is reasonable and not in conflict with the expressed intent of Congress.”

The court of appeals then examined both the statute itself and several cases interpreting the statute to determine congressional intent. It found that: (1) the CWA did not specifically address delegation authority; (2) the case involved internal rather than external subdelegation; (3) there was no legislative history indicating that Congress expressly rejected subdelegation; and (4) the overall intent of the CWA was consistent with authority to subdelegate. Thus, the court held that the phrase “acting through the Chief of Engineers” did not clearly indicate an intent to prohibit subdelegation.

Next, the court addressed the issue of whether the Secretary reasonably interpreted the statute to allow for subdelegation. The court held the Secretary’s interpretation reasonable. First, the court stated that Congress had used the same language in other statutes that contemplated responsibility for a duty at a level below the Chief’s. Second, the

magnitude of the task of issuing permits suggested that Congress intended to allow subordinate Corps officials to issue permits and specify permit conditions. The court noted that the Corps processed approximately 11,000 permits per year, a task too daunting for one person. Finally, the court stated that “when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.”

Finally, the court addressed whether the conditions imposed on the permit were related to the discharge. The court noted that the CWA itself did not specify how closely the conditions must relate to the discharge. They held that permit conditions were valid if reasonably related to the discharge, whether directly or indirectly. From the record, the court could not determine with certainty whether the conditions adopted from the EIS are reasonably related to the discharge.

The court held that the Secretary could subdelegate authority to issue permits to agency officials. Thus, the court reversed and remanded the case to determine whether the conditions of the permit were reasonably related to the discharge.

Kimberley Crawford

SEVENTH CIRCUIT

Kelly v. United States Env'tl. Protection Agency, No. 99-2496, 2000 U.S. App. LEXIS 1786 (7th Cir. Feb. 10, 2000) (holding that negligence or knowledge was not required for civil or administrative penalties for violations of the Clean Water Act).

Thomas Kelly bought property adjacent to Lake Koshkonong in Jefferson County, Wisconsin with the intention of turning it into a subdivision. A 3.5-acre swale, or low-lying marsh, existed on this property. As part of the development, Kelly began filling in the swale. In August 1990, with thirty percent of the swale filled, the Army Corps of Engineers (“Corps”) informed Kelly that he needed a federal permit to discharge fill material into the swale, and later the Corps mailed him an application for a permit. Kelly continued to fill the swale because an attorney advised him that he did not need a permit.

When the Corps returned in September 1990, almost ninety percent of the swale contained fill material. The United States Environmental Protection Agency (“EPA”) found that Kelly violated the Clean Water Act (“CWA”) by filling a wetland without a permit, and ordered him to remove the fill and restore the swale to its prior condition. Kelly hired a friend, Jonathan Prisk, to do some of the work. In January 1994, Kelly again hired Prisk to dig pits in the swale, bury debris left by the previous summer’s flooding, and level the ground. Prisk inquired about the