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Wilderness case law for nonlawyers

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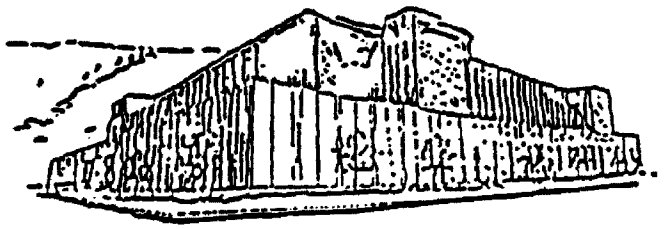

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Wilderness Case Law

for Nonlawyers

by

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Abstract

This paper is designed to be a handbook for wilderness managers and advocates. It begins with observations about wilderness case law in general, followed by an overview of how to research a potential lawsuit and what resources are available to non-lawyers interested in agency wilderness management. The second part of the handbook contains summaries of 14 cases, organized by subject, that pertain to wilderness areas. Two cases that were pertinent to wilderness were omitted because wilderness issues were resolved before litigation and the case issue in each was a matter of money to be paid to owners of inholdings after wilderness designation of the areas. All other relevant cases to date are included.

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Part Two: Non-precedential Case Summaries by Subject

Introduction

Although litigation may not be the most efficient or expert means of answering wilderness management questions, it is currently one of the few options available to the public and the government. Perhaps a more specific Wilderness Act (one that would give government agencies more direction in management) could settle disputes outside of court, but a new wilderness bill is not pending nor would it necessarily shrink the number of suits brought to court over wilderness issues. Preservationists will always demand more wilderness protection than developers will and individuals will always pursue private rights in wilderness regardless of the strictness of the statute that is passed. Therefore, it is important that people understand wilderness case law and how it may be useful for them to work for continued wilderness preservation.

Observations

After reviewing these 14 wilderness cases as a citizen, I have a few comments to make about wilderness case law. First, while these 14 cases took place in wilderness, the courts do not rely solely on the Wilderness Act to make their decisions. In fact, the cases reference a number of statutes in addition to the Wilderness Act. There are few provisions in the Wilderness Act that are specific guidelines for management, but the overall language of the Act is vague. As a result, the courts rely on other statutes that apply to the different wilderness

areas in question. A list of statutes that have been used in wilderness case law to date is found in Appendix A.

Second, the courts are wary of issues that have not been finalized at an agency's administrative level. In fact, it seems evident that an agency must make a decision on an issue before a court will deliver a holding in the case. If you are involved with an agency decision that has not been finalized, you would be wise to wait to take the issue to court until a final decision is made to avoid added cost and wasted time.

Lastly, when the Wilderness Act is part of a case, there are two things that are reliable about the court's interpretation of the Act. First, if a provision applies to the issue that includes a waiver in the case of 'valid existing rights,' the court will likely decide in favor of the rights. Pay attention to whether valid existing rights can be established by you or the opposing side. The provisions in the Wilderness Act that include a 'valid existing right' clause are: Section 1133(d) that contains prohibitions about "commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations...," and section 1133(d)(3) that includes "[m]ining and mineral leasing laws; leases, permits, and licenses; withdrawal of minerals from appropriation and disposition." There are other statutes that include 'valid existing right' exceptions. If pre-existing rights are a potential issue, any relevant statutes should be read closely for 'valid existing rights' exceptions. Second, if the relevant provision of the Act includes the language, "subject to such restrictions

as the Secretary...deems desirable" or "such reasonable regulations governing ...as may be prescribed by the Secretary," the court will tend to defer to the agency's discretion. Again, read relevant statutes closely for this language. It will allow you to predict better the court's interpretation of your case.

Keep these observations in mind as you read the overview and the case summaries.

Note to Non-agency Wilderness Advocates

Suppose you disagreed with a government agency's wilderness management decision that affects one of your favorite spots. Have you ever considered what options you have to contest the decision? Unfortunately, if you have not acted by the time the decision has been finalized, you may not have any options. To attempt to influence an agency decision, the first step is to contact the agency staff working on the management decision. Make an appointment with the agency person in charge of the project (and any other people involved) to introduce yourself and establish a relationship. Ask questions about the proposal, express your concerns and determine what you can do to help in the planning process. Establish a dialogue about the planning decisions and why you agree or disagree with the management plans. Discussion could resolve the issues that concern you before the comment or litigation stage.

If you do expect to reach the litigation stage, it is important to consider the steps required to secure standing in court. A case will not be heard in court unless the plaintiffs have standing. The question of standing is determined by

"whether...the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992) quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26. In order to have standing in a wilderness case, you must establish that you (or a member of your group) have visited the area in question and that you will be negatively affected by the management decision. Other steps required to have standing include participating in the comment period.

After meeting with agency staff, participate in the public comment process. When a government agency announces a pending decision, it invites the public to comment on the proposed action. After receiving comments, the agency will issue its decision after consideration of public input. Forest Service and Bureau of Land Management decisions may be appealed in writing to the agency's administration.[1] Before bringing a lawsuit against these agencies (USFS and BLM)—to have standing for a lawsuit—a plaintiff must have exhausted the available administrative appeal remedies. Neither the National Park Service nor the Fish and Wildlife Service have an appeals process. As a result, it is important to become involved with the situation at the comment stage for all agency planning. In writing comments, mention any issue about which you are concerned. In order to bring a challenge over a particular issue in court, you must have raised it in the comment period. Furthermore, include any case cites

[1] Each agency has a different appeal process. Contact the agency to determine what is required in your situation.

that support your opinion to bolster the impact of your comments. Therefore, if you are interested in a wilderness area, it is prudent to stay aware of proposed agency actions and pending decisions at the administrative level. Contact the agencies to be put on their mailing or e-mail lists.

If you participated in the comment process (and, if appropriate, administratively appealed and were denied), it could be appropriate to consider a lawsuit. The purpose of this paper is to give wilderness advocates with an interest in wilderness management some ideas of where to start if considering initiating a lawsuit. There are several important considerations of wilderness case law that can help you decide whether you have a legitimate case and, if so, that can help make the process of bringing a suit easier.

Taking Action

The first step in developing a case is to write out all the facts involved. This should be started as soon as you learn of the facts, but at the latest, during the comment period before a draft environmental impact statement or environmental assessment. Fundamentally, court decisions are based on facts. Three cases could be in the same wilderness area, but the decisions may all be different depending on the facts of the situation. Consider the two *Stupak-Thrall* cases that both contested Forest Service Forest Plan amendments in the Sylvania Wilderness. The cases involved the same location and the same people, but the court reached different conclusions in each. The court in the first case held that

the Forest Service Forest Plan amendment restricting the use of "electronic fish-finders, boom-boxes, and other mechanical or battery-operated devices" was appropriate. 843 F. Supp. at 327. In the second case, the court decided that the Forest Service Forest Plan amendment restricting the use of gas-powered motorboats in the Sylvania Wilderness infringed on the plaintiffs' valid existing rights.[2] The court held that the plaintiffs proved that their use of motorboats was a valid existing right before the amendment was passed and was crucial to their livelihood. Facts such as bookkeeping evidence to show how that the use of motorboats were important to a plaintiffs' businesses would be valuable in presenting a credible case. Facts that could be important in general include the results of ecological studies, business receipts or expert opinions. Therefore, clearly research and write out the facts of your case.

Next, visit a law library to begin a review of other cases. The United States Code Annotated for the Wilderness Act, 16 U.S.C.A. 1131 et seq., lists all cases that refer to the Wilderness Act. Read through other cases in your court's jurisdiction to find ones that have similar facts. Federal courts are organized in circuits, typically divided geographically. A law library will have a map of courts and will help you decide in which jurisdiction you are. When comparing facts between cases, you may find that no cases are similar, but remember that courts pay attention to details, so a minor fact in everyday life may be useful in

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[2] The Michigan Wilderness Act states that the Wilderness Act is subject to "valid existing rights" of Michigan citizens.

court. If you find a case that has similar facts, follow the reasoning of the court to see if it could apply to your case.

Studying other cases for similarities means that you are looking for precedents in case law. A precedent is a case that establishes law for that court and all lower courts in the circuit. If a case has been decided at the Supreme Court level, for example, all district and appellate courts will abide by that decision. Similarly, cases decided by the United States Court of Appeals for the Tenth Circuit, for example, generally require that all lower courts in that circuit follow the law established in the case. On rare occasions, a court will overturn one of its own decisions if it decides the case was not correctly decided, but usually, a precedent is followed. If in all relevant cases the court decided against your contention, if it deferred to agency discretion, for example, there is slim chance that you will succeed in court. However, if precedents support your argument, then you have a stronger chance of winning. Always double-check that a case decision still stands and was not overturned by a later decision. It will save you hours of frustration.

As you read similar cases, note all the laws that were involved and determine the ones that apply to your situation.[3] Research in the library for any other laws that are relevant, read them closely and note specific clauses that support your contention. For example, if you are concerned about an insect

[3] Relevant statutes to date are found in Appendix A.

control program in wilderness, note that the Wilderness Act states that the Secretary [of Agriculture] may take "such measures [within Wilderness Areas] ... as may be necessary in control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable." 16 U.S.C.A. § 1123(d)(1) (1982). Courts often rely on specific language to make their decision so attention to language is very important. In addition, research the statute's legislative history so you understand the intent of the legislators in enacting the bill. Investigate any relevant administrative history, which may also be important in the court's decision-making process.[4] You will be well-prepared in the beginning stages of bringing your suit if you know the language of the relevant statutes, the intent of the legislators, and the history of the agency's administrative process. Furthermore, gathering this information may help you determine whether you have a solid case. That is, if there is no specific language or administrative history that supports your argument, odds of success are diminished.

Should you decide to proceed with a lawsuit, the following discussion illustrates the topics covered thus far, using real cases as examples.

More about Precedent

Of the fourteen wilderness case law summaries included in this paper, nine set precedents in the court's jurisdiction. Four precedential cases were at

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[4] Records of congressional hearings and other pertinent legislative history can be found in the government documents section of a library. Administrative history information may be requested about a particular area through the relevant government agency.

the appellate level and five were at the district court level.[5] Two of the four appellate cases concerned the Boundary Waters Canoe Area Wilderness in Minnesota: *State of Minnesota by Alexander v. Block,* 660 F. 2d 1240 (8th Cir. 1981), and *Minnesota Public Interest Group v. Butz,* 541 F. 2d 1292 (8th Cir. 1976). Lakefront water rights in the Sylvania wilderness in Michigan were at issue in *Stupak-Thrall v. United States,* 843 F. Supp. 327 (W.D. Mich 1994)[6]. *Clouser v. Espy,* 42 F. 3d 1522 (9th Cir. 1994), considered access to mining claims in Kalmiopsis and North Fork John Day Wilderness Area in Oregon.

The six cases decided at the district court level included *U.S. v. Gregg,* 290 F. Supp. 706 (W.D.Wash. 1968), which established that airplanes were illegal within wilderness unless a special exception was made by the Secretary. One case, *Stupak-Thrall II,* 988 F. Supp. 1055 (W.D. Mich. 1997), held that banning gas-powered motorboats in the Sylvania Wilderness constituted a taking of the plaintiff's valid existing right to operate motorboats for business. *Sierra Club v. Lyng,* 663 F. Supp. 556 (D.D.C. 1987), considered a Southern Pine Beetle program in a wilderness area and decided that it was an appropriate program within

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[5] A case is first heard at the district level. If the district court's decision is appealed by one of the parties, the case is heard at the appellate level.

[6] The case was heard en banc before the United States Court of Appeals for the Sixth Circuit. The court was equally divided so that the earlier appellate decision by a panel of three judges was vacated and the district court ruling automatically was affirmed because there were not sufficient votes to reverse it. Anyone relying on the district court case, however, should be aware that one-half of the appellate court disagreed with the decision, leaving some question as to how other courts considering the issue would resolve it.

wilderness management guidelines. *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386 (S.D. Fla. 1997), explained how the Property Clause of the Constitution gives Congress, and through delegation, federal agencies, the right to regulate non-federal waters and lands. The court in *Audubon v. Hodel*, 606 F. Supp. 825 (D. Alaska 1984), reversed a land transfer of wilderness in Alaska that Secretary Hodel defended under the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. § 3101 et seq.

The following federal statutes address the management of wilderness areas. The Wilderness Act of 1964, 16 U.S.C.A. § 1131 et seq.; the National Environmental Policy Act, 42 U.S.C.A. § 4321 et seq.; and the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 et seq. In addition, the Property Clause of the United States Constitution, U.S.C.A. Constitution (Article 4, § 3, clause 2) has been used several times by the courts in their decisions about public land management. The Property Clause reads: "The Congress shall have the Power to dispose of and make all Rules and Regulations respecting the territory or other Property belonging to the United States..." United States Constitution, Article IV, § 3, cl. 2. Studying the incorporation of the Property Clause in several decisions illustrates how a precedent is useful for later cases. Three cases, *State of Minnesota v. Block*, 660 F. 2d 1240; *Stupak-Thrall v. U.S.*, 843 F. Supp. 827; and *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386, provide an example of how a case uses precedent, how it has been useful in wilderness case law, and how it is a tool for later courts.

In *State of Minnesota by Alexander v. Block*, 660 F. 2d 1240, one of the issues before the court was whether Congress (and through delegation, the Forest Service) could regulate motorized use in the Boundary Waters Canoe Area. The court held that Congress had the authority to regulate non-federal lands and waters according to the Property Clause of the Constitution as long as the regulations were for the overall good of the public lands. The court referred to precedents, *Kleppe v. New Mexico*, 426 U.S. 529, and *United States v. Brown*, 431 U.S. 949, and *Camfield v. United States*, 167 U.S. 518, in which the Supreme Court ruled that the Property Clause could include private or state land.

In *Stupak-Thrall*, a similar case questioned the regulation of "electronic fish-finders, boom-boxes, and other mechanical or battery-operated devices." 843 F. Supp. at 327. The court referred to several precedents: *Kleppe v. New Mexico*, 426 U.S. 529, *United States v. Brown*, 431 U.S. 949, *Camfield v. United States*, 167 U.S. 518, and *State of Minnesota by Alexander v. Block*, 660 F. 2d 1240, in its conclusion that the Property Clause allowed regulation of non-federal lands as long as the regulations were reasonable. In *Stupak-Thrall*, the regulations were to keep the area in compliance with its new wilderness designation.

The court in *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386, referred to the Property Clause in its decision to explain why the Fish and Wildlife Service could regulate commercial use of federal lands including submerged lands and adjacent state waters. The decision refers the reader to and includes language from *State of Minnesota by Alexander v. Block*: "'Congress clearly has the power to

dedicate federal lands for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes.'" 986 F. Supp. at 1386 *quoting* 660 F. 2d 1240.

It is evident in these three examples that precedent is an important tool for courts and that over time precedential law may create trends in wilderness management. That is, as the Property Clause applies to a range of wilderness management issues, wilderness managers will need to keep it in mind as they regulate non-federal lands, where necessary, in an environmentally-sound manner while considering private rights before acting.

Interpretation of Laws

In addition to using precedents, courts pay close attention to specific language in the statute applicable to a case. In *Sierra Club v. Lyng*, 663 F. Supp. 556, and *Clouser v. Espy*, 42 F. 3d 1522, the courts made their decisions according to language in specific clauses in the Wilderness Act. In *Sierra v. Lyng*, which concerned a federal beetle-control program in wilderness, the court noted that the Wilderness Act "authorizes the Secretary to carry out 'such measures [within Wilderness Areas] ... as may be necessary in control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.'" 663 F. Supp. at 558 *quoting* 16 U.S.C. § 1123(d)(1)(1982). The court reasoned that the Wilderness Act gave the Secretary the authority to carry out a beetle control program in wilderness. The court then determined that the Secretary's decision was

reasonable and that his actions would not sacrifice wilderness quality for the interests of nearby private land owners.

In *Clouser v. Espy*, 42 F. 3d at 1534, the court was to decide if the Forest Service had the right to determine the means of access to mining claims within wilderness. The court quoted the Wilderness Act:

> In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated. 16 U.S.C. § 1134(b).

The Wilderness Act provided the important language that provided the basis for the court's decision.[7]

In other cases, the language of the statute must be supplemented by other information, such as a history of the statute, legislative intent, or other facts relevant to the situation. In *Minnesota Public Interest Research Group v. Butz*, 541 F. 2d at 1297, the court studied the Wilderness Act, which contains a special provision allowing timber production in the Boundary Waters Canoe Area. The special provision states:

> Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area ... shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining,

[7] When an agency acts, it acts under the delegation of authority by Congress or the relevant Secretary, as provided by statute. The Forest Service has the authority to regulate the National Forest System according to regulations and statutes through the Organic Administrative Act of 1897, 16 U.S.C. § 478, 551.

> without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams and portages.... 16 U.S.C. §1133(d)(5).

Timber was included by legislators as an "other use" leading the court to decide that logging was permitted in certain situations. To help clarify the issue, the court considered the administrative history of designation of the Boundary Waters Canoe Area as a wilderness. Specifically, the court noted that the Boundary Waters Canoe Area was a unique wilderness that had never been managed as a "pure wilderness." In its decision, the court incorporated this information from the legislative intent and administrative history into its decision that timber production was allowed in the Boundary Waters Canoe Area's Portal Zone. 541 F. 2d at 1307.

Another example is *National Audubon v. Hodel*, 606 F. Supp. 825, in which the plaintiffs challenged a land exchange authorized by Secretary of Interior Hodel. The court looked to the applicable statutes. Section 1302(h) of Alaska National Interest Lands Conservation Act provides that a land exchange must be in the 'public interest.' In reviewing the Secretary's reasoning for authorizing the transfer of a wilderness island for lands within a refuge, the court looked to relevant facts as they related to the statutory language. The language of the statute served as a guide in the court's research. The court studied the potential impact of the exchange on St. Matthew Island. Information about the natural environment on St. Matthew Island and the proposed development on the island led the court to determine that the land exchange would be detrimental to the

unique wilderness environment on the island. Therefore, the court held that the exchange would not improve national conservation objectives and was in poor judgment. *Id* at 846.

Judicial Involvement versus Agency Discretion

Often a case is not decided even after consulting statutes and incorporating an interpretation of the meaning or intent of the statute. In those cases, the court may defer to the government agency involved. Agency discretion is an important aspect of wilderness case law (and management) as the courts reason that the agency made a particular management decision based on expert opinions in the relevant field. The idea is that the courts know the law while the agency experts know the science. In *Sierra Club v. Lyng*, 663 F. Supp. at 560, the court ultimately trusted the Secretary's, and therefore the Forest Service's, determination that the beetle program was reasonable. In the same case the court decided that a beetle program could be conducted within a wilderness (see above). But once the court held that a beetle control program could be carried out in a wilderness, it deferred to the agency's discretion on the legitimacy of the particular program.

In *Sierra Club v. Yeutter*, 911 F. 2d 1405 (10th Cir. 1990), federal reserved water rights were at issue. Plaintiffs contended that federal reserved water rights existed in Colorado wilderness. The court held that the Wilderness Act did not mandate how agencies should manage potential federal reserved water rights,

and that management of such rights should be left to the discretion of the particular agency and was not an issue for the courts to decide.

Conversely, cases in which the court disagrees with a government agency's decision are rare. In wilderness case law there are two examples. The court in *Audubon v. Hodel*, 606 F. Supp. at 846, found that Secretary Hodel had used poor judgment in authorizing the St. Matthew Island land exchange. Although the court held that the Secretary's decision was not arbitrary and capricious, it cancelled the land transfer and criticized the Secretary's decision as an abuse of discretion. In *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D.Mich. 1997), the court decided against the Forest Service in holding that the plaintiffs' use of motorboats was a valid existing right. The Forest Service had issued a regulation banning the use of motorboats in the Sylvania Wilderness. The plaintiffs successfully challenged the Forest Service's decision when the court held that the Forest Service Amendment infringed on their use of motorboats for their livelihoods under the Fifth Amendment of the Constitution.

Last Words

Finally, a lawsuit requires time, energy and money. Seriously consider the options available to you before instigating the legal process. Once you have assembled your facts, consult an attorney for advice on whether to and how to proceed. Consult like-minded environmental groups (with or without legal staffs) in your community for guidance. Many groups have been involved in litigation over public land issues and may have suggestions to make the process

easier.[8] If you have a promising case, other groups and individuals may want to join you as plaintiffs. Overall, remember to be involved at the decision-making process through public comment and appeals so that litigation may not be necessary and, if it is, you or your group is legally entitled to bring a suit.

The next section of this paper includes case summaries of lawsuits that have pertained to wilderness areas. Part One includes cases that set precedents in their jurisdictions and the cases are organized by subject. As you read the cases, consider any corollaries to the issue that concerns you—the case summaries may be useful to you regardless of the fact that the subject of the case may be unrelated to your issue. Part Two contains cases that are of interest, but do not offer precedents in their jurisdictions. The district court decision may have been overturned by the appellate court, and the case issue remanded to the agency for a final decision. Or, an issue may have been resolved before the appellate court heard the case, rendering the court's decision irrelevant. These cases are divided by subject as well. The appendix lists useful statutes, Code of Federal Regulation references, agency manual references and websites.

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[8] An environmental group with litigation experience may be able to refer you to a lawyer willing to help you on a pro bono basis.

Minnesota Public Interest Research Group v. Butz
541 F. 2d 1292 (8th Cir. 1976)

Case History

401 F. Supp. 1276 (1975)—*reversed by* 541 F. 2d 1292 (1976)—*stay denied by* 429 U.S. 935, 97 S. Ct. 347—*AND cert. denied by* 430 U.S. 922, 97 S. Ct. 1340.

Background

The defendants appealed the district court's decision to grant a permanent injunction against present and future logging in areas of and next to virgin forest in the Portal Zone of the Boundary Waters Canoe Area (BWCA).

The Boundary Water Canoe Area contains two sections within its borders: the Portal and Interior Zone. The Portal Zone contains approximately 412,000 acres in which timber production has been permitted. The Interior Zone contains approximately 618,000 acres, in which logging has been prohibited.

Plaintiffs' Identities and Contentions

Minnesota Public Interest Group and Sierra Club, appellees.

The plaintiffs argued that logging was prohibited in virgin forest areas in the Boundary Waters Canoe Area according to the national Wilderness Act of 1964 (Wilderness Act). 16 U.S.C.A. § 1131 *et seq.* In addition, they argued that the Environmental Impact Statement (EIS) was inadequate under the National Environmental Policy Act (NEPA). 42 U.S.C.A. § 4332.

Defendants' Identities and Contentions

Earl V. Butz, Individually and as Secretary of Agriculture, et al., appellants.

The defendants contended that logging was permitted in the Wilderness Act under the special provision regarding the BWCA. They also claimed that the EIS was adequate under NEPA.

Case Issues

(1) Did the Wilderness Act of 1964, 16 U.S.C.A. § 1131 et seq., prohibit logging in the virgin forest areas of the Boundary Waters Canoe Area?

(2) Did the Forest Service's Environmental Impact Statement (EIS) meet the requirements of the National Environmental Policy Act (NEPA)? 42 U.S.C.A. § 4332.

Court's Holdings

On whether the Wilderness Act prohibited logging: The court of appeals held that logging was permitted in certain parts of the Portal Zone, according to provisions of the Wilderness Act of 1964. 16 U.S.C. § 1131 *et seq.* The court determined that the Wilderness Act's ban on commercial logging in Boundary Water Canoe Area sections contiguous to virgin forest was dependent on certain exceptions, "'subject to existing private rights,' and other exceptions in the Act." 16 U.S.C. § 1133(c).

> The BWCA is included in a specific exception within the Wilderness Act. Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: *Provided*, That nothing in this chapter shall preclude the continuance within the area of any established use of motorboats." 16 U.S.C. § 1133(d)(5).

The court of appeals determined three points from their reading of the statute. First, the BWCA was subject to special treatment regarding logging in the wilderness. Second, management of the BWCA was delegated by Congress to the Secretary of Agriculture. Third, management of the BWCA should protect the primitive quality of the area without undue restrictions on timber and other uses. Furthermore, the court found that the administrative and legislative history of the BWCA proved that logging was present at the time of designation of the BWCA and was approved within the Portal Zone, even in virgin areas away from shoreline areas. 541 F. 2d at 1297.

As a final point on the special provision issue, the court explained that the BWCA "has never been managed as a pure wilderness area. The Wilderness Act did not change this management policy. The Act preserved the traditional BWCA management policy of multiple use." 541 F. 2d at 1298. Therefore,

referring to both legislative and statutory interpretation, the court found that the district court erred in its finding and stated that timber was a legitimate use in the BWCA's Portal Zone.

On whether or not the EIS was adequate: The court outlined three purposes of an Environmental Impact Statement (EIS). The court must be able to review the environmental record presented and be able to conclude that the agency made a "good faith effort" to meet the goals of NEPA. Second, the EIS must present a full record of environmental effects of the specific project for public information. Finally, the EIS must present "*reasoned* analysis" regarding conflicting data or opinions.

The court concluded that the EIS had been completed in "good faith objectivity." Satisfactory information had been included in the EIS for the court to determine that while not exhaustive, the document provided ample information for its public audience (including Congress and federal agencies).

In response to specific reasoning by the district court, the court of appeals explained its position. The district court determined that the matrices approach in the EIS was inadequate to consider the various environmental effects of the alternatives. The court of appeals disagreed stating that the matrices provided the most information in the most readable way—writing out the environmental effects would have taken too much time to be reasonable. The district court also stated that the EIS did not discuss the negative environmental impacts of virgin

timber logging. The court of appeals found that a fair amount of the EIS discussed logging in virgin timber areas and the related effects. In the case that virgin timber would be cut, the EIS stated that individual environmental analyses would be completed for each area. The court also stated that 354,000 acres of the 501,000 acres of remaining virgin timber are in the protected Interior Zone of the BWCA.

The discussion of future timber sales troubled the court of appeals. The court found that the plan for future logging was inadequate. The court determined that the EIS was complete concerning present sales. Environmental analysis reports (EARs) were completed for each pending sale. The EIS stated that EARs would be done for any timber sale in the BWCA in the future as well. The court of appeals decided that the Forest Service acted according to NEPA for pending sales with the inclusion of individual sale EARs. However, it continued a permanent injunction for future sales until the Forest Service issued a more complete report in its Superior National Forest Timber Management Plan and accompanying EIS.

Result

The court of appeals reversed the district court's decision on the basis that the Wilderness Act of 1964 allowed logging in virgin forest areas of the BWCA and that the environmental impact statement (EIS) completed for the BWCA was adequate. The court of appeals did decide that the EIS was inadequate

concerning future logging plans. The court maintained the permanent injunction concerning future logging until the new Timber Management Plan and EIS were completed.

Boundary Waters Canoe Area

Other Cases Referenced

Judicial review under NEPA—*Environmental Defense Fund (EDF) v. Corps of Engineers (Corps)*, 470 F. 2d 289, 294 (8th Cir. 1972), *cert. denied*, 412 U.S. 931, 93 S. Ct. 2749, 37 L.Ed.2d 160 (1973).

"Detailed statements" requirements—*EDF v. Froehlke*, 473 F. 2d 346, 351 (8th Cir. 1972); *EDF v. Corps, supra*, 470 F. 2d at 295; *Sierra Club v. Morton*, 510 F. 2d 813, 820 (5th Cir. 1975); *Silva v. Lynn*, 482 F. 2d 1282, 1284 (1st Cir. 1973); *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*, 146 U.S.App.D.C. 33, 449 F. 2d 1109, 1114 (1971).

Good faith objectivity—*EDF v. Corps, supra*, 470 F. 2d at 296; *Iowa Citizens for Environmental Quality, Inc. (ICEQ) v. Volpe*, 487 F. 2d 849, 852 (8th Cir. 1973); *EDF v. Callaway*, 497 F. 2d 1340 (8th Cir. 1974); *Natural Resources Defense Council, Inc. (NRDC) v. Morton*, 148 U.S.App.D.C. 5, 458 F. 2d 827, 836 (1972); *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404, 412 (W.D.Va.), *aff'd per curiam*, 484 F. 2d 453 (4th Cir. 1973).

Substantive review—*EDF v. Corps*, 470 F. 2d at 298; *EDF v. Froelhke, supra*, 473 F. 2d at 358; *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission, supra*, 449 F. 2d at 1115; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971); *Kleppe v. Sierra Club*, —U.S. —, —, n.21, 96 S. Ct. 2718, 2731, 49 L.Ed.2d 576 (1976).

Procedural compliance under NEPA—*Cape Henry Bird Club v. Laird, supra,* 359 F. Supp. at 415; *EDF v. Froehlke, supra,* 368 F. Supp. at 240; *Kleppe v. Sierra Club, supra,* —U.S. at —, 96 S. Ct. 2718.

EIS alternatives—*ICEQ v. Volpe, supra,* 487 F. 2d at 852; *NRDC v. Morton, supra,* 458 F. 2d 834; *EDF v. Froehlke, supra,* 368 F. Supp. at 240.

Future sales: *Kleppe v. Sierra Club, supra,* —U.S. at —, 96 S. Ct. 2718; *Sierra Club v. Froehlke, supra,* 534 F. 2d at 1297.

State of Minnesota by Alexander v. Block
660 F. 2d 1240 (8th Cir. 1981)

Case History

National Association of Property Owners v. U.S., 499 F. Supp. 1223 (D. Minn. 1980)—*judgment affirmed by State of Minnesota by Alexander v. Block*, 660 F. 2d 1240 (8th Cir. 1981)—*cert. denied by Minnesota v. Block*, 455 U.S. 1007 (U.S. Minn. 1982)

Background

Three suits brought by the National Association of Property Owners against the United States were combined in this opinion: (1) *National Association of Property Owners v. U.S.*, Civil 5-79-95 (D.Minn.1979), (2) *Minnesota v. Bergland*, Civ. 5-79-178, (3) *National Association of Property Owners v. U.S.*, Civ. 5-80-25.

The Boundary Waters Canoe Area was incorporated as wilderness in the 1964 National Wilderness Preservation System Act (Wilderness Act) with the provision that "nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats." 16 U.S.C. § 1133(d)(5) (1976).

The plaintiffs challenged the legality of the 1978 Boundary Waters Canoe Area Wilderness Act (Act). Congress passed the 1978 Act to protect the area's wilderness environment from potential degradation. Included in the new Act were restrictions on motorized use in the BWCAW. Section 4 restricted motorboat use (maximum of 10-25 horsepower) except in certain designated areas and snowmobile use was restricted to two trails.

Plaintiffs' Identities and Contentions

Case No. 1: National Association of Property Owners; National Park Inholders Association; Ely-Winton Boundary Waters Conservation Alliance; Local 4757 United States Steel Workers of America; Lac La Croix Indian Band; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carol M. Fisher; Border Lakes Association; Crane Lake Voyageur Snowmobile Club, Inc.; Crane Lake Sportsmen's Club; Ash River Namakan Lake Association; Charlotte Ekroot, d/b/a Windigo Lodge; Robert J. Handberg, d/b/a Campbell's Cabins and Trading Post. National Association of Property Owners is based in San Antonio, Texas. National Parks Inholders Association is based in Tahoe, California. Both organizations brought this suit as representatives of its members. All other plaintiffs use the BWCAW or operate businesses on the border of the BWCAW.

State of Minnesota, plaintiff-intervenor.

The plaintiffs in the first case argued that (1) Congress unlawfully delegated power to the Secretary to designate the boundaries of the Boundary Water Canoe Area Wilderness; and (2) section 4 of the Act, restricting the use of snowmobiles and motorboats, discriminated against disabled persons, violated the Due Process Clause of the Fifth Amendment, and violated Ninth Amendment rights as the disabled need motorized access in order to enjoy the BWCAW. 499 F. Supp. at 1236.

Boundary Waters Canoe Area

Case No. 2: State of Minnesota by Joseph N. Alexander, its Commissioner of Natural Resources.

Carl Brown, d/b/a Walleye Bait & Tackle Co.; Viking Cruises, Inc.; Concerned Citizens of Northeastern Minnesota; Boundary Waters Landowners Association, a Minnesota non-profit corporation; Koochiching County; City of South International Falls; Village of Ranier; International Falls Chamber of Commerce; Minnesota United Snowmobilers Association, Inc.; City of International Falls, plaintiff-intervenors.

The plaintiffs in the second case argued that the BWCAW Act was unlawful because the federal government lacked the constitutional authority to regulate non-federal lands and waters.

Case No. 3: National Association of Property Owners; Ely-Winton Boundary Waters Conservation Alliance; Range Actioneers, Inc.; Crane Lake Sportsmen's Club; City of Winton.

In the third case, the plaintiffs argued that the enactment of the BWCAW Act constituted a significant major federal action so that an environmental impact statement was required per the National Environmental Policy Act of 1976. 42 U.S.C. § 4332(2)(C).

Defendants' Identities and Contentions

Case No. 1: United States of America; Bob Bergland, Secretary of Agriculture, individually and in his official capacity.

Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis Chapter, National Audubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornithologists' Union; The Wilderness Society, defendants-intervenors.

Defendants move for summary judgment dismissing the plaintiffs' suits and declaring the BWCAW Act lawful.

Case No. 2: Robert Bergland, individually and as Secretary of Agriculture of the United States.

Sierra Club; Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Inc.; The League of Women Voters of Minnesota, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis Chapter, National Audubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornithologists' Union; The Wilderness Society; defendant-intervenors.

Defendants move for summary judgment dismissing the plaintiffs' suits and declaring the BWCAW Act lawful.

Case No. 3: Bob Bergland, Individually and in his official capacity as Secretary of Agriculture; R. Max Peterson, individually and in his official capacity as Chief of the United States Forest Service.

Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis Chapter, National Audubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornithologists' Union; The Wilderness Society; defendants-intervenors.

Defendants moved for summary judgment dismissing the plaintiffs' suits and declaring the BWCAW Act lawful.

Case No. 1 Issues

(1) Did Congress unlawfully delegate authority to the Secretary of Agriculture to draw the boundaries of the new Wilderness Area?

(2) Does the Act, by limiting motorboat and snowmobile use in the Wilderness, discriminate, unconstitutionally, against the class of all handicapped persons and the class of all persons less physically fit?

Case No. 2 Issue

(1) Was Congress authorized to regulate non-federal lands and waters?

Case No. 3 Issue

(1) Did the execution of the 1978 Boundary Waters Canoe Area Wilderness Act constitute a significant major federal action requiring an environmental impact statement (EIS) under the National Environmental Policy Act?

Court's Holdings Case No. 1

On the designation of the boundaries of the BWCAW: The court held that Congress did not delegate illegal authority to the Secretary. Rather, Congress designated the boundaries of the BWCAW, not the Secretary. Congress did require the Secretary to publish a description and map of the boundaries in the Federal Register.

On the question of the Act's discrimination towards disabled persons: The court held that the Boundary Waters Canoe Area Wilderness Act did not discriminate against disabled persons in restricting snowmobile and motorboat use in the wilderness.

The Ninth Amendment claim by the plaintiffs was unfounded as the Ninth Amendment only protects "fundamental rights." "Fundamental rights" have been construed strictly by the courts and include the right to interstate travel, the right to procreate, the right to choose a safe method of contraception, the right to marry, and the right to child-rearing and education. The present

issue of motorized access to the wilderness did not constitute a fundamental right in the view of the court.

Furthermore, the court held that the Act was not subject to review on the issue of the Due Process Clause of the Fifth Amendment which requires judicial review only if the plaintiff's "fundamental rights" were abused. As stated above, the issue of motorized access by the disabled did not qualify as a "fundamental right."

Court's Holdings Case No. 2

On the authority of Congress to regulate non-federal lands and waters: The court held that Congress was authorized by the Constitution's Property Clause to regulate non-federal lands and waters. The Property Clause states that: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. Constitution, Article IV, § 3, cl. 2. To maintain the wilderness quality of the Boundary Waters Canoe Area Wilderness, Congress chose to regulate motorized use in the area. Therefore, the motorized regulation was in keeping with the Property Clause for certain for federal land.

The court referred to precedents in which the Supreme Court held that the Property Clause could be extended to state- or privately-owned lands. See *Kleppe v. New Mexico*, 426 U.S. 529, 536, 96 S. Ct. 2285, 2290, 49 L.Ed. 2d 34 (1976). In *Kleppe*, the court found that Congress could regulate non-federal lands if the

regulations were necessary to protect public lands. The decision was expanded in *United States v. Brown*, 552 F. 2d 817 (8th Cir. 1977), to include non-federally owned waters as long as the regulations were to protect the public lands or waters.

The court held that as long as the Congress's regulations were reasonable, it could, according to the Constitution, regulate non-federal lands and waters. Since the purpose of the Boundary Waters Canoe Area Wilderness is to protect the wilderness quality of the area, the court found that regulations on motorized access were reasonable.

Court's Holdings Case No. 3

On whether the 1978 Act constituted a significant major federal action: The court held that the National Environmental Policy Act did not apply to the enactment of the Boundary Waters Canoe Area Wilderness Act of 1978. Therefore, the action was not a significant major federal action and an environmental impact statement (EIS) was not required.

First, the court noted that the main purpose of an EIS is to help the federal agency involved to make an appropriate decision on an agency project. In the BWCAW Act case, the Congress wrote and passed the Act congressionally—it was not an agency decision. Therefore, while the Secretary must enforce the congressional Act, he had no ability to change it. As a result, preparation of an EIS was not applicable.

Furthermore, the *Flint Ridge Doctrine* (*Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 96 S. Ct. 2430, 49 L.Ed. 2d 205 (1976)), explained that EIS requirements and NEPA are superceded by other specific statute mandates. For example, the BWCAW Act states that it was to be implemented by January 1, 1979. For the court to order an EIS would delay the implementation date and thereby conflict with the statutory mandate of the BWCAW Act.

Result

In all three cases, the defendants' and defendant-intervenors' motions for summary judgment were granted. The plaintiffs' motions for summary judgment was denied. The BWCAW Act was declared lawful.

Case No. 1, Other Cases Referenced

Review of congressional act—*Chacon v. Granata*, 515 F. 2d 922, 925 (5th Cir. 1975), *cert. denied*, 423 U.S. 930, 96 S. Ct. 279, 46 L.Ed. 2d 258 (1975).

Congressional authority to designate wilderness boundaries—*Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L.Ed. 446 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L.Ed. 1570 (1935); *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660, 88 L.Ed. 834 (1944); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C.1971); *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113, 2 L.Ed. 2d 1204 (1958); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S. Ct. 935, 938, 22 L.Ed. 2d 162 (1969); *Hander v. San Jacinto Junior College*, 325 F. Supp. 1019 (S.D.Tex.1971).

Congressional constitutional authority to regulate wilderness—*Izaak Walton League v. St. Clair*, 353 F. Supp. 698, 710 (D.Minn.1973), *rev'd on other grounds*, 497 F. 2d 849 (8th Cir. 1974); *Parker v. United States*, 309 F. Supp. 593, 597-98 (D.Colo.1970), *aff'd* 448 F. 2d 793, 795-96 (10th Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S. Ct. 1252, 31 L.Ed. 2d 455 (1972); *McMichael v. United States*, 355 F. 2d 283, 286 (9th Cir. 1965); *Gregg v. United States*, 290 F. Supp. 706, 707-08 (W.D.Wash. 1968).

Question of discrimination under BWCAW Act of 1978—*Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823, 18 L.Ed. 2d 1010 (1967); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S. Ct. 193, 194, 98 L.Ed. 194 (1944); *Graham v. Richardson*, 403 U.S. 365, 371-72, 91 S. Ct. 1848, 1851-52, 29 L.Ed. 2d 534 (1971).

"Suspect classes"—*Dunn v. Blumstein*, 405 U.S. 330, 363-64, 92 S. Ct. 995, 1013-14, 31 L.Ed. 2d 274 (1972); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 1294, 36 L.Ed. 2d 16 (1973); *Johnson v. Robison*, 415 U.S. 361, 375 n. 14, 94 S. Ct. 1160, 1169 n. 14, 39 L.Ed. 2d 389 (1974); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 2566, 49 L.Ed. 2d 520 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S. Ct. 1764, 1770, 36 L.Ed. 2d 583 (1973); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F. 2d 672 at 676 n. 9 (8th Cir. 1980); *Counts v. United States Postal Service*, 17 FEP Cases 1161, 1164 (N.D.Fla. 1978); *Vanko v. Finley*, 440 F. Supp. 656, 663 n. 14 (N.D.Ohio 1977); *Doe v. Colautti*, 592 F. 2d 740, 710-11 (3d Cir. 1979).

"Fundamental" rights—*Graham v. Richardson*, 403 U.S. 365, 371, 91 S. Ct. 1848, 1851, 29 L.Ed. 2d 534 (1971); *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1104-05, 6 L.Ed. 2d 393 (1961); *State Bd. of Tax Comm'rs v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543, 75 L.Ed. 1248 (1931); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357, 36 S. Ct. 370, 374, 60 L.Ed. 679 (1916); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340-41, 55 L.Ed. 369 (1911); *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S. Ct. 1322, 1333, 22 L.Ed. 2d 600 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L.Ed. 1655 (1942); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, 92 S. Ct. 1029, 1038-39, 31 L.Ed. 2d 349 (1972); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823, 18 L.Ed. 2d 1010 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S. Ct. 571, 573, 69 L.Ed. 1070 (1925); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 29-34, 93 S. Ct. 1278, 1294-1297, 36 L.Ed. 2d 16 (1973).

Ninth Amendment—*Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 1681, 14 L.Ed. 2d 510 (1965); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed. 2d 147 (1973); *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L.Ed. 288 (1937).

Fifth Amendment—*Palko v. Connecticut*, 302 U.S. 319, 328, 58 S. Ct. 149, 158, 82 L.Ed. 288 (1937); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925); *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, 12 L.Ed. 2d 992

(1964); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed. 2d 510 (1965); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed. 2d 147 (1973).

Reasonable restrictions by Congress—*McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1104-05, 6 L.Ed. 2d 393 (1961); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L.Ed. 563 (1955); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340-41, 55 L.Ed. 369 (1911).

Takings—*Kohl v. United States*, 91 U.S. (1 Otto) 367, 372, 23 L.Ed. 449 (1875); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 78-80, 57 S. Ct. 364, 375-76, 81 L.Ed. 510 (1937); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L.Ed. 322 (1922); *Cf. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 551, 66 S. Ct. 715, 717, 90 L.Ed. 843 (1946); *Berman v. Parker*, 348 U.S. 26, 32-36, 75 S. Ct. 98, 102-104, 99 L.Ed. 27 (1954).

Treaty questions—*The Chinese Exclusion Case*, 130 U.S. 581, 600, 9 S. Ct. 623, 627, 32 L.Ed. 1068 (1889); *Whitney v. Robertson*, 124 U.S. 190, 195, 8 S. Ct. 456, 458, 31 L.Ed. 386 (1888); *Head Money Cases*, 112 U.S. 580, 599, 5 S. Ct. 247, 254, 28 L.Ed. 798 (1884); *United States v. Postal*, 589 F. 2d 862, 878-79 n. 25 (5th Cir. 1979); *Moser v. United States*, 341 U.S. 41, 45 & n. 9, 71 S. Ct. 553, 555 & n. 9, 95 L.Ed. 729 (1951); *Clark v. Allen*, 331 U.S. 503, 508, 67 S. Ct. 1431, 1434, 91 L.Ed. 1633 (1947); *Diggs v. Shultz*, 470 F. 2d 461, 465-66 & n. 4 (D.C.Cir. 1972).

Standing—*Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S. Ct. 1361, 1364, 31 L.Ed. 2d 636 (1972); *Wampler v. Goldschmidt*, 486 F. Supp. 1130, 1133

(D.Minn.1980); *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 829, 25 L.Ed. 2d 184 (1970); *Rodeway Inns of America, Inc. v. Frank*, 541 F. 2d 759, 763-65 (8th Cir. 1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L.Ed. 2d 536 (1973); *Wheaton v. Hagan*, 435 F. Supp. 1134, 1148-49 (M.D.N.C.1977); *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 505, 7 L.Ed. 2d 446 (1962); *United States v. Peskin*, 527 F. 2d 71, 86 (7th Cir. 1975); *United States v. Oaks*, 527 F. 2d 937, 940 (9th Cir. 1976); *United States v. Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974).

Case No. 2, Other Cases Referenced

Property clause—*Camfield v. United States*, 167 U.S. 518, 525-26, 17 S. Ct. 864, 865-67, 42 L.Ed. 260 (1987); *Cf Hunt v. United States*, 278 U.S. 96, 100, 49 S. Ct. 38, 73 L.Ed. 200 (1928); *United States v. Brown*, 552 F. 2d 817 (8th Cir. 1977).

Case No. 3, Other Cases Referenced

Major federal action—*South Dakota v. Andrus*, 614 F. 2d 1190 (8th Cir. 1980); *N.A.A.C.P. v. Medical Center Inc.*, 584 F. 2d 619, 634 (3d Cir. 1978); *Monroe County Conserv. Council, Inc. v. Volpe*, 472 F. 2d 693, 697 (2d Cir. 1972); *Environmental Defense Fund Inc. v. Corps of Engineers*, 470 F. 2d 289, 294 (8th Cir. 1972), *cert. denied*, 412 U.S. 931, 93 S. Ct. 2749, 37 L.Ed. 2d 160 (1973); *Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C.*, 449 F. 2d 1109, 1114 (D.C.Cir. 1971); *Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316, 326 (C.D.Cal.1977); *Lake Berryessa Tenants' Council v. United States*, 588 F. 2d 267 (9th Cir. 1978).

Flint Ridge Doctrine—*Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 96 S. Ct. 2430, 49 L.Ed. 2d 205 (1976); *Alaska v. Carter*, 462 F. Supp. 1155, 1161 (D.Alaska 1978); *Accord Gulf Oil Corp. v. Simon*, 502 F. 2d 1154, 1156-57 (Temp.Emer.Ct.App.1974); *Dry Color Manufacturers' Ass'n v. Department of Labor*, 486 F. 2d 98, 107-08 (3d Cir. 1973); *Atlanta Gas. Light Co. v. Federal Power Comm'n*, 476 F. 2d 142, 150 (5th Cir. 1973).

Boundary Waters Canoe Area

Clouser v. Espy
42 F. 3d 1522 (9th Cir. 1994)

Case History

Clouser v. Madigan, 1992 WL 694368 (D. Or. 1992)—*decision affirmed by* 42 F. 3d 1522 (9th Cir. 1994)—*cert. denied by Clouser v. Glickman*, 515 U.S. 1141 (1995)—*rehearing denied by Clouser v. Glickman*, 515 U.S. 1178 (1995).

Background

Three mining claims were at issue, two of which were part of the National Wilderness Preservation System and one of which was part of the Wild and Scenic Rivers System. The Robert E. mining claim was in the Kalmiopsis Wilderness in the Siskiyou National Forest, Thunderbolt Claim #2 was in the North Fork John Day Wilderness Area in the Umatilla National Forest, and the Wilson Placer mining claim was on the Illinois River (which is part of the Wild and Scenic River System) in the Siskiyou National Forest.

This case was a lawsuit brought against the Department of Agriculture's Forest Service by three mining claim holders. The claim holders challenged the Forest Service's rulings that pack animals were required to access mining claims rather than motorized vehicles.

Plaintiffs' Identities and Contentions

Leroy Clouser and Sharon Clouser (Owners of Robert E. Mining Claims), Carl E. Setera, Judith M. Setera, Anthony S. Setera and Lois A. Setera (Owners of

the Thunderbolt Mining Claims), Gary Hoefler, Don Wurster, Cameron Anderson and Robin Anderson (Owners of the Wilson Mining Claim).

The plaintiffs sought declaratory and injunctive relief to permit motorized access to mining claims on public land.

The plaintiffs contended that: (1) the Department of Interior had "exclusive jurisdiction" over mining claim validity; (2) the Forest Service could not prohibit motorized transport as a method of access to a claim while the Department of Interior was determining the claim's validity; (3) the plaintiffs representing the Thunderbolt Claim #2 argued that the trails they wished to travel via motorized transport constituted public highways and were therefore not in the Forest Service's jurisdiction (16 U.S.C.A. § 551); and (4) they claimed that existing trails were "public right-of-ways under Revised Statutes (R.S.) § 2477 and that according to 36 C.F.R. § 228.4(a), the permittees did not need to submit a plan of operation if the operations "... will be limited to the use of vehicles on existing public roads or roads used ... for National Forest purposes."

Defendants' Identities and Contentions

Mike Espy, Secretary of Agriculture, United States of America; Dale Robertson, Chief Forester, Forest Service; John Butruille, Regional Forester, Pacific Northwest Region; Jeff Blackwood, Forest Supervisor, Umatilla National Forest; Craig Smith Dixon, District Ranger, North Fork John Day Ranger District; Mike Lunn, Forest Supervisor, Siskiyou National Forest; Dennis Holthus, District Ranger, Illinois Valley Ranger District; Bruce Babbitt, Secretary of the Interior; Cy

Jamison, Director of the Bureau of Land Management; D. Dean Bibles, State Director, Oregon State Office.

The district court had granted summary judgment to the defendants. The defendants contended that: (1) as a matter of law, the Forest Service has the authority to regulate access to mining claims in wilderness; (2) the Forest Service has the authority to regulate access while the Department of Interior is reviewing claim validity; (3) the Forest Service was proper in regulating motorized access to mining claims; and (4) the Forest Service was correct in stating that trails were not public right-of-ways.

Case Issues

(1) Does the Department of Interior or the Department of Agriculture, through the Forest Service, have jurisdiction and statutory authority over access to mining claims in wilderness areas within national forest land?

(2) Does the Forest Service have jurisdiction to prevent motorized access while the Department of Interior is assessing the validity of the plaintiff's mining claim?

(3) Were the Forest Service's rulings preventing the use of motorized vehicles to access mining claims in wilderness areas proper?

(4) Are national forest trails public right-of-ways?

Court's Holdings

On jurisdiction and statutory authority: The court held that the Forest Service has jurisdiction over access to mining claims in wilderness areas, according to the Wilderness Act of 1964 which states:

> In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated. 16 U.S.C. § 1134(b).

In the Wilson claim, the Wilderness Act does not apply. However, the Forest Service maintains statutory authority to regulate mining claim access through the Organic Administration Act of 1897. Therefore, even though the Wilson claim is part of the National Wild and Scenic River System, the Forest Service has statutory authority to regulate mining claim access.[1]

On Forest Service motorized access restrictions while Interior considered claim: The court determined that changes in motorized access are authorized under the Wilderness Act, 16 U.S.C. § 1134(b), and the Forest Service's own regulations at 36 C.F.R. § 228.15. The plaintiffs referred to 43 C.F.R. § 4.21(a) which applies to the Department of Interior stating that "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal ...." The court determined that, legally, the Department of Interior and

the Department of Agriculture could take different positions on the mining claim.

> The Interior department regulation does not purport to instruct other agencies such as Agriculture about how to treat putative mining claims during the pendency of appeals in validity proceedings ... Interior has taken one position, Agriculture another, and we see no reason why such a divergence is impermissible as a matter of law. 42 F. 3d 1522 (9th Cir.1994).

Moreover, the Forest Service ruled in a timely manner on the plaintiffs' plan of operation—it modified the plan to exclude motorized access, using its authority under 36 C.F.R. § 228.5(a).

On the Forest Service rulings preventing motorized access to mining claims: The court upheld the Forest Service rulings that the plaintiffs could not access mining claims via motorized transport. The court supported the Forest Service's rulings that the trails were not public highways and that motorized access was not "essential" to the operation of the claims nor "customarily used with respect to other such claims." See 36 C.F.R. §§ 228.15(b) and (c).

On whether trails were public "right of ways": The court held that the trails in question, which had been closed to traffic for ten years and were returning to their natural state, did not constitute public right-of-ways.[2]

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[1] However, the court found that the Wilson claim plaintiffs failed to exhaust their administrative remedies before seeking judicial review. As a result, those plaintiffs' claims were dismissed.

[2] The court further held that plaintiffs' takings claim could not be used in district court as miners were seeking equitable relief from the Forest Service's denial of motorized access. Rather, miners would need to seek money damages under Tucker Act in Court of Federal Claims. U.S.C.A. Const. Amend. 5; 28 U.S.C.A. § 1346(a)(2).

Result

The court held that the Forest Service was correct in prohibiting motorized access to mining claims.

Other Cases Referenced

Standard of review—*United States v. City of Spokane*, 918 F. 2d 84, 86 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250, 111 S. Ct. 2888.

Forest Service authority to regulate—*United States v. Weiss*, 642 F. 2d 296, 298 (9th Cir. 1981); *United States v. Richardson*, 599 F. 2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014[, 100 S. Ct. 663] (1980); *United States v. Goldfield Deep Mines Co.*, 644 F. 2d 1307, 1309 (9th Cir. 1981), *cert. denied*, 455 U.S. 907, 102 S. Ct. 1252; *United States v. Doremus*, 888 F. 2d 630, 632 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 751.

Exhaustion requirements under the Administrative Procedures Act—*Darby v. Cisneros*, —U.S. —, —, 113 S. Ct. 2539, 2548 (1993); *Franklin v. Massachusetts*, —U.S. —, 112 S. Ct. 2767 (1992); *El Rescate Legal Serv. v. EOIR*, 959 F. 2d 742 (9th Cir. 1992).

Grounds on which plaintiffs challenge Forest Service rulings—*United States v. Barrows*, 404 F. 2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974, 89 S. Ct. 1468 (1969); *Adams v. Witmer*, 271 F. 2d 29, 33 (9th Cir. 1958); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378[, 109 S. Ct. 1851, 1861 (1989); *United States v. Vogler*, 859 F. 2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006, 109 S. Ct. 787 (1989).

Takings claim—*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n. 18[, 69 S. Ct. 1457, 1465 n. 18](1949); *Hurley v. Kinkaid*, 285 U.S. 95, 104[, 52 S. Ct. 267, 269] (1932); *United States v. Causby*, 328 U.S. 256, 267[, 66 S. Ct. 1062, 1068] (1946); *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 60 S. Ct. 413, 414, (1940); *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17, 104 S. Ct. 2862, 2879-80 (1984).

Stupak-Thrall v. United States
843 F. Supp. 327 (W.D. Mich. 1994)

Case History

843 F. Supp. 327 (W.D. Mich. 1994)—*affirmed by* 70 F. 3d 881 (6th Cir. 1995)—*rehearing En Banc granted, opinion vacated by* 81 F. 3d 651—*AND on rehearing En Banc* 89 F. 3d 1269—*cert. denied by* 519 U.S. 1090.

Background

The Sylvania Wilderness in the Ottawa National Forest is part of the National Wilderness Preservation System. The plaintiffs, who owned land along the shore of Crooked Lake, shared surface rights of the lake with the federal government since 90 percent of the lake falls within the Sylvania Wilderness. The Forest Service amended the Ottawa National Forest Land and Resource Management Plan with the contested Amendment No. 1. Amendment No. 1 prohibited the use of houseboats and sailboats on Crooked Lake in the Sylvania Wilderness Area in Michigan's Upper Peninsula and restricted the use of "electronic fish-finders, boom-boxes, and other mechanical or battery-operated devices." 843 F. Supp. at 327.

Plaintiffs' Identities and Contentions

Kathy Stupak-Thrall, Michael A. Gajewski, and Bodil Gajewski, Plaintiffs-Appellants. The three plaintiffs own and operate businesses on the shore of Crooked Lake.

Plaintiffs argued that (1) the Forest Service acted outside its statutory authority and that (2) its actions were unconstitutional when it issued Amendment No. 1 to its land and resource management plan for the Sylvania Wilderness Area.

Defendants' Identities and Contentions

United States of America and Daniel R. Glickman, Secretary of Agriculture, individually and in his official capacity, defendants-appellees.

The defendants claimed that the Amendment was within statutory and constitutional power of the federal government.

Case Issues

(1) Does Congress have the authority to regulate riparian rights of private citizens?

(2) Does Michigan's "reasonable use" doctrine apply to the federal government's sovereign power to regulate waters.

Court's Holdings

On Congress's authority to regulate the riparian rights of private citizen's: The court found that Congress had the power to regulate private riparian rights of citizens who lived along the edge of the lake.

The Property Clause of the Constitution, Article IV, § 3, cl. 2, permits Congress to promulgate rules and regulations to protect federal property. The Constitution states: "Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

belonging to the United States." In the present situation, the court held that Congress's authority included the regulation of private property when it is within the best interest of federal property. The court referred to Supreme Court cases *Camfield v. United States*, 167 U.S. 518, 17 S. Ct. 864, 42 L.Ed. 260 (1987); *United States v. Alford*, 274 U.S. 264, 266, 47 S. Ct. 597, 598, 71 L.Ed. 1040 (1927); and *Kleppe v. New Mexico*, 426 U.S. 529, 538, 96 S. Ct. 2285, 2290, 49 L.Ed. 2d 34 (1976).

The court referred to precedents, *U.S. v. Brown* and *Minnesota v. Block*, in which the courts relied on *Kleppe* and *Camfield* to determine that (1) Congress had the power to regulate state-owned waters within the boundaries of a national park; and (2) that Congress had the power to restrict motorboat usage on state-owned waters within federal wilderness. *United States v. Brown*, 552 F. 2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949, 97 S. Ct. 2666, 53 L.Ed. 2d 266 (1977). *Minnesota v. Block*, 660 F. 2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007, 102 S. Ct. 1645, 71 L.Ed. 2d 876 (1982).

On the application of Michigan's "reasonable use" doctrine to the promulgation of Amendment No. 1's regulation of private riparian rights: The court held that Michigan's "reasonable use" doctrine applied to the regulation of Crooked Lake. In order to determine whether the restrictions under Amendment No. 1 were permissible, the court had to decide whether the Amendment fell under the "reasonable use" doctrine.

Michigan's "reasonable use" doctrine separates riparian rights into two catagories: natural and artificial. "Natural purposes" include "those absolutely necessary for the existence of the riparian proprietor." "Artificial purposes" include "those which merely increase one's comfort and prosperity." *Thompson v. Enz*, 379 Mich. 667, 154 N.W. 2d 473, 483-84 (1967). The court found that the restrictions placed on the private citizens' riparian rights by Amendment No. 1 were reasonable considering the greater purpose of protecting the surrounding wilderness area. Under Michigan's "reasonable use" doctrine, the Forest Service was not infringing on the natural riparian rights of the plaintiffs so that the Forest Service's restrictions were not unreasonable.

The Michigan Wilderness Act (MWA) states that management of the Sylvania Wilderness Area must correspond with the conditions of the national Wilderness Act of 1964. The national Wilderness Act requires each wilderness area to be preserved according to its wilderness character. Therefore Amendment No. 1 provided reasonable restrictions. The court decided that the Forest Service was fulfilling its role in preserving the wilderness character of the Sylvania Wilderness according to the Wilderness Act.

Result

The district court granted the defendant's motions for summary judgment and denied the plaintiffs' motions for summary judgment and declared the amendment lawful.

Other Cases Referenced

Riparian rights—*Hall v. Wantz*, 336 Mich. 112, 116, 57 N.W. 2d 462, 464 (1953); *Burt v. Munger*, 314 Mich. 659, 661, 23 N.W. 2d 117, 119-20 (1946).

Standard of review—*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41, 103 S.Ct. 2856, 2865, 77 L.Ed. 2d 443 (1983); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984); *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F. 2d 933, 937 (Fed. Cir. 1990) (citing *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369, 66 S. Ct. 637, 643, 90 L.Ed. 718 (1946)); *Rydeen v. Quigg*, 748 F. Supp. 900, 905 (D.D.C. 1990), aff'd, 937 F. 2d 623 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1075, 112 S. Ct. 974, 117 L.Ed. 2d 138 (1992).

Valid existing rights—*United States v. Underhill*, 813 F. 2d 105, 111 (6th Cir. 1987) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S. Ct. 3245, 3249, 73 L.Ed. 2d 973 (1982), *cert. denied*, 482 U.S. 906, 107 S. Ct. 2484, 96 L.Ed. 2d 376 (1987).

Regulation under police powers: *Square Lake Hills Condominium Ass'n v. Bloomfield Twp.*, 437 Mich. 310, 322, 471 N.W. 2d 321, 326 (1991), *reh'g denied*, 437 Mich. 1280, 472 N.W. 2d 287 (1991); *Miller v. Fabius Township Bd., St. Joseph County*, 366 Mich. 250, 258-60, 114 N.W. 2d 205, 209-10 (1962); *Kleppe v. New Mexico*, 426 U.S. 529, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976); *Camfield v. United States*, 167 U.S. 518, 17 S. Ct. 864, 42 L. Ed. 260 (1987); *United States v. Lindsey*, 595 F. 2d 5 (9th Cir. 1979); *United States v. Brown*, 552 F. 2d 817 (1977), *cert. denied*, 431

U.S. 949, 97 S. Ct. 2666, 53 L. Ed. 2d 266 (1977); *Minnesota by Alexander v. Block*, 660 F. 2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007, 102 S. Ct. 1645, 71 L. Ed. 2d 876 (1982).

Reasonable use: *Thompson v. Enz*, 379 Mich. 667, 687, 154 N.W. 2d 473, 484 (1967); *Pierce v. Riley*, 35 Mich. App. 122, 192 N. W. 2d 366 (1971); *Kleppe v. New Mexico*, 426 U.S. at 540, 96 S. Ct. at 2292.

Stupak-Thrall v. Glickman
988 F. Supp. 1055 (W.D. Mich. 1997)

Background

The plaintiffs owned property along the shore of Crooked Lake which lies within the Sylvania Wilderness, which is part of the National Wilderness Preservation System, in the Ottawa National Forest. The plaintiffs argued that Amendment No. 5 of the Ottawa National Forest Land and Resource Management Plan, regulating the use of gas-powered motorboats on parts of Crooked Lake, was beyond the authority of the Forest Service.

Plaintiffs' Identities and Contentions

Kathy Stupak-Thrall; Michael A. Gajewski; and Bodil Gajewski, Plaintiffs.

The plaintiffs argued that the Forest Service lacked the authority to regulate the use of gas-powered motorboats on parts of Crooked Lake in the Sylvania Wilderness.

Defendants' Identities and Contentions

Daniel Glickman, Secretary of Agriculture; Michael P. Dombeck, Chief of the United States Forest Service; Bob Jacobs, Regional Forester for Region IX of the United States Forest Service; Phyllis Green, Forest Supervisor of the Ottawa National Forest; and the United States Forest Service; defendants.

The defendants contended that the regulation was within the authority of the Forest Service.

Case Issues

(1) Did earlier litigation bar this case from being heard?

(2) Did the plaintiffs have a valid existing right in the use of motorboats on Crooked Lake?

(3) Did the Forest Service have the authority to "promulgate rule preventing use of gas-powered motorboats" inside the Sylvania Wilderness?

(4) Did Amendment No. 5 to the Forest Service's Land and Resource Management Plan constitute a "taking" of personal property under the Fifth Amendment of the Constitution?

Court's Holdings

On whether earlier case barred the hearing of present suit: The District court held that earlier litigation (see summary for *Stupak-Thrall v. U.S.*, 843 F. Supp. 327) did not exclude the present case from being heard.

The plaintiffs had brought a case against the United States concerning Amendment No. 1 to the Ottawa National Forest Land and Resource Management Plan. In the earlier litigation, the court held that the Forest Service's amendment regulating use of sailboats and electronic items (ex. boomboxes) was reasonable and within the authority of the Forest Service. The defendants argued that the present issue (of the Forest Service's authority to promulgate regulations governing Crooked Lake) was resolved in earlier litigation. See *Stupak-Thrall v. U.S.*, 843 F. Supp. 327 (W.D. Mich. 1994) (Quist, J.), *aff'd*, 70 F. 3d 881 (6th Cir. 1995), *vacated*, 81 F. 3d 651 (6th Cir. 1996), *aff'd by an*

equally divided en banc court, 89 F. 3d 1269 (6th Cir. 1996), *cert denied,*—U.S. —, 117 S. Ct. 674, 136 L.Ed. 2d 711 (1997) .

In the present case, the district court decided that the plaintiffs' arguments were different enough from the earlier litigation so that they were legitimate issues before the court. As motorboat use was not discussed in *Stupak-Thrall I,* and the defendants' have used motorboats actively in the past as an existing right, the court decided that the issue could be heard in court.[1]

On whether the plaintiffs' use of motorboats was a valid existing right: The court held that the plaintiffs did have a valid existing right regarding the use of motorboats on Crooked Lake.

The plaintiffs showed that motorboat use had been an established use on Crooked Lake and that it was vital for their businesses. Stupak-Thrall showed that motorboat use was important for her livelihood through her rental business and had been for years. Hence, motorboat use was a valid existing right for Stupak-Thrall on Crooked Lake. Michael and Bodil Gajewski showed that motorboat use and rentals were crucial for their business's success. The Court found that motorboat use was a valid existing right for the Gajewskis as well.

On whether the Forest Service has the authority to promulgate Amendment No. 5 which regulated motorboat use on Crooked Lake: The court

[1] The plaintiffs included a challenge to the snowmobile restrictions under Amendment No. 1 in their suit. The court stated that any Amendment No. 1 claims should have been raised in the earlier case and that it was no longer ripe.

held that the Forest Service was unauthorized to pass Amendment No. 5 in the Ottawa National Forest Land and Resource Management Plan.

The court found that the National Wilderness Act of 1964, 16 U.S.C. § 1131 *et seq.*, allowed the Secretary of Agriculture to restrict established uses of motorboats in wilderness areas as the Secretary found necessary. "Within wilderness areas designated by this chapter the use of aircraft or motorboats, where the uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." 16 U.S.C. § 1133(d)(1). However, the court continued its consideration by pointing out that the Michigan Wilderness Act of 1987 (MWA), Pub.L. No. 100-184, 101 Stat. 1274, limited the Forest Service's authority with special language not in the National Wilderness Act. Specifically, the MWA includes: "wilderness areas ... are to be managed 'in accordance with the provisions of the Wilderness Act of 1964,' that management is '[s]ubject to valid existing rights.'" 988 F.Supp. at 1062.

On whether Amendment No. 5 constituted a "taking": The court held that Amendment No. 5 did constitute a "taking" of private property without just compensation under the Fifth Amendment of the Constitution. Because the plaintiffs used motorboats as part of their family business, the court found that the restriction would negatively affect their businesses. Therefore, the government ought to have compensated the plaintiffs for their anticipated loss in

business earnings as a result of the motorboat restrictions found in Amendment No. 5.

Result

The court found that motorboat restrictions on Crooked Lake constituted an unlawful act by the Forest Service and a taking under the Fifth Amendment.

However, the ruling applied only to Crooked Lake that has the unique situation of private citizens inhabiting its shoreline which depend on motorboat access for business.

The court granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment. Finally, Amendment No. 5 was declared null and void in that it was beyond the authority of the Forest Service as granted by the MWA.

Other Cases Referenced

Question of whether issue was previously litigated—*Stupak-Thrall v. United States*, 843 F.Supp. 327 (W.D. Mich.1994) (Quist, J.), *aff'd*, 70 F. 3d 881 (6th Cir.1995), *vacated*, 81 F. 3d 651 (6th Cir.1996), *aff'd by an equally divided en banc court*, 89 F. 3d 1269 (6th Cir.1996), *cert denied*, —U.S. —, 117 S. Ct. 764, 136 L.Ed. 2d 711 (1997); *Drummond v. Comm'r of Social Sec.*, 126 F. 3d 837, 840 (6th Cir.1997); *Heylinger v. State Univ. & Comm. College Sys.*, 126 F. 3d 849, 852 (6th Cir.1997) (quoting *Barnes v. McDowell*, 848 F. 2d 725, 728 n. 5 (6th Cir.1988) *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789, 102 L.Ed. 2d 780 (1989)); *Id* (quoting *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S. Ct. 892, 894 n. 1, 79 L.Ed. 2d 56

(1984)); *Drummond* (quoting *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414-415, 66 L.Ed. 2d 308 (1980)); *Sanders Confectionary Products v. Heller Financial*, 973 F. 2d 474, 480 (6th Cir.1992), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1046, 122 L.Ed. 2d 355 (1993); *Central Transport, Inc. v. Four Phase Systems, Inc.*, 936 F. 2d 256, 259 (6th Cir.1991).

Arbitrary and capricious action by Forest Service?—*Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S. Ct. 1890, 1901, 90 L.Ed. 2d 369 (1986).

"Valid existing rights"—*Hall v. Wantz*, 336 Mich. 112, 116-17, 57 N.W. 2d 462 (1953); *Burt v. Munger*, 314 Mich. 659, 663-64, 23 N.W. 2d 117 (1946); *Pierce v. Riley*, 81 Mich.App. 39, 45, 264 N.W. 2d 110, 114 (1978); *Thompson v. Enz*, 379 Mich. 667, 154 N.W. 2d 473, 476 (1967).

Statutory construction—*United States v. Bazel*, 80 F. 3d 1140, 1145 (6th Cir.1996), *cert. denied*, —U.S. —, 117 S. Ct. 210, 136 L.Ed. 2d 145 (1996).

Plain meaning of statute—*Audette v. Sullivan*, 19 F. 3d 254, 256 (6th Cir.1994); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L.Ed. 2d 391 (1992); *Id* at 254, 112 S. Ct. at 1149 (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 701-02, 66 L.Ed. 2d 633 (1981).

Personal property taking—*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15, 112 S. Ct. 2886, 2892-93, 120 L.Ed. 2d 798, 812 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L.Ed. 322 (1922)); *Agins v. Tiburon*, 447 U.S. 255, 262, 100 S. Ct. 2138, 2142, 65 L.Ed. 2d 106

(1980) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S. Ct. 383, 392-93, 62 L.Ed. 2d 332 (1979)).

Michigan riparian rights—*Peterman v. State Department of Natural Resources*, 446 Mich. 177, 521 N.W. 2d 499 (1994); *Mumaugh v. McCarley*, 219 Mich.App. 641, 646, 558 N.W. 2d 433, 435 (1996); *Difronzo v. Village of Port Sanilac*, 166 Mich.App. 148, 152, 419 N.W. 2d 756 (1988); *Id* (quoting *Hilt v. Weber*, 252 Mich. 198, 225, 233 N.W. 159 (1930).

McGrail & Rowley v. Babbitt
986 F. Supp. 1386 (S.D. Fla. 1997)

Background

This case involved Boca Grande Island, which lies within the Key West National Wildlife Refuge (KWNWR). The KWNWR, established in 1908, is managed by the United States Fish and Wildlife Service (FWS). Islands within the refuge were designated part of the National Wilderness Preservation System under the Wildlife Act of 1964. Pub. L. 88-577.

The FWS and State of Florida Department of Natural Resources developed a new management plan for two wildlife refuges, including the KNNWR, in 1992 called the "Management Agreement for Submerged Land Within the Boundaries of the Key West and Great Heron National Wildlife Refuges." The objectives of the Plan included protecting Boca Grande Key and its ecosystem.

The plan required permits for commercial operations within the wildlife refuges. A permit application process was designed. Permits would be awarded to commercial enterprises whose use was compatible with the purposes of the refuge.

McGrail and Rowley, Inc. (MRI), were commercial operators, running passengers via catamaran to Boca Grand Key. The FWS alerted MRI in January 1994 that a permit was required. MRI applied for a permit June 23, 1994. The FWS denied its application August 3, 1994, stating that MRI's use of the refuge was incompatible with the purposes of the refuge. MRI continued to carry

passengers via catamaran to the key without a permit. In October 1994, MRI appealed the FWS's decision. FWS responded by not processing the appeal, claiming, "'an appeal is meaningless' so long as MRI continued to use the refuge for commercial purposes without a permit." 986 F. Supp. at 1390. MRI filed suit against the FWS March 10, 1995, hoping the court would order the process of MRI's appeal as well as decide several other issues relating to the commercial permit process and operation within the refuge.

The court issued temporary restraining orders (TROs) March 21, 1995. First, the court forbid the government from seizing any of MRI's boats or from arresting any of the captains working for MRI. Second, the court prohibited MRI from breaking any federal laws relating to the KWNWR.

After the TROs were in place, FWS alerted MRI that it was proceeding with MRI's appeal. On May 22, 1995 the FWS Regional Director upheld the permit denial.

Now that the FWS processed MRI's appeal, Count 1 in this suit was moot. The other issues were addressed.

Plaintiff's Identities and Contentions

McGrail and Rowley, Inc., plaintiff.

McGrail and Rowley owned McGrail and Rowley, Inc. (MRI), a business running catamarans in the waters off Key West, Florida. MRI filed suit to order the FWS to file its permit application appeal and to resolve several issues concerning the FWS management and permit process. (see below)

Herbert Pontin, plaintiff.

Pontin, a captain for MRI, was cited for refuge trespass while operating an individual jet ski. He challenged the FWS action for citing him with a Notice of Violation for trespassing in refuge waters.

Defendants' Identities

Bruce Babbitt, Secretary of the United States Department of the Interior, and several officials of the United States Fish and Wildlife Service (FWS), defendants.

The defendants argued that the permit application process was legitimate and that the plaintiffs application was properly denied.

Case Issues

(1) What is the extent of judicial review for actions taken by the Fish and Wildlife Service? If subject to the court's review, what is the scope of judicial review?

(2) Did the FWS act in "bad faith?"

(3) Was the FWS action "arbitrary and capricious?"

(4) Was the FWS Refuge Manual binding on FWS actions?

(5) Did the FWS have authority over state lands and waters?

(6) How should refuge boundary violations be resolved?

Court's Holdings

On the extent of judicial review: The court held that the actions of the FWS were reviewable under § 706 of the Administrative Procedure Act. 5 U.S.C.

§ 701 *et seq.* Section 706 requires the court to restrict its review to the agency's administrative record.

The court could expand its review beyond the administrative record providing it could prove allegations that the FWS acted in "bad faith."

On whether the FWS acted in "bad faith": The court held that while the FWS acted in "bad faith" by refusing to process MRI's appeal, it found that the agency did not act in "bad faith" in the decision-making process.

On whether the agency's actions were arbitrary and capricious: The court held that the agency's decision that MRI's uses were incompatible with the purposes of the refuge was not arbitrary and capricious. The refuge and wilderness within it were established to protect wildlife, birds and their habitat. MRI's business ventures, including frisbee in the shallow water on the beach and kayaking around the shore, were found to have potentially negative impacts on the sensitive ecosystem of the keys. In reviewing the agency's decision, the court found that it acted appropriately.

On whether the FWS Manual was binding on FWS actions: The court found that the FWS Manual was not binding on FWS actions. While the manual provided guidance to the FWS, the court found no precedents in which manuals were found binding.

On whether the FWS had the authority to regulate non-federal lands and waters: The court held that the FWS had the authority to regulate commercial use of federal lands including submerged lands and adjacent state waters. The

authority was vested in the FWS through the Property Clause of the Constitution. The Property Clause states "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ...." 986 F. Supp. at 1394 *quoting* The Constitution, Article IV, § 3, cl. 2. In *United States v. Lindsey*, 595 F. 2d 5, 6 (9th Cir. 1979), the court expanded the federal government's authority to include, "non-federal land 'when reasonably necessary to protect adjacent federal property or navigable waters.'" 986 F. Supp. at 1394. Therefore, the court held that the FWS was acting within its authority in regulating access to state-owned waters off Boca Grande Key.

On how trespass violations should be resolved: The court held that because the payment schedule for refuge trespasses was defective, it could not decide on the plaintiffs' challenge to agency authority.

Administrative Order 89-39, by United States District Court for the Southern District of Florida, established that refuge trespass violations could be resolved with payment of fines. The court held that refuge violations were classified as Petty A violations. Petty B violations, according to Local Rule 88.4 could be resolved with payments in collateral. The court found that because refuge trespasses were Petty A offenses, the Administrative Order 89-39 was in violation of Local Rule 88.4 and was therefore, null and void.

Result

The court held that the FWS acted appropriately in denying the plaintiff's permit application. The court ordered MRI to provide an account of fees and costs for reimbursement under Equal Access to Justice Act.

Other Cases Referenced

Administrative Procedure Act—*Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 105 S. Ct. 1598, 84 L.Ed. 2d 643 (1985); *Organized Fisherman of Florida, Inc. v. Franklin*, 846 F. Supp. 1569, 1573 (S.D. Fla. 1994); *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1243, 36 L.Ed. 2d 106 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 410 U.S. 402, 416, 91 S. Ct. 814, 823, 28 L.Ed. 2d 136 (1971); *Bowman Transp., Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286, 95 S. Ct. 438, 442, 42 L.Ed. 2d 447 (1974).

Enforcement of Specific Refuge Manual Provision—*Hamlet v. United States*, 63 F. 3d 1097, 1103 (Fed.Cir. 1995); *Lumber, Production and Industrial Workers Log Scalers Local 2058 v. United States*, 580 F. Supp. 279 (D.Or.1984); *Western Radio Services Co., Inc. v. Espy*, 79 F. 3d 896 (9th Cir. 1996).

Federal Authority over State-Owned Lands—*United States v. Lindsey*, 595 F. 2d 5, 6 (9th Cir. 1979); *State of Minnesota by Alexander v. Block*, 660 F. 2d 1240 (8th Cir. 1981).

Qualified Immunity—*Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed. 2d 396 (1982).

Attorney's Fees—*Dow v. Busbee*, 684 F. 2d 1375, 1379 (11th Cir. 1982); *Iranian Students Ass'n v. Sawyer*, 639 F. 2d 1160, 1163 (5th Cir. 1981); *Martin v. Heckler*, 773 F. 2d 1145, 1149 (11th Cir. 1985); *Robinson v. Kimbrough*, 652 F. 2d 458, 465 (5th Cir. 1981); *United States v. 4880 S.E. Dixie Highway*, 838 F. 2d 1558, 1561 (11th Cir. 1988); *Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 159 n. 7, 110 S. Ct. 2316, 2319 n. 7, 110 L.Ed. 2d 134 (1990); *Pierce v. Underwood*, 487 U.S. 552, 566, 108 S. Ct. 2541, 2550, 101 L.Ed. 2d 490 (1988); *Taylor Group, Inc. v. Johnson*, 919 F. Supp. 1545, 1549 (M.D.Ala.1996).

National Audubon Society v. Hodel
606 F. Supp. 825 (D. Alaska 1984)

Background

The Secretary of Interior exchanged St. Matthew Island, a wilderness area, within the Alaska Maritime National Wildlife Refuge for lands in two other wildlife refuges, the Kenai and Yukon Delta National Wildlife Refuges, on August 10, 1983, to several corporations. The corporations, Cook Inlet Region, Inc., Calista Corp., and Sea Lion Corp., known as CIRI, were native Alaskan corporations. After the suits were filed, the Secretary defended his actions under Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. § 3192(h).

The lawsuits were brought by plaintiffs concerned about the probable loss of a treasured wilderness area that provided crucial habitat for wildlife and birds. CIRI planned to excavate oil and gas from the area, an action which could damage the ecosystem of St. Matthew Island. A draft environmental statement outlined possible plans, including a potential pipeline to St. Matthew Island or offshore loading with facilities to be built on St. Matthew Island.

The Alaska Maritime National Wildlife Refuge was designated for environmental protection under ANILCA in 1980. 43 U.S.C. §§ 3101-3233 (1982). St. Matthew was designated as wilderness under the national Wilderness Act, 16 U.S.C.A. § 1131 *et seq*, on October 23, 1970. Alaska Native Claims Settlement Act (ANSCA), which passed in 1971, 43 U.S.C. §§ 1601-1628 (1982), was enacted as a settlement concerning Native claims of subsistence use and occupation of

Alaskan lands. ANILCA and ANCSA are interrelated in the present case because some ANCSA provisions were incorporated into ANILCA's statutory framework.

Plaintiffs' Identities and Contentions

National Audubon Society, Bering Sea Fishermens' Association, Trustees for Alaska, the Wilderness Society, Defenders of Wildlife, National Wildlife Refuge Association, Friends of the Earth, Natural Resources Defense Council, Inc.

In case A83-425, the plaintiffs' sought declaratory and injunctive relief. First, plaintiffs sought judicial declaration that the Secretary's land exchange was unlawful and invalid, and second, the plaintiffs sought a permanent injunction preventing the defendants from completing the proposed plan of activity on St. Matthew Island.

In case A84-401, the plaintiffs' argued that the defendants' suggested plan to fill in wetlands would require CIRI to have a permit from the United States Army Corps of Engineers (Corps).

In case A84-402, the plaintiffs' argued that an Environmental Impact Statement was required before the oil and gas exploration project could continue.

Defendants' Identities and Contentions

Donald P. Hodel, William P. Horn, Robert Jantzen, Keith Schreiner, Cook Inlet Region, Inc., Calista Corporation, Sea Lion Corporation, Malcolm Baldridge, John V. Bryne.

Defendants argued that the Secretary's actions were not subject to judicial review.

CIRI argued that the land exchange created a private inholding, which was not subject to federal restrictions as long as the Regional Director received construction and operation plans for comment.

Case Issues

(1) Was the Secretary of Interior's decision reviewable by the court?

(2) What is the standard of review for the Secretary's decision?

(3) What did the court decide on the legality of the land exchange?

Court's Holdings

On whether the Secretary's decision was reviewable: The court held that the Secretary's decision was reviewable. In rejecting CIRI's claim that the Secretary's actions were unreviewable, the court cited earlier cases in which agency decisions for the "public interest" were reviewable. Ninth Circuit Judge Wright found that judicial review was precluded only in cases when "statutes are drawn so broadly that in a given case 'there is no law to apply.'" 606 F. Supp. at 834. See *FCC v. WNCN Listeners* Guild, 450 U.S. 582, 101 S. Ct. 1266, 67 L.Ed. 2d 521 (1980), and *Keating v. Federal Aviation Administration*, 610 F. 2d 611 (9th Cir. 1979).

The court concluded that the Secretary's decision was reviewable under the requirements of § 1302(h) of ANILCA. The court looked at the language of ANILCA and its specifications directing the Secretary's actions. Under ANILCA,

the Secretary must meet two requirements before a land exchange is approved. First, the land exchange must be "for the purposes of [ANILCA]." Second, the land exchange is to be in "the public interest" in the case that the lands involved are of unequal value. 16 U.S.C. § 3192(h) (1982). Therefore, the court may review the Secretary's actions to determine whether he fulfilled his statutory duty to make a final decision in the public's interest.

On the standard of review for the Secretary's decision: The court held that the Secretary's actions should be reviewed under the "arbitrary and capricious" standard. Precedents (stated above) determined that the Ninth Circuit Court applied the arbitrary and capricious standard to earlier cases.

The court also held that in reviewing the Secretary's decision, it must limit itself to the Secretary's factors and consideration thereof, rather than including its own judgment. The Secretary's actions were explained in two documents. The Department of Interior's *Record of Decision* and the *Public Interest Determination for the Proposed Acquisition of Inholdings in Kenai and Yukon Delta National Wildlife Refuges by Exchange for Lands on St. Matthew Island, Alaska.* The Record of Decision described the documents used and referred to in the decision process. The Public Interest Determination outlined the factors considered in the decision and the explanations for the final decision made by the Secretary. Therefore, the court considered the Public Interest Determination and Record of Decision in making its conclusions about the legality of the St. Matthew Island land exchange.

What did the court decide about the Secretary's actions: In consideration of the evidence before the Secretary, the court held that the Secretary's decision was an abuse of discretion. While the Secretary had determined that the lands received in exchange for St. Matthew Island enhanced the national wildlife and conservation worth, the court decided that the Secretary erred in his judgment.

The Yukon Delta lands received in the exchange were put under a non-development easement in the Kokechik Bay. These 8,000 acres were home to numerous nesting and brood rearing waterfowl. The court decided that while the land was enormously valuable, it was already protected. As part of the Delta NWR, the area was under the authority of § 22(g) of ANCSA which states that "*every patent* issued by the Secretary pursuant to this chapter—which covers lands lying within the boundaries of a National Wildlife Refuge on December 18, 1971—*shall contain a provision that such lands remain subject to the laws and regulations governing use and development of such Refuge.*" 43 U.S.C. § 1621(g) (1982) (emphasis added).

The land exchange granted the Secretary 1100 acres on Nunivak Island. The island is part of the Yukon Delta NWR so that conservation of wildlife is one of its primary purposes. The land is also incorporated in ANCSA as an area in which native activities that are compatible with refuge purposes are permitted. Section 14(h) and § 22(g). 43 U.S.C. § 1613(h) (1982)

The land exchange included 2254 acres of CIRI claims in the Kenai NWR. Again, these lands were largely protected as part of the refuge. Overall, the court

decided that these lands were already protected from incompatible uses so that the land exchange did not present a significant benefit to national conservation values.

Despite these determinations, the court decided that the Secretary's actions were not arbitrary or capricious because the land exchange ensured the recreational objectives of the refuge.

However, the court found that the Secretary's determination that the land exchange would not have a permanent impact on St. Matthew was incorrect. (For summary of potential damage, see 606 F. Supp. at 843-44).

In the Public Interest Determination, the Secretary found the exchanges to be favorable for wildlife refuge and conservation worth. He also determined that St. Matthew would not suffer long-term environmental damage. Under § 22(g) of ANCSA and § 304(b) of ANILCA, the Secretary is allowed to permit activities on refuges only if they are "compatible" with the refuge's purposes. 606 F. Supp. at 842. The Secretary claimed that the oil development would be compatible with the refuge's purpose and that disturbances would be temporary.

In light of the potential long-term environmental damage to St. Matthew Island, the court determined that national conservation objectives would not be better off from the exchange and that the increased recreational opportunities in the Kenai and Yukon Delta NWRs did not mitigate the negative impacts of the land exchange.

Result

The preliminary injunction was granted based on the Secretary's abuse of discretion. The court declared the land exchange invalid.

Other Cases Referenced

Standing—*Kale v. United States*, 489 F. 2d 449, 454 (9th Cir. 1973); *Raypath, Inc. v. City of Anchorage*, 544 F. 2d 1019 (9th Cir. 1976); *Rowe v. United States*, 464 F. Supp. 1060, 1075 (D.Alaska 1979), *aff'd in part and rev'd in part*, 633 F. 2d 799 (9th Cir. 1980), *cert. denied*, 451 U.S. 970, 101 S. Ct. 2047.

Reviewability of Secretary's Decision—*Lewis v. Hickel*, 427 F. 2d 673 (9th Cir. 1970), *cert denied*, 400 U.S. 992, 91 S. Ct. 456; *National Forest Preservation Group v. Butz*, 458 F. 2d 408 (9th Cir. 1973); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 101 S. Ct. 1266; *Keating v. Federal Aviation Administration*, 610 F. 2d 611 (9th Cir. 1979).

Review of Secretary's Public Interest Determination—*Chevron U.S.A., Inc. v. NRDC*, —U.S.—, 104 S. Ct. 2778; *NAACP v. FPC*, 425 U.S. 662, 96 S. Ct. 1806, *Confederated Tribes & Bands v. F.E.R.C.*, 746 F. 2d 466 (9th Cir. 1984); *People of the Village of Gambell v. Clark*, 746 F. 2d 572 (9th Cir. 1984); *Environmental Defense Fund v. Andrus*, 596 F. 2d 848 (9th Cir. 1979) (citing *Lathan v. Volpe*, 455 F. 2d 1111 (9th Cir. 1971)).

Granting injunctive relief—*American Motorcyclist Association v. Watt*, 714 F. 2d 962 (9th Cir. 1983).

Sierra Club v. Lyng
663 F. Supp. 556 (D. D.C. 1987)

Case History

Case followed temporary injunction in earlier case, *Sierra Club v. Block*, 614 F. Supp. 488.

Background

This case was brought by environmental organizations against the Secretary of Agriculture (Secretary) concerning a program implemented in wilderness areas to control Southern Pine Beetle infestations.

The program concentrated on controlling Southern Pine Beetle infestations in state and privately-owned lands as well as adjacent wilderness areas. The wilderness areas included Caney Creek Wilderness, Ouachita National Forest, Arkansas; Kisatchie Hills Wilderness Area, Kisatchie National Forest, Louisiana; Black Creek Wilderness Area and Leaf Wilderness Area, De Soto National Forest, Mississippi.

Following the plaintiffs original complaints, the court preliminarily enjoined the program in wilderness areas, except for selective cutting around woodpecker colonies, to benefit the woodpeckers, until the Forest Service completed an environmental impact statement (EIS). *Sierra Club v. Block*, 614 F. Supp. 488 (D. D.C. 1985). The plaintiffs raised three concerns over the program. First, they claimed that the program required an Environmental Impact

Statement (EIS) according to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1982), before it could be implemented. Second, they argued that the program violated the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982), by possibly causing harm to the endangered Red Cockaded Woodpecker. Lastly, the plaintiffs claimed that the program, requiring tree-cutting and chemical-spraying in wilderness areas, violated Section 2 of the Wilderness Act. 16 U.S.C. §§ 1131-1136 (1982).

The Forest Service completed the EIS process on March 6, 1987, and the Secretary delivered a Record of Decision on April 6, 1987. After the EIS was completed, the plaintiffs' complaints were heard.

The NEPA claim was settled as the Forest Service completed an EIS. The ESA claim was declared moot. The parties agreed the issue was moot as the plaintiffs could not show that the Forest Service's program constituted a "taking" under the ESA. 16 U.S.C.A. § 1532(19). The only claim to be heard was the Wilderness Act claim.

Plaintiffs' Identities and Contentions

The Sierra Club and the Wilderness Society, plaintiffs.

The plaintiffs contended that the Secretary's actions in implementing the Southern Pine Beetle infestation control plan were unjustified under the appropriate language of the Wilderness Act. The plaintiffs moved for summary judgment.

Defendants' Identities and Contentions

Richard E. Lyng, Secretary of Agriculture, et al., defendants.

The defendants contended that the Secretary's actions were reasonable and within his discretion. The defendants moved for summary judgment.

Case Issues

(1) What statute governed the Secretary's actions?

(2) How did the court interpret Section 4(d)(1) of the Wilderness Act related to the question of whether cutting along the borders of wilderness areas was "necessary"?

(3) Were the Secretary's actions reasonable?

(4) Under the beetle control program, would federally-designated wilderness areas be sacrificed for private interests?

Court's Holdings

On what statute governed the Secretary's actions: The court and both parties agreed that the Secretary's actions were governed by Section 4(d)(1) of the Wilderness Act. The section allows the Secretary to take "such measures [within Wilderness Areas] ... as may be necessary in control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable." 16 U.S.C. § 1123(d)(1) (1982).

On the court's interpretation of Section 4(d)(1)'s "necessary" wording: In *Sierra Club v. Lyng*, 662 F. Supp. 40 (D.D.C. 1987), the court held that under the Wilderness Act, the Secretary had "an affirmative burden of justifying his actions

'by demonstrating they are necessary to effectively control the threatened harm that prompts the action being taken.'" 663 F. Supp. at 558-59 *quoting* 662 F. Supp. 40.

The plaintiffs interpreted "necessary" to mean that the Secretary needed scientific proof that the cutting was necessary before the program could be implemented.

The court found that the plaintiffs had interpreted "necessary" too narrowly. Specifically, the court held that "necessary" should be read as the means "needed to achieve a certain result or effect," a definition according to the American Heritage Dictionary of the English Language 877 (1981). The court concluded that:

> [t]he pertinent section of the statute is therefore most reasonably construed as allowing the Secretary to use measures that fall short of full effectiveness so long as they are reasonably designed to restrain or limit the threatened spread of beetle infestations from wilderness land into the neighboring property, to its detriment. 663 F. Supp. at 556.

On whether the Secretary's actions were reasonable: The court held that the Secretary's actions were reasonable pursuant to Section 10 of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A)(1982).

Reviewing Forest Service records on beetle infestation control and relevant scientific opinion, the court found that the Secretary's decisions were reasonable and not arbitrary or capricious.

On whether wilderness areas would be sacrificed for private land interests: The court held that wilderness areas would not be sacrificed for private land interests. Rather, the court found that the Secretary had properly explained that private landowners would exert the same amount of effort as the Forest Service to control beetle infestation. That said, the court found that the Secretary had met his obligations under the Wilderness Act.

Result

The court granted the defendants summary judgment on the Wilderness Act claims. The plaintiffs motion for summary judgment was denied. The ESA claim was moot. The NEPA claim was dismissed.

Other Cases Referenced

Earlier Litigation—*Sierra Club v. Block*, 614 F. Supp. 488 (D.D.C. 1985); *Sierra Club v. Lyng*, 622 F. Supp. 40, 42 (D.D.C. 1987).

"Necessary" interpretation—*Sierra Club v. Lyng*, supra; *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L.Ed. 579.

United States v. Gregg
290 F.Supp. 706 (W.D. Wash. 1968)

Background

The defendant was convicted by the United States for landing an airplane in a federally-designated wilderness area. This case was presented before the court on the appeal by the defendant.

Plaintiff's Identity and Contentions

The United States of America, plaintiff.

The United States contended that the defendant was lawfully and properly convicted.

Defendant's Identity and Contentions

Vean R. Gregg, defendant.

The defendant claimed that he was unlawfully convicted for landing an airplane in a National Forest Wilderness. He claimed that the Wilderness Act permitted airplane landings where there was established use. He argued that landings could continue unless the Secretary of Agriculture banned them and furthermore, that the Secretary did not have the power to prohibit landings altogether. Finally, Gregg argued that the United States could not treat his landing as a criminal violation as no penalty for wilderness landings was written in law.

Case Issues

(1) Are aircrafts allowed in national wilderness areas?

(2) Would an illegal aircraft landing constitute a criminal violation in a national wilderness area?

Court's Holdings

On whether aircrafts are allowed in national wilderness areas: The court held that aircraft landings were outlawed in national wilderness areas according to the Wilderness Act of 1964 and a federal regulation promulgated by the Secretary of Agriculture. 16 U.S.C. § 1133(c), (d)(1). 36 CFR 251.75, 16 U.S.C. § 551. Section 1133(c) states,

> except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be ... no landing of aircraft ... within any such area."

Section 1133(d)(1) states that aircraft landings may be permitted in areas where there has been an established use. The court stressed the use of the word "may" rather than "shall" in the section.

After the passage of the Wilderness Act of 1964, aircraft landings continued in areas where previous use was established. However, aircraft landings, except where permitted in the Wilderness Act, were banned in a regulation declared by the Secretary of Agriculture. 36 CFR 251.75, 16 U.S.C. §

551. In the regulation, the Secretary granted the Chief of the Forest Service the power to condone landings in cases of need where prior use was established. According to these aspects of the Wilderness Act and Code of Federal Regulations, the court held that aircraft landings were not permitted in wilderness areas unless specifically allowed by the Secretary of Agriculture or Chief of the Forest Service.

On whether an illegal aircraft landing would constitute a criminal violation: The court held that an illegal aircraft landing in a national wilderness area did constitute a criminal violation according to 16 U.S.C. § 551 and the earlier case law in *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965). Section 551 states,

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the ... national forests ... and he may make such rules and regulations ... as will insure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of ... such rules and regulations shall be punished by a fine of not more that $500 or imprisonment for not more than six months, or both.

The court in *McMichael v. United States* relied on section 551 to uphold a conviction in that case in which the plaintiffs used motorized vehicles in a primitive area before the Wilderness Act had been passed. In the present case, the court decided that section 551 designated infractions of the Wilderness Act as criminal acts. The Wilderness Act prohibited the plaintiff's landing. Therefore, the action was criminal according to section 551.

Result

The court confirmed the United States Commissioner's decision that the aircraft landing was a criminal act. The court found that the plaintiff's appeal was groundless.

Other Cases Referenced

16 U.S.C. § 551—*McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965).

Izaak Walton League of America v. St. Clair
497 F. 2d 849 (8th Cir. 1974)

Case History

55 F.R.D. 139 (1972)—*judgment affirmed by* 497 F. 2d 849 (1974)—*cert. denied by* 419 U.S. 1009 (1974).

Background

This case focused on the mining rights of defendant, George W. St. Clair, in the Boundary Waters Canoe Area. In 1969, St. Clair conducted exploratory work in the 150,000 acres of land in which his mining rights lie and determined that drilling would be appropriate in the area. St. Clair did not have a permit to conduct the drilling. He alerted the Forest Service of his plan to drill that in turn notified him that it was not in favor of the proposed drilling. Throughout the litigation the Forest Service had not completed the administrative permit process for St. Clair.

The Boundary Waters Canoe Area is part of the Superior National Forest in northern Minnesota. The Superior National Forest (3,000,000 acres) was protected as a national forest in 1909 by President Theodore Roosevelt. The land comprising the present day Boundary Waters Canoe Area (1,031,204 acres) was included in the forest's designation. As part of the designation, President Roosevelt found "at least inferentially that the Superior National Forest was more valuable for forest than for mineral." 353 F. Supp. at 703. The Secretary of

Agriculture established the first roadless area in the Superior National Forest in 1927. After a number of roadless areas were designated, a regulation was passed combining them into the Boundary Waters Canoe Area (BWCA) on January 27, 1958.

The national Wilderness Act of 1964, 16 U.S.C.A. § 1131 et seq., established the BWCA as part of the National Wilderness Preservation System. The Wilderness Act allowed mineral activity for existing rights so long as the exploration is compatible with the wilderness character of the area. Similarly, mineral extraction was permitted until December 31, 1983 so long as the means of extraction were deemed appropriate by the Secretary of Agriculture. 16 U.S.C. § 1133(d)(2) and (3).

The Secretary of Agriculture appointed a BWCA Review Committee in 1964 that made recommendations regarding mining activity in the BWCA. The committee recommended that mining not be allowed and that permission granting mining permits ought to be revoked. 353 F. Supp. at 706. The Secretary responded with a report saying that "consent of the Department of Agriculture not be given for mining and mineral leasing in the Boundary Waters Canoe Area, except in a national emergency ..." 353 F. Supp. at 706.

Plaintiff's Identity and Contention

Izaak Walton League of America, plaintiff.

The plaintiffs argued that mining was banned by the Wilderness Act. In the appeal, the plaintiffs supported the decision of the District Court.

Defendant's Identity and Contention

George W. St. Clair, a citizen holding mineral rights to 150,000 acres in the Boundary Waters Canoe Area, appellant.

The appellant argued that mining was permitted in the BWCA according to federal laws and that the district court erred in its granting of an injunction against him. Furthermore, St. Clair argued that the district court's decision constituted a taking of his private property rights.

Robert L. Herbst, Commissioner of Conservation of the State of Minnesota, appellant.

Herbst, a representative for the state of Minnesota argued that the state had standing and could make cross-claims in the suit although it was denied by the district court.

Earl L. Butz, Secretary of Agriculture, et al., appellants.

Butz represented the federal interests in the case. The federal appellants argued that the doctrine of primary jurisdiction should have been applied to the present case. It disagreed with the district court that mining was disallowed by the Wilderness Act and claimed that some compatible mining was permitted.

Case Issues

(1) Could the court rule on the plaintiff's claims?

(2) Did the district court err in its decision?

Court's Holdings

On whether the court could rule on the plaintiff's claims: The court of appeals held that it could not rule on the plaintiff's claims. The case at hand involved a legal question (did the Wilderness Act bar the defendant from mining?) while enforcement of the decision required resolution of the issues at hand by the administrative process (would the Forest Service grant St. Clair a permit?).

The court held that the Forest Service had to grant a final decision on St. Clair's permit to drill in the BWCA before the court could proceed with the decision.

On whether the district court erred in its decision: The court of appeals found that the district court erred in its earlier decision. The court reversed the district court's decision and remanded the case with instructions that the Forest Service needed to complete its permit review before the case was subject to judicial review.

Result

The case was reversed and remanded with instructions that the Forest Service complete permit process before the case was subjected to judicial review.

Other Cases Referenced

Establishment of Roadless Areas—*United States v. Perko*, 108 F. Supp. 315, 316 (D.Minn.1952), aff'd *Perko v. United States*, 204 F. 2d 446 (8th Cir. 1953), cert. denied 346 U.S. 832, 74 S. Ct. 48, 49, 98 L.Ed. 355 (1953); see companion cases of

United States v. Perko, 8 Cir., 133 F. Supp. 564 (D.Minn.1955); 141 F. Supp. 372 (D.Minn.1956); *Bydlon v. United States*, 146 Ct.Cl. 764, 175 F. Supp. 891 (1959).

Zoning—*Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L.Ed. 348 (1915); *St. Paul v. Chicago, St. Paul, Mpls. and Omaha Ry.*, 413 F. 2d 762 (8th Cir.1969); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593, 82 S. Ct. 987, 8 L.Ed. 2d 130 (1962); *City of Marysville v. Standard Oil Co.*, 27 F. 2d 478 (8th Cir.1928), aff'd, *Standard Oil Co. v. Marysville*, 279 U.S. 582, 49 S. Ct. 430, 73 L.Ed. 856 (1929); *Kiges v. City of St. Paul*, 240 Minn. 522, 62 N.W. 2d 363, 369-70 (1953); *State ex rel. Beery v. Houghton*, 164 Minn. 146, 204 N.W. 569, 54 A.L.R. 1012 (1925), aff'd mem., 273 U.S. 671, 47 S. Ct. 474, 71 L.Ed. 832 (1927), *Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L.Ed. 303 (1926); *Gorieb v. Fox*, 274 U.S. 603, 608-609, 47 S. Ct. 675, 71 L.Ed. 1228 (1927); *McMahon v. City of Dubuque, Iowa*, 255 F. 2d 154, 158-159 (8th Cir.), cert. denied, 358 U.S. 833, 79 S. Ct. 53, 3 L.Ed. 2d 70 (1958); *Naegele Outdoor Adv. Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W. 2d 206, 212 (1968); *State ex rel. Howard v. Village of Roseville*, 244 Minn. 343, 70 N.W. 2d 404, 407 (1955); *South Carolina State H. Dept. v. Barnwell Bros.*, 303 U.S. 177, 191-192, 58 S. Ct. 510, 82 L.Ed. 734 (1938); *Weinberg v. Northern Pac. Ry. Co.*, 150 F. 2d 645, 648 (8th Cir. 1945); *Naegele Outdoor Adv. Co. v. Village of Minnetonka*, [281 Minn. 492] 162 N.W. 2d at 209; *American Wood Products Co. v. City of Minneapolis*, 21 F. 2d 440, 444 (D.Minn.1927) (J. Sanborn), aff'd, 35 F. 2d 657 (8th Cir.1929); *Kiges v. City of St. Paul*, [240 Minn. 522,] 62 N.W. 2d at 369; *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L.Ed. 27 (1954); *Naegele Outdoor Adv. Co. v.*

Village of Minnetonka, supra, State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 174 N.W. 885, 176 N.W. 159, 162, 8 A.L.R. 585 (1920); *United States v. Gregg*, 290 F. Supp. 706 (W.D.Wash.1968); *McMichael v. United States*, 355 F. 2d 283 (9th Cir.1965); *United States v. Foresyth*, 321 F. Supp. 761 (D.Colo.1971); *West Virginia Highlands Conserv. v. Island Greek Coal Co.*, 441 F. 2d 232 (4th Cir.1971).

Abandonment, Laches, Equities—*Washburn v. Gregory Co.*, 125 Minn. 491, 147 N.W. 706 (1914); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W. 2d 800 (1957); *Klass v. Twin City Federal Savings and Loan Ass'n*, 291 Minn. 68, 190 N.W. 2d 493 (1971); *Heywood v. Northern Assurance Co.*, 133 Minn. 360, 158 N.W. 632 (1916).

Otter Creek Coal Company v. United States
231 Ct.Cl. 878 (1982)

Background

The plaintiff owned mining rights to an area within the Otter Creek Wilderness Area of the National Wilderness Preservation System. 16 U.S.C. § 1131 *et seq.* The defendant owned the surface rights above the area in question. Earlier in the litigation, the court determined that the plaintiff had to be denied a permit application before the court could enter a final decision. The plaintiff applied to the Secretary of Interior through the Office of Surface Mining & Reclamation (OSM) and the Secretary of Agriculture through the Forest Service (USFS).

The court described this situation as a role reversal. The government did not want to deny the permit as it might constitute a taking which was discouraged by the legislative history of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). 30 U.S.C. §§ 1201 *et seq.* The government claimed the plaintiff was unwilling to cooperate with the government's guidelines. For example, the government encouraged the plaintiff to pursue a declaration of "valid existing rights" so that it's mining claim could be granted under the SMCRA. 30 U.S.C. § 1272(e).

In the two earlier court reports the court decided that no decision could be made until the government made a final decision on the plaintiff's application.

However, after the plaintiff applied to the Secretaries, the Secretaries halted the decision process as the application would have been denied.

Plaintiff's Identity and Contention

Otter Creek Coal Company, plaintiff.

The plaintiff pursued this suit arguing that the designation of the wilderness area constituted a legislative taking of its mining claim. It claimed that the Wilderness Act of 1964, Surface Mining Control and Reclamation Act of 1977, and the Eastern Wilderness Act of 1975 prohibited mining and that it should be reimbursed for the legislative taking. 16 U.S.C. § 1131 *et seq.*; 30 U.S.C. §§ 1201 *et seq.*; Pub. L. No. 93-622, 99 Stat. 2096.

Defendant's Identity and Contention

United States of America, defendant.

The United States, under the direction of the Surface Mining Control and Reclamation Act of 1977, wanted to avoid a taking claim in this situation. 30 U.S.C. §§ 1201 et seq.

Case Issues

(1) Could Otter Creek Coal Company mine in the Otter Creek Wilderness Area?

(2) Could Otter Creek Coal Company use the "valid existing rights" claim under the Surface Mining Control and Reclamation Act of 1977?

Court's Holdings

On whether Otter Creek Coal Company could mine in the Otter Creek Wilderness Area: The court held that if the government could design a plan to mine in the Otter Creek Wilderness Area which met all regulations, the Otter Creek Coal Company could coal mine in the wilderness.

On whether Otter Creek Coal Company could claim "valid existing rights" under SMCRA: The court held that Otter Creek could pursue "valid existing rights" as the definition of "valid existing rights" was vague. The plaintiff argued that it could not pursue "valid existing rights" because it did not pass the "all permits" test which was part of the regulation adopted in 1979. The court disagreed because the regulations had become more permissive as a means to avoid takings. Therefore, the plaintiff could and should pursue its "valid existing rights."

Result

The court affirmed the trial judge's order that encouraged the plaintiff and defendant to determine whether an agreement for coal mining could be reached in the Otter Creek Wilderness Area.

Other Cases Referenced

Surface Mining Control and Reclamation Act—*Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-97 (1981); *Hodel v. Indian*, 452 U.S. 314, 333-35 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

"Valid Existing Rights"—*Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. Feb. 26, 1980), aff'd 653 F. 2d 514, *cert. denied*; *Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981).

Pacific Legal Foundation v. Watt
529 F. Supp. 982 (D.Mont. 1981)

Case History

529 F. Supp. 982 (D. Mont. 1981)—*supplemented by* 539 F. Supp. 1194 (D. Mont. 1982)

Background

The wilderness areas at issue included the Bob Marshall, Scapegoat and Great Bear Wilderness that were designated as part of the National Wilderness Preservation System under the national Wilderness Act of 1964. 16 U.S.C. § 1131 *et seq.* (1976). The case concerned mineral activity in the wilderness areas. Mining was addressed in the Wilderness Act that stated that mining could continue until midnight December 13, 1983, after which mining exploration and leasing would cease completely.

The Federal Land Policy and Management Act of 1976 (FLPMA) includes a provision for emergency public land withdraws to be used by the Secretary of Interior. 43 U.S.C.A. § 1701 *et seq.* Section 204(e) allows the Secretary to withdraw public lands from mineral activity if either the Committee on Interior and Insular Affairs of the House of Representatives or the Committee on Energy and Natural Resources of the Senate apprises the Secretary that an emergency situation exists for the public lands.

The House Committee on Interior and Insular Affairs voted 23 to 18 on May 21, 1981, for a resolution stating that an emergency situation existed in the

Bob Marshall, Scapegoat and Great Bear Wilderness Areas. The resolution found that "'extraordinary measures' must be taken 'to preserve values that otherwise would be lost.'" 529 F. Supp. at 986. As a result, the Committee chairman directed the Secretary of Interior to withdrawal lands in the Bob Marshall, Scapegoat, and Great Bear Wilderness Areas from mining exploration and leasing until Jan. 1, 1984.

The Secretary withdrew the lands under Public Land Order No. 5952 on June 1, 1981.

Plaintiffs' Identities and Contentions

Pacific Legal Foundation (PLF), et al., plaintiffs.

Mountain States Legal Foundation, plaintiff.

Pacific Legal Foundation and Mountain States Legal Foundation (MSLF) brought this suit against the Secretary of the United States Department of the Interior, James Watt, to dispute the withdrawal of certain wilderness lands from mineral activity. The plaintiffs included eight individuals who are members of the MSLF and six individuals who support PLF. All individuals held lease applications to wilderness lands within the areas withdrawn under Public Land Order No. 5952.

Plaintiffs argued that (1) the House instructions to withdraw lands under § 204(e) violated that Secretary of Agriculture's discretionary control of determining scope and duration of the withdrawal, and (2) the House directive

conflicted with § 4(d)(3) of the Wilderness Act which permitted mineral exploration and leasing activities until Jan. 1, 1984.

Defendants' Identities and Contentions

James G. Watt, Secretary of the United States Department of Interior, John R. Block, Secretary of the United States Department of Agriculture, defendants.

The Bob Marshall Alliance, the Wilderness Society, and the Sierra Club, intervening-defendants.

The federal defendants contended that the plaintiffs lacked standing to sue, but wrote that,

> if plaintiffs have standing to sue, the Committee had no statutory authority to direct the Secretary to withdraw the wilderness areas and the Secretary had no authority to withdraw the lands; and ... that portion of section 204(e) which authorized Committee's emergency withdrawal resolution is unconstitutional for essentially the same reasons urged by the plaintiffs. 529 F. Supp. at 987.

Case Issues

(1) Did the House directive "impermissibly conflict" with the National Wilderness Act of 1964?

(2) May a Congressional Committee establish the scope and duration of a "withdrawal" under Section 204(e) of FLPMA of wilderness lands from mineral and gas leasing?

Court's Holdings

On the conflict between the House directive and the Wilderness Act: The court held that the House's resolution did conflict with the Wilderness Act. The

resolution prohibited mineral exploration and leasing activities until Jan. 1, 1984 whereas the Wilderness Act permitted mineral exploration and leasing activities until Jan. 1, 1984. 16 U.S.C.A. § 4(d)(3).

On Section 204(e) of FLPMA: The court found that the House Committee did not have the power to direct the Secretary to remove public lands under the Federal Lands Policy and Management Act (FLPMA) section 204e. Rather, section 204(e) permitted the House Committee to recommend a withdrawal of public land in the case of an emergency situation, but the Secretary must determine the scope and duration of the withdrawal, subject to judicial review. Finally, the Court found that the Secretary had the power to cancel the order to withdrawal lands (after a reasonable amount of time) made by the House or Senate Committees on natural resources.

Result

The court ordered the Secretary to revoke Public Land Order No. 5952 and to determine the scope and duration of the public land withdrawal within the three wilderness areas. The Secretary had, after the original review of the issue and before this opinion, deferred all gas and oil drilling in all wilderness areas.

Other Cases Referenced

Standing (Injury)— *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79, 98 S. Ct. 2620, 2633, 57 L.Ed. 2d 595 (1978); *Chadha v. Immigration and Naturalization Service*, 634 F. 2d 408. 415 (9 Cir. 1980), *cert. granted*, — U.S. —, 102 S. Ct. 87, 70 L.Ed. 2d 80 (1981).

Standing (sufficient concrete interests)—*Buckley v. Valeo*, 424 U.S. 1, 12 n. 10, 96 S. Ct. 612, 631 n.10, 46 L.Ed. 2d 659 (1976) (per curiam).

Standing(personal stake)—*Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 2205, 45 L.Ed. 2d 343 (1975).

Standing, "Injured in fact, zone of interests"—*United States v. SCRAP*, 412 U.S. 669, 686, 93 S. Ct. 2405, 2415, 37 L.Ed. 2d 254 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 733, 92 S. Ct. 1361, 1365, 31 L.Ed. 2d 636 (1972).

Standing related to noncompetitive leases—*Burglin v. Morton*, 527 F. 2d 486, 488 n.2 (9 Cir. 1976), *cert. denied*, 425 U.S. 973, 96 S. Ct. 2171, 48 L.Ed. 2d 796 (1976). *Arnold v. Morton*, 529 F. 2d 1101, 1106 (9 Cir. 1976). *Schraier v. Hickel*, 419 F. 2d 663, 667 (D.C. Cir. 1969)

Standing to challenge unlawful impediments—*Krueger v. Morton*, 539 F. 2d 235 (D.C.Cir. 1976); *Duesing v. Udall*, 350 F. 2d 748 (D.C.Cir. 1965), *cert. denied*; 383 U.S. 912, 86 S. Ct. 888, 15 L.Ed. 2d 667 (1966).

"Generalized grievance"—*Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205; *Duke Power Co.*, 438 U.S. at 80, 98 S. Ct. 2634; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220, 94 S. Ct. 2925, 2931, 41 L.Ed. 2d 706 (1974); *Sierra Club v. Morton*, 405 U.S. at 735, 92 S. Ct. at 1366; *Western Mining Council v. Watt*, 643 F. 2d 618, 623 (9 Cir. 1981), *petition for cert. denied* —U.S. —, 102 S. Ct. 567, 70 L.Ed. 2d 474 (1981); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264, 97 S. Ct. 555, 563, 50 L.Ed. 2d 450 (1977).

Standing of organizations—*Sierra Club v. Morton*, 405 U.S. at 739, 92 S. Ct. at 1368; *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434, 53 L.Ed. 2d 383 (1977); *Legal Aid Society of Alameda County v. Brennan*, 608 F. 2d 1319 (9 Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3010, 65 L.Ed. 2d 1112 (1980); *Coles v. Havens Realty Corp.*, 633 F. 2d 384 (4 Cir. 1980).

Ripeness—*Myers v. Bethlehem Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 463, 82 L.Ed. 638 (1938); *United States v. Abilene and Southern Ry.*, 265 U.S. 274, 282, 44 S. Ct. 565, 567, 68 L.Ed. 1016 (1924); *Kale v. United States*, 489 F. 2d 449, 454 (9th Cir. 1973), *cert. denied*, 417 U.S. 915, 94 S. Ct. 2617, 41 L.Ed. 2d 220 (1974); *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S. Ct. 815, 818, 31 L.Ed. 2d 17 (1972); *Pence v. Kleppe*, 529 F. 2d 135, 143 (9 Cir. 1976).

Constitutionality—*New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, 99 S. Ct. 1355, 1364, 59 L.Ed. 2d 587 (1979). *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154, 89 L.Ed. 101 (1944).

Withdrawal under mineral leasing laws—*Udall v. Tallman*, 380 U.S. 1, 85 S. Ct. 792, 13 L.Ed. 2d 616 (1965). *Mecham v. Udall*, 369 F. 2d 1 (10 Cir. 1966). *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D.Wyo. 1980).

Secretary's power to revoke order—*State of Alaska v. Carter*, 462 F. Supp. 1155, 1157 (D.Alaska, 1978).

Duration established by committee—*Chadha v. Immigration and Naturalization Service*, 634 F. 2d 408.

Sierra Club v. Yeutter
911 F. 2d 1405 (10th Cir. 1990)

Case History

615 F. Supp. 44 (1985)—*remanded with directions for federal defendants to complete a "memorandum explaining their analysis, final decision, and plan to comply with their statutory obligations..." by* 622 F. Supp. 842 (D. Colo. 1985)—*defendants' appeal denied due to lack of finality by Sierra Club v. Lyng,* Nos. 86-1153, 86-1154 & 86-1155 (10th Cir. 1986)—*holding that federal water rights exist in Colorado wilderness areas affirmed by Sierra Club v. Lyng,* 661 F. Supp. 1490 (D. Colo. 1987)—*final judgment declared by Sierra Club v. Lyng,* No. 84-M-2 (D. Colo. 1988)—*vacated and remanded with directions by* present case.

Background

This case focused on whether federal reserved water rights existed in Colorado wilderness areas. The Colorado wilderness areas in question were part of the National Wilderness Preservation System, which was created by the National Wilderness Act of 1964. 16 U.S.C. § 1131 *et seq.*

The defendants and intervenors appealed the final decision of the District Court of Colorado which stated that federal reserved water rights existed in federally-designated Colorado wilderness areas. *Sierra Club v. Lyng,* No. 84-M-2 (D.Colo. Sept. 30, 1988).

The court of appeals ruled that the management of federally reserved water rights should be left to agency discretion. In its decision, the court overturned the district court's decision and created a non-binding precedent.

Result

The appeal was dismissed. The judgment of the district court granting declaratory judgment that federal reserved water rights were created by the Wilderness Act was vacated. The case was remanded "with directions to dismiss the complaint as not ripe for adjudication." 911 F. 2d 1405.

Other Cases Referenced

Nonassertion of reserved water rights—*Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

Doctrine of separation of powers—*Sierra Club v. Department of the Interior*, 424 F. Supp. 172, 175 (N.D. Cal. 1976).

Determining the proper method of analysis—*Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *Toilet Goods Association v. Gardner (Toilet Goods I)*, 387 U.S. 158, 87 S. Ct. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704 (1967).

Agency action reviewability—*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); *Heckler v. Chaney*, 470 U.S. 402, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 95 S. Ct. 1851, 44 L. Ed. 2d 377 (1975); *Webster v. Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988).

Application of reviewability standard—*Adams v. Richardson*, 480 F. 2d 1159, 1162 (D.C. Cir. 1973) (*en banc*); *Kola, Inc. v. United States*, 882 F. 2d 361, 363-64 (9th Cir. 1989); *Laird v. Tatum*, 408 U.S. 1, 15, 92 S. Ct. 2318, 2326, 33 L. Ed. 2d 154 (1971).

Was the issue ripe for decision—*Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *Toilet Goods I*, 387 U.S. 158, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U. S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); *United States v. New Mexico*, 438 U.S. 696, 698, 98 S. Ct. 3012, 3013, 57 L. Ed. 2d 1052 (1978) (scope of federal reserved water rights turn on congressional intent); *Cappaert v. United States*, 426 U.S. 128, 138, 96 S. Ct. 2062, 2069, 48 L. Ed. 2d 523 (1976) (reserved water rights can arise by implication from reservations of land); *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40, 101 S. Ct. 488, 493, 66 L. Ed. 2d 416 (1980); *Lujan v. National Wildlife Federation*, 496 U.S. —, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990); *McKart v. United States*, 395 U.S. 185, 89 S. Ct. 1657, 1663, 23 L. Ed. 2d 194 (1969); *U.S. v. Bell*, 724 P. 2d 631, 641-42 (Colo. 1986) (en banc); *United States v. City & County of Denver*, 656 P. 2d 1, 34-35 (Colo. 1983) (en banc); *Navajo Development Co. v. Sanderson*, 655 P. 2d 1374, 1379 (Colo. 1982) (en banc).

Determining jurisdiction—*Familia de Boom v. Arosa Mercantil, S.A.*, 629 F. 2d 1134, 1137 (5th Cir. 1980), *cert. denied*, 451 U.S. 1008, 101 S. Ct. 2345, 68 L. Ed. 2d 861 (1981); *Sherman v. American Fed'n of Musicians*, 588 F. 2d 1313, 1314 (10th Cir.

1978), *cert. denied*, 444 U.S. 825, 100 S. Ct. 46, 62 L. Ed. 2d 31 (1979); *Northern Ind. Pub. Serv. Co. v. FERC*, 782 F. 2d 730, 746 (7th Cir. 1986); *Environmental Defense Fund v. Ruckelshaus*, 439 F. 2d 584, 596 (D.C. Cir. 1971).

Wright v. United States
868 F. Supp. 930 (E.D. Tenn. 1994)

Case History

Affirmed without opinion by 82 F. 3d 419 (6th Cir. 1996).

Background

The Joyce Kilmer-Slickrock Wilderness (Slickrock) is part of the Nantahala National Forest in western North Carolina. Slickrock was designated as wilderness in 1975. Pub. L. No. 93-622, § 3(a)(7), 88 Stat. 2097 (Jan. 3, 1975). The plaintiffs were hiking on Slickrock Creek Trail in the Slickrock Wilderness on April 11, 1991, when a rotting tree fell across the trail on which they were hiking. Ms. Wright claimed she was knocked unconscious and injured her left leg which required subsequent amputation above the knee. Ms. Acuff claimed she was knocked unconscious as well and received injuries to both legs, suffered broken ribs, and various cuts.

Plaintiffs' Identities and Contentions

Gladys Wright and her husband, Henry L. Wright, and Christine Acuff.

Plaintiffs brought a negligence action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674, for the injuries they received from the falling tree (including loss of consortium for Mr. Wright). The plaintiffs argued negligence because (1) the trail was not appropriately inspected; (2) the rotting tree was not removed before it fell on the trail; (3) there were no

signs posted warning of the danger of falling trees; and (4) the plaintiffs were permitted to hike on the trail. The plaintiffs amended their original complaint by including that the defendants violated the Forest Service's Land and Resource Management Plan.

Defendant's Identity and Contentions

United States of America, defendant.

Defendant argued that (1) "the discretionary function of the FTCA prohibits judicial review of United States' policies and decisions regarding wilderness management; (2) the North Carolina Trails and Hikers Act bars the action; and (3) the United States did not owe plaintiffs a duty under North Carolina law." 868 F. Supp. at 931.

Case Issue

Did the Forest Service's failure to cut down rotting tree in wilderness fall within "the discretionary function exception to the Federal Torts Claim Act (FTCA) waiver of sovereign immunity?"

Court's Holding

On whether the Forest Service's decision not to cut down rotting tree in wilderness fell within "the discretionary function exception" to the liability of the federal government: The court held that the Forest Service's decision fell within the discretionary function exception to liability of the federal government. Because the decision was within the discretionary function exception, the court lacked jurisdiction.

The United States is immune from being sued for tort claims because of its sovereign status except where a "clear relinquishment" of immunity is present. The Federal Torts Claim Act generally waives the sovereign immunity of the United States in cases where the suit filed is "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1345(b). The FTCA contains a number of exceptions to this general waiver of immunity. The discretionary function exception exempts the United States from liability for

> any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a).

The Supreme Court established a two-part test to determine whether the government's actions fall within the discretionary function exception. *United States v. Gaubert*, 499 U.S. at 322-324, 111 S. Ct. at 1274. A court must first decide whether the alleged act or failure to act violated a "mandatory regulation or policy that allowed no judgment or choice." 868 F. Supp. at 932. If the government employee was required to act in a prescribed manner without exercising judgment, the discretionary function exception does not apply, and the court has jurisdiction. If the employee is entitled to exercise discretion, however, the court must reach the second part of the test, and determine whether

that judgment is of the kind "that the discretionary function exception was designed to shield." 868 F. Supp. at 932, *quoting Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

In applying the two-part test here, the district court focused on the manual promulgated by the Forest Service, the Land and Resource Management Plan 1986-2000, Nantahala and Pisgah National Forest (Management Plan or Plan). The parties agreed that, pursuant to the Plan, the Slickrock Creek Trail was to maintained at Level 1 or 2. Referring to maintenance requirements, the Management Plan states:

> Removal of tree that could fall across the trail. Fell only trees likely to fall on or across the trail. Fell away from trail. Remove any slash from corridor. *No hazard tree removal in wilderness.* FREQUENCY: 2 years or less, depending on timber type. Management Plan Table G-5, p. G-9. (emphasis added).

The parties disagreed about the effect of this provision. The government argued that because the Slickrock Creek Trail is in a designated wilderness area, the Plan forbade the Forest Service from felling any trees because there is to be "[n]o hazard tree removal in wilderness." Plaintiffs argued that that phrase does not apply to trails in the wilderness, which are governed by the first part of the quotation from the Plan, *i.e.*, "[f]ell only trees likely to fall on or across the trail." *See* 868 F. Supp. at 935.

Rather than resolving this issue, the court assumed *arguendo* that the provision of the Plan that stated that no trees were to be felled in the wilderness did not apply to trees near trails. 868 F. Supp. at 935. The court then concluded

that the provision, "[f]ell only trees likely to fall on or across the trail," was not mandatory and did not require the Forest Service to remove all trees that might fall across trails, but merely specified those trees which may be removed. It concluded that the guidelines for trail maintenance allowed Forest Service employees maximum discretion. 868 F. Supp. at 936.

Having concluded that the government met the first part of the *Gaubert* test in that the act was discretionary, the court then proceeded to the second part of the test, *i.e.*, whether the discretionary function exception was designed to shield this type of judgment. 868 F. Supp. at 936. It concluded that "Plaintiffs' allegations regarding the Forest Service's hazardous tree inspection and removal procedures, and the decisions on how to comply with those inspections and procedures, are clearly within the scope of the discretionary function exception." 868 F. Supp. at 936.

The court did not address the state law issues raised by the United States.

Result

The court found that plaintiff's "claims are barred by the discretionary function exception to the FTCA, 28 U.S.C.A. §2680 (a)" and awarded the defendant's motion for dismissal. 868 F. Supp. at 937.

Other Cases Referenced

United States sovereignty—*United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 769-770, 85 L.Ed. 1058 (1941).

"Clear relinquishment" of sovereign immunity—*Dalehite v. United States*, 346 U.S. 15, 31, 73 S. Ct. 956, 965, 97 L.Ed. 1427 (1953).

Federal Tort Claims Act—*United States v. Orleans*, 425 U.S. 807, 813, 96 S. Ct. 1971, 1975, 48 L.Ed.2d 390 (1976); *Kurinsky v. United States*, 33 F. 3d 594, 596 (6th Cir. 1994); *Sherwood*, 312 U.S. at 586-87, 61 S. Ct. at 769-70; *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L.Ed.2d 259 (1986); *United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S. Ct. 2755, 2762, 81 L.Ed.2d 660 (1984).

Two part test—discretionary function exception—*United States v. Gaubert*, 499 U.S. 315, 322-24, 111 S. Ct. 1267, 1273-74, 113 L.Ed.2d 335 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 1958, 100 L.Ed.2d 531 (1988); *Varig Airlines*, 467 U.S. at 813, 104 S. Ct. at 2765, *Dalehite*, 346 U.S. at 36, 73 S. Ct. at 968; *Gaubert*, 499 U.S. at 324, 111 S. Ct. at 1274.

FTCA §2680 (a) application even if there is negligence—*Dalehite*, 346 U.S. at 32, 73 S. Ct. at 966, *Id.* at 33, 73 S. Ct. at 966, *Autery v. United States*, 992 F. 2d 1523 (11th Cir. 1993); *Zumwalt v. United States*, 928 F. 2d 951 (10th Cir. 1991); *Baum v. United States*, 986 F. 2d 716 (4th Cir. 1993).

Appendix A

Statutes in Wilderness Case Law

Wilderness Act of 1964, 16 U.S.C.A. §§ 1131 et seq.

Administrative Procedure Act, 5 U.S.C.§ 706

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq.

Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 et seq.

Federal Tort Claims Act, 28 U.S.C. §§ 1346

National Environmental Policy Act, 42 U.S.C.A. § 4332 et seq.

Alaska National Lands Conservation Act, 16 U.S.C. § 3101 et seq.

Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq.

Regulations in Wilderness Case Law

Forest Service Regulations, Code of Federal Regulations, Title 36

Forest Service website: www.fs.gov

BLM Regulations, Code of Federal Regulations, Title 43

Bureau of Land Management website: www.blm.gov

Park Service Regulations, Code of Federal Regulations, Title 36

Park Service website: www.nps.gov

Fish and Wildlife Service Regulations, Code of Federal Regulations, Title 1

Fish and Wildlife Service website: www.fws.gov

Appendix A Continued

Constitutional Amendments in Wilderness Case Law

Property Clause, United States Constitution, Article IV, § 3, cl. 2

United States Constitution, Fifth Amendment

Appendix B

Legal Definitions
source: Black's Law Dictionary

ARBITRARY. Means in an "arbitrary' manner, as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; Corneil v. Swisher County, Tex.Civ.App., 78 S.W.2d 1072, 1074. Without fair, solid, and substantial cause; that is, without cause based upon the law. U.S. v. Lotempio, D.C.N.Y., 58 F.2d 358, 359; not governed by any fixed rules or standard. People ex. rel. Hutlman v. Gilchrist, 188 N.Y.S. 61, 65, 114 Misc. 651.

ARGUENDO. In arguing; in the course of the argument. A statement or observation made by a judge as a matter of argument or illustration, but not directly bearing upon the case at bar, or only incidentally involved in it, is said (in the reports) to be made *arguendo*, or in the abbreviated form, *arg*.

ARGUMENT. An effort to establish belief by a course of reasoning.
In rhetoric and logic, an inference drawn from premises, the truth of which is indisputable, or at least highly probable.

BAD FAITH. The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an innocent mistake as to one's rights or duties, but by some interested or sinister motive. State v. Griffin, 100 S.C. 331, 84 S.E. 876, 877; Penn Mut. L. Ins. Co. v. Mechanics' Savings Bank & Trust Co., C.C.A. Tenn., 73 F. 653, 19 C.C.A. 316, 38 L.R.A. 33, 70; Spiegel v. Beacon Participations, 297 Mass. 398, 8 N.E.2d 895, 907.

COLLATERAL. By the side; at the side; attached upon the side. Not lineal, but upon a parallel or diverging line. Additional or auxiliary; supplementary; co-operating; accompanying as a secondary fact; or acting as a secondary agent; related to, complementary; accompanying as a co-ordinate, City Investment & Loan Co. v. Wichita Hardware Co., Tex.Civ.App., 57 S.W.2d 222, 223; collateral security, Pepper v. Beville, 100 Fla. 97, 129 So. 334, 337.

COLLATERAL ESTOPPEL. The collateral determination of a question by a court having general jurisdiction of the subject. Small v. Haskins, 26 Vt. 209.

GOOD FAITH. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. Siano v. Helvering, D.C.N.J., 13 F.Supp. 776, 780. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transactions unconscientious. Warfield Natural Gas Co. v. Allen, 248 Ky. 646, 59 S.W.2d 534, 91 A.L.R. 890; Crouch v. First Nat. Bank, 156 Ill. 342, 40 N.E. 974; Waugh v. Prince, 121 Me. 67, 115 A. 612, 614.

JUDGMENT. An opinion or estimate. McClung Const. Co. v. Muncy, Tex.Civ.App., 65 S.W.2d 786, 790.

The formation of an opinion or notion concerning some thing by exercising the mind upon it. Cleveland Clinic Foundation v. Humphreys, C.C.A. Ohio, 97 F.2d 849, 857.

The official and authentic decision of a court of justice upon the respective rights and claims of parties to an action or suit therein litigated and submitted to its determination. People v. Hebel, 19 Colo.App. 523, 76 P. 550; Bullock v. Bullock, 52 N.J.Eq. 561, 30 A. 676, 27 L.R.A. 213, 46 Am.St.Rep. 528; State v. Brown & Sharpe Mfg. Co., 18 R.I. 16, 25 A. 246, 17 L.R.A. 856.

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