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United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001)

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moot.

Nevertheless, the Organizations sought civil penalties against the Cities for past violations of the CWA. The Minnesota District Court then faced the question of whether citizens could rightfully file suit for such retroactive civil penalties as well as whether assessing penalties retroactively could possibly redress the Organizations' injuries or prevent further violations of the CWA.

The court first considered whether civil penalties could redress the Organizations' injuries or deter future violations. A request for civil penalties becomes moot if the court can no longer grant relief that will redress the injury claimed. Because the CWA makes all civil penalties assessed pursuant to citizen suits payable to the United States Treasury, assessing penalties would not result in awards to the Organizations. Therefore, the court held, such penalties did nothing to redress their injuries. Furthermore, the assessment of civil penalties is warranted only when they "encourage defendants to discontinue current violations and deter them from committing future ones." Here, the court held since the Cities had permits, they did not continue to violate the CWA.

Next, the court considered the power to sue for retroactive penalties. It held such power fell outside the purview of citizen suits and, thus, belonged only to the government. Citizen suits, at most, allowed for civil penalties only if commenced during ongoing violations. Here, the eventual issuance of the NPDES permits stopped the violations, thus barring the Organizations' right to sue for civil penalties.

Lacking any proof that penalties would redress injuries or deter violation, and lacking the power to bring a citizen suit for retroactive penalties in the first place, the Organizations' claims failed and the court accordingly dismissed the suit.

Dan Wennogle

United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001) (holding *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* did not overrule the Clean Water Act protections of tributaries of navigable waters, and such protections were constitutional).

On August 11, 1996, Mr. Buday dug ponds and created burns near Fred Burr Creek in Granite County, Montana. Fred Burr Creek flooded in the spring of 1997, destroying the burns, and draining the ponds. This sent dirt and debris into the surrounding wetlands and downstream into Flint Creek. Mr. Buday was indicted, and pled guilty to violating the Clean Water Act ("CWA") by releasing pollutants into navigable waters, including wetlands.

Subsequently, the Supreme Court limited the definition of

“navigable waters” in *Solid Waste Agency of Northern Cook County v. United States Army Core of Engineers*. In light of this decision, Buday submitted a brief claiming Fred Burr Creek and the surrounding wetlands were no longer navigable waters, and the United States thus lacked jurisdiction to prosecute him. The court construed this brief as a motion to withdraw his guilty plea. The court denied the motion, and in so doing, found the holding in *Solid Waste* inapplicable.

In *Solid Waste*, the Supreme Court held seasonal ponds or wetlands that were entirely within one state’s borders and not adjacent to any navigable streams or tributaries were not navigable waters within the meaning of the CWA. However, the district court found that this definition did not apply to the wetlands surrounding Fred Burr Creek. Although Fred Burr Creek was not navigable, it drained into Flint Creek, which in turn flowed into the Clark Fork of the Columbia River. The Clark Fork was navigable-in-fact; thus Fred Burr Creek was a tributary of a tributary of a navigable waterway. The CWA specifically covers such tributaries, and the court cited numerous cases, including *United States v. Texas Pipe Line*, which found tributaries such as Fred Burr Creek within the scope of the CWA envisioned by Congress.

Furthermore, the court held the inclusion of tributaries in the CWA fell within the boundaries of congressional power dictated by the Commerce Clause, authorizing Congress to regulate the channels of interstate commerce. By definition, navigable waters are channels of interstate commerce. The court reasoned that although Fred Burr Creek’s effect on interstate commerce was minimal, the effect of tributaries as a whole was not. Thus, in protecting tributaries in the CWA, Congress was protecting the interests of interstate commerce.

Since Fred Burr Creek was a tributary of a navigable waterway, it was protected by the CWA even after *Solid Waste*. Since this protection is within the powers constitutionally granted to Congress, Mr. Buday’s motion to withdraw his guilty plea was denied.

James Siegesmund

Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001) (holding lack of entitlement prevented citizens either from enjoining the implementation of the Bureau of Reclamation’s annual plan for a water project, or from forcing releases for irrigation without a showing of probable chance of success on the merits.)

The Upper Klamath Lake (“Lake”) provided primary storage for a limited-capacity water project (“Project”) established in 1905. It also served as a valuable resource to Indian tribes as well as a source of nourishment and life for endangered and threatened fish and birds. This suit arose out of problems concerning the allocation of water to irrigators holding contracts for water from the Project.

The project allowed the Bureau of Reclamation (“Bureau”) to