Agricultural Law Press

Publisher/Editor
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Issue Contents

Agricultural Law Digest

Volume 12, No. 6 March 16, 2001 ISSN 1051-2780

"MIGRATORY BIRD RULE" SHOT DOWN

— by Roger A. McEowen*

In a major decision important to farmers and ranchers with isolated wet areas on their land or private ponds, the U.S. Supreme court, in early January 2001, reversed the opinion of the Seventh Circuit Court of Appeals and held that the federal government's assertion of jurisdiction over an intrastate wetland pursuant to the so-called "migratory bird rule" exceeded its authority under the Clean Water Act.[1]

Section 404 of the Clean Water Act

Section 404 of the Clean Water Act (CWA) makes illegal the discharging of dredge or fill material into the "navigable waters of the United States" without obtaining a permit from the Secretary of the Army acting through the Corps of Engineers (COE). Until 1975, the Corps construed the term "navigable waters" to mean waters that were actually navigable. In accordance with regulations promulgated in 1975, the COE expanded its jurisdiction to "other waters" of the United States, including streams, wetlands, playa lakes, and natural ponds if the use, degradation or destruction of those areas could affect interstate commerce.[2]

A series of court decisions beginning in the mid-1970s also contributed to the COE's increasing jurisdiction over wetlands.[3] In 1983, the Fifth Circuit Court of Appeals held that the term "discharge" may reasonably be understood to include "redeposit" and concluded that the term "discharge" covered the redepositing of soil taken from wetlands such as occurs during mechanized land clearing activities.[4] In 1987, the COE's permit jurisdiction was held to extend to wetlands created by irrigation and flood control structures.[5]

Isolated and Nonadjacent Wetlands

Since 1975, the COE and the Environmental Protection Agency (EPA) have defined "waters of the United States" such that the agencies assert regulatory authority over isolated wetlands or wetlands not adjacent to "waters of the United States" if a link exists between the waterbody and interstate commerce.[6] This interpretation has been upheld by the courts. For example, in 1979, the Seventh Circuit Court of Appeals held that COE jurisdiction exists over all waters, and adjacent wetlands within the COE's constitutional reach under the Commerce Clause.[7]

The "Migratory Bird Rule"

In 1985, an EPA internal memorandum concluded that CWA jurisdiction could be extended to include isolated wetlands that were or could be used by migratory birds or endangered species.[8] In 1986, the COE issued memoranda to its districts explaining that the use of waters by migratory birds could support the CWA's jurisdiction.[9] A 1992 case from the federal district court for North Dakota held that protection of waters utilized

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See the back page for details about the
2001 Agricultural Tax and Law Seminars
by Dr. Neil Harl and Prof. Roger McEowen

Agricultural Law Digest is published by the Agricultural Law Press, P.O. Box 50703, Eugene, OR 97405 (ph/fax 541-302-1958), bimonthly except June and December. Annual subscription $100 ($90 by e-mail). http://www.agrilawpress.com Printed with soy ink on recycled paper.

primarily for bird and wildlife habitat was within the Congress' intent as expressed in the CWA.[10] In this case, the county had cleared a lengthy drainage ditch through a vast shallow water area that was frequented by tens of thousands of migratory waterfowl for feeding, resting and breeding. The area was also utilized by interstate travelers for recreation, hunting and bird watching. The court held that the isolated wetlands were jurisdictional waters under the CWA. However, also in 1992, the Seventh Circuit Court of Appeals held that the EPA's regulatory definition of "other waters" whose destruction could adversely impact interstate commerce did *not* include isolated wetlands and was invalid.[11] But, in a highly unusual move, the court granted the EPA's petition for a rehearing, vacated its earlier decision and referred the case to a senior court attorney for settlement negotiations.[12] The court was informed in early 1993 that a settlement could not be reached. In a final decision, the court held that isolated wetlands actually used by migratory birds presented a sufficient connection to interstate commerce to give the EPA and COE jurisdiction under the CWA.[13] The court held likewise in a subsequent decision and the Supreme Court agreed to hear the case.[14]

The *Solid Waste Agency* Case

In the case, the plaintiff was a consortium of suburban Chicago municipalities that selected for a 410-acre solid waste disposal site a 533-acre abandoned sand and gravel pit containing excavation trenches that had become permanent and seasonal ponds. The ponds and small lakes had become home to approximately 121 species of birds, including many endangered, water-dependent, and migratory birds. Because the proposal for the site required filling in some of the ponds, the plaintiff contacted the COE to determine if a landfill permit was required under Section 404 of the CWA. The COE, asserting jurisdiction under the "migratory bird rule,"[15] refused to issue a permit in 1991 and 1994, citing a need to protect the habitat of the migratory birds. When the municipalities challenged the COE's jurisdiction, the District Court granted the COE's motion for summary judgment,[16] and, on appeal, the Seventh Circuit held that the Congress had authority under the Commerce Clause to regulate intrastate waters and that the "migratory bird rule" was a reasonable interpretation of the CWA.[17]

On January 9, 2001, in a 5-4 opinion, the Supreme Court reversed the Seventh Circuit and held that the "migratory bird rule" exceeded the authority granted to the COE under §404 of the CWA. Accordingly, the Court held that the COE did not have jurisdiction over ponds that are not adjacent to open water. Because the Court found the "migratory bird rule" invalid, it did not address the scope of the CWA's jurisdiction under the commerce clause of the U.S. Constitution. The court stated that the "migratory bird rule" raised significant constitutional questions and would significantly impinge upon traditional states' power over land and water use. Since, there was no clear congressional intent to do so, the court interpreted the act to avoid raising the constitutional and federalism issues created by the COE's interpretation of its jurisdiction.

Impact of the Decision

The Supreme Court's decision seems to indicate rather strongly that the COE does not have a legal basis under the CWA to regulate isolated waters that do not have a substantive connection to interstate commerce. While there is perhaps room remaining to argue over navigability, the opinion does appear to remove federal jurisdiction over private ponds and seasonal or ephemeral waters where the only connection with interstate commerce is migratory waterfowl. Indeed, in early March 2001, the EPA and COE eliminated their regulatory definition for isolated, solely intrastate water bodies.

It is also believed that the opinion will have a particularly significant impact on agricultural activities in the prairie pothole region of the Dakotas, and other areas that experience seasonal flooding.

FOOTNOTES

1 Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 121 S. Ct. 675 (2001), *rev'g*, 191 F.3d 845 (7th Cir. 1999).

2 By the early 1990s, the term "waters of the United States" was defined to mean "all waters which are currently used or were used in the past, or may be susceptible to use in interstate or foreign commerce…" 33 C.F.R. §328.3(b).

3 *See, e.g.*, United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) (CWA held to manifest clear intent to break from Rivers & Harbors Act limitations); United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974) (CWA held to extend to any tributary of any navigable stream); Natural Resources Defense Council v. Calloway, 392 F. Supp. 685 (D. D.C. 1975) (CWA held to extend Section 404 permit jurisdiction to all waters of United States); United States v. TGR Corp., 171 F.3d 762 (2d Cir. 1999) (phrase "waters of the United States" broadly defined to include nonnavigable tributaries of navigable waterways, and includes everything from "intrastate lakes" to "prairie potholes").

4 Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

5 United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987).

6 The CWA has also been held to apply to the discharge of fill material into wetlands that are connected to navigable waters only via groundwater. See, United States v. Banks, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 852 (1998); Mutual Life Insurance Co. of New York v. Mobil Corp., No. 96-CV-1781, 1998 U.S. Dist. LEXIS 4513 (N.D. N.Y. Mar. 31, 1998) (term "navigable waters" included groundwater hydrologically connected to surface water such as wetland with discharge of pollutants therein requiring permit).

7 United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979) (Corps has jurisdiction over wetlands adjacent to inland lakes if lakes visited by interstate travelers for recreational purposes).

8 Memorandum from Francis S. Blake, General Counsel, U.S. EPA, to Richard E Sanderson, acting assistant administrator, Office of External Affairs, U.S. EPA, September 12, 1985, "Clean Water Act jurisdiction over isolated waters." See also, 40 C.F.R. § 230.3(s)(3) and 33 C.F.R. § 328.3(a)(3).

9 Memorandum from Brig. Gen. Patrick J. Kelly, Deputy Director of Civil Works, U.S. Army Corps. of Engineers, Corps Field Offices (EPA memorandum on CWA jurisdiction over isolated waters, Nov. 8, 1985); memorandum from Brig. Gen. Patrick J. Kelly to Commander, Southwestern Division, U.S. Corps of Engineers (Commerce Clause jurisdiction in isolated waters, Feb. 11, 1986).

10 United States v. Sargent County Water Resources District, 876 F. Supp. 1081 (D. N.D. 1992).

11 Hoffman Homes, Inc. v. EPA, 961 F.2d 1310 (7th Cir. 1992) (only adjacent wetlands are within the CWA's jurisdiction).

12 Hoffman Homes, Inc., v. EPA, 975 F.2d 1554 (7th Cir. 1992).

[13] Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993) (use of phrase "could affect interstate commerce" in 40 C.F.R. §230.3(s)(3) indicated that regulation covered waters with only potential or minimal connection to interstate commerce).

[14] Solid Waste Agency v. United States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000).

[15] *Id.*

[16] 33 C.F.R. §328.3(a)(3); 51 Fed. Reg. 41217.

[17] Solid Waste Agency, Inc. v. United States Army Corps of Engineers, 998 F. Supp. 946 (N.D. Ill. 1998).

[18] Solid Waste Agency v. United States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

CONVERSION. The debtor was an agricultural cooperative which filed for Chapter 11. During the case, the debtor liquidated all business assets, terminated all employees and ceased business activities. The debtor did have a pending lawsuit against a former manager for embezzlement. The debtor claimed that if the lawsuit produced the claimed damages, the money would be sufficient for the debtor to restart the business. The debtor did not provide any evidence of the chances of success in the lawsuit or that the claimed damages could be recovered, even if awarded. The court held that the case would be converted to Chapter 7 because of the uncertain future of the debtor and the lack of ongoing business or employees to protect through Chapter 11. ***In re* Orienta Co-op. Ass'n, 256 B.R. 508 (Bankr. W.D. Okla. 2000)**.

FEDERAL TAX-*ALM* § 13.03[7].*

AUTOMATIC STAY. The debtors filed for Chapter 13 in April 1998. The IRS received notice of the filing and filed a claim for unpaid taxes. The debtors filed post-petition amended returns for 1991 through 1996 which claimed no income and requested refund of all taxes. In September 1998, the IRS rejected the amended returns as frivolous and assessed a penalty of $500 for each return. In November 1998, the IRS mailed the debtors a Form 6335 which again claimed the frivolous return penalty. In December 1998, the IRS sent the debtors a Notice of Intent to Levy. After contact from the debtors' attorney, the IRS placed a hold on their account and stopped all collection effort. The court held that the Notice of Intent to Levy was a willful violation of the automatic stay. The debtors claimed emotional distress injury from the IRS actions and the court held that the debtors were entitled to $1000 in damages for emotional distress personal injury. ***In re* Covington, 256 B.R. 463 (Bankr. D. S.C. 2000)**.

DISCHARGE. The IRS has issued a Chief Counsel Notice which states that an I.R.C. § 6404(c) abatement of a taxpayer's tax liability does not require a new assessment in order to increase the tax liability. A Section 6404(c) abatement occurs when the IRS has determined that a properly assessed tax liability has become more costly to collect than the amount of the tax collectable. Section 6404(c) abatements can occur during a bankruptcy case where the debtor has insufficient assets to cover a tax liability secured by a tax lien. However, if the tax is not paid, the tax lien is not extinguished in the bankruptcy case, and if the debtor is later found to have sufficient assets subject to the lien, the IRS ruled that it has the authority to increase the debtor's tax assessment without issuing a new assessment, because the Section 6404(c) abatement does not characterize the original assessment as improper, just financially unreasonable to collect. **CC-2001-014**.

TAX LIEN. The debtor failed to file or pay federal income taxes for several years and the IRS filed a tax lien for its estimation of the taxes owed. The debtor argued that the debtor was not subject to any federal tax because the debtor was a "natural sovereign individual" or "freeman." The court held that the debtor, as a resident citizen of the United States was subject to federal income taxation; therefore, the assessed taxes were sufficient to support the tax lien. ***In re* Lesonik, 256 B.R. 441 (Bankr. W.D. Pa. 2000)**.

CONRACTS

ARBITRATION CLAUSE. The debtor was a farmer and had entered into several hedge-to-arrive contracts with a grain cooperative. The debtor defaulted on three of the contracts and the cooperative demanded damages from the debtor. The contracts contained provisions requiring arbitration before the National Grain & Feed Ass'n (NGFA). The debtor refused to submit to arbitration and the cooperative obtained a state court order forcing arbitration. In the arbitration proceeding the debtor claimed that the contracts were void as illegal off-exchange futures contracts. The arbitrators ruled that the contracts were valid cash forward contracts and awarded damages to the cooperative. The debtor filed for bankruptcy and the cooperative filed a claim for the damage award. In the bankruptcy case, the debtor attempted to attack the validity of the arbitration proceeding as biased because of the predominance of grain dealers on the arbitration panel. The court held that the debtor failed to provide sufficient evidence of bias in the arbitration process. The court also held that the arbitration award was due preclusive effect, barring the Bankruptcy Court from relitigating the validity of the contracts. ***In re* Robinson, 256 B.R. 482 (Bankr. S.D. Ohio 2000)**.