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United States Circuit Courts - Ninth Circuit: Fairhurst v. Hager

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Fairhurst v. Hagener, 422 F.3d 1146 (9th Cir. 2005) (holding pesticides discharged into navigable waters in compliance with FIFRA that leave no excess material after fulfilling their intended purpose, are not “pollutants” requiring an NPDES permit under the Clean Water Act).

Jeff Hagener, director of the Montana Department of Fish, Wildlife and Parks (“Department”), initiated a ten-year program to reintroduce a threatened species of fish, the westslope cutthroat trout, into Cherry Creek. Competition from a non-native trout species threatened the westslope cutthroat trout’s survival. The program included a plan to remove the non-native trout. This removal involved applying the pesticide antimycin into the water for short durations over a period of several years before the westslope cutthroat trout reintroduction.

Cherry Lake, Cherry Creek, and all of its tributaries are navigable waters subject to the Clean Water Act (“CWA”). The Department applied antimycin in accordance with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), but did not obtain a National Pollutant Discharge Elimination System (“NPDES”) permit pursuant to the CWA. The antimycin discharge served the project’s purpose by eradicating the non-native trout species as planned.

William Fairhurst brought suit against Hagener under the citizen suit provision in the CWA. Fairhurst alleged that Hagener violated the Clean Water Act when the Department applied antimycin without an NPDES permit. Fairhurst sought an injunction prohibiting any future antimycin application without an NPDES permit. The District Court for the District of Montana granted summary judgment in favor of Hagener. On appeal, the United States Court of Appeals for the Ninth Circuit addressed the issue of whether a pesticide applied directly and intentionally to navigable waters is a “pollutant” for purposes of the CWA, when such administration was performed in accordance with an EPA-approved FIFRA label, and when the pesticide performed as intended.

The court examined the meaning of “chemical waste” for purposes of the CWA. The court found the plain meaning of “waste” referred to damaged, defective, or superfluous material produced by a manufacturing process. The court applied this definition to the Department’s antimycin use and determined that the antimycin was not a “chemical waste” because the Department applied it and it functioned as intended, leaving no residual excess portions after performing its intended use. Moreover, the court cited and afforded deference to an EPA Interpretative Statement from February 2005 that concluded pesticides that are administered in conformance with FIFRA are not “chemical wastes.”

The Ninth Circuit held that when pesticides are (1) intentionally applied for a beneficial purpose in compliance with FIFRA, (2) produce no unintended effects, and (3) leave no excess material, they are

not “chemical wastes,” and thus are not “pollutants” requiring an NPDES permit. The court held that Hagener was not in violation of the CWA because the antimycin discharge did not require an NPDES permit. However, the Ninth Circuit did express that registration and labeling under FIFRA does not necessarily preclude the NPDES permit requirement under the CWA.

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Smith v. Cent. Ariz. Water Conservation Dist., 418 F.3d 1028 (9th Cir. 2005) (holding the conservation district’s master federal contract and the irrigation districts’ subcontracts precluded landowners’ enforcement of contractual terms as third-party beneficiaries).

Landowners within the Maricopa-Stanfield Irrigation and Drainage District and the Central Arizona Irrigation and Drainage District (“irrigation districts”) brought an action for declaratory relief against the Central Arizona Water Conservation District (“Conservation District”) as third-party beneficiaries to contracts between the Conservation District and the federal government (“master contract”) and the irrigation districts (“subcontracts”), for operation and water delivery under the Colorado Basin River Project Act. The landowners sought to prevent the Conservation District from negotiating new contractual terms to alter the amount of water the irrigation districts, and therefore landowners, received each year. The landowners claimed the Conservation District had obligations, based on vested water rights under both the master and subcontracts, to deliver project water to the irrigation districts for the benefit of the landowners.

The Conservation District removed the case to federal court. The federal district court dismissed the action on summary judgment because the landowners were neither parties to nor third-party beneficiaries of the master contract or subcontracts, and they were therefore unable to enforce contractual terms. The landowners appealed.

The ninth circuit upheld the district court. After review of the master and subcontracts’ language, the appellate court determined that neither contract manifested intent to create third-party beneficiary status for the landowners regarding vested water rights from the irrigation districts. The court reasoned that because the master contract and the subcontracts did not clearly intend to allow third-party beneficiary status to all groups potentially benefited, the contracts did not confer vested rights to agricultural priority water. Consequently, the landowners were merely incidental beneficiaries to the subcontracts without a vested right to the irrigation districts’ water. The appellate court upheld the district court’s dismissal on summary judgment.

Amy Mockenhaupt