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## Recent Developments

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## RECENT DEVELOPMENTS

ENVIRONMENT—*Air Pollution Control District of Jefferson County, Kentucky v. Environmental Protection Agency*, 739 F.2d 1071 (6th Cir. 1984), U.S.L.W. 2054 (July 10, 1984).

Jefferson County, Kentucky petitioned the Environmental Protection Agency (EPA) for the abatement of sulfur dioxide emissions from a power plant across the Ohio River in Indiana. The county claimed that the plant violated Clean Air Act provisions prohibiting emissions in one state which prevent the attainment or maintenance of national air quality standards in another state. Jefferson County claimed that Kentucky had established air quality standards more stringent than national standards in order to create a margin for future growth in the area. The county argued that the emissions from the Indiana plant effectively stole this margin for growth.

The EPA rejected the county's position. The EPA ruled that it is irrelevant whether the Indiana plant infringes upon the margin needed for the county's future industrial development. It found that the Act prohibits interstate pollution only insofar as it prevents another state from attaining or maintaining *national* air quality standards. The EPA further found that the emissions from the Indiana plant did not prevent the maintenance of such standards.

The Sixth Circuit Court of Appeals upheld the EPA's ruling as a reasonable interpretation of the Act. The court recognized that the Act does not specify how much pollution may spill into another state before the EPA's enforcement mechanism is triggered. The court held that the Act was intended to apply to interstate emissions which "significantly contribute" to excessive pollution levels in the complaining state. Because the EPA found that the emissions from the Indiana plant did not substantially contribute to a violation in Jefferson County, the abatement provisions did not apply.

ENVIRONMENT—*Ruckelshaus v. Monsanto Company*, — U.S. —, 104 S. Ct. 2862 (June 26, 1984).

The Monsanto Company brought an action in United States District Court to enjoin the implementation or enforcement of certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Monsanto argued that the data-consideration and data-disclosure provisions of the Act were unconstitutional under the fifth amendment.

Under FIFRA, applicants for pesticide registration must provide the EPA with extensive data so that the agency can determine any possible adverse environmental effects. The Act authorizes the EPA to use the data submitted by applicants in evaluating subsequent applications. The EPA also may publicly disclose health, safety, and environmental information other than data on new active ingredients. The preparation of the registration data is expensive and time-consuming. The subsequent applicants save a great deal in preparation costs by using the data of the original applicant. The data is also valuable because of the possible trade secrets and formulas which may be contained therein. The Act provides that applicants who rely on data submitted by a previous applicant must compensate that applicant. The Act further establishes a mandatory arbitration procedure to apply when the applicants cannot agree on the amount of compensation due.

Monsanto argued that the challenged provisions of the Act effected a "taking" of property without compensation in violation of the fifth amendment. It also argued that the provisions of the Act violated the fifth amendment because the "taking" was for a private, rather than a public, purpose. The district court agreed with Monsanto on both points. It found the challenged provisions of the Act unconstitutional and permanently enjoined the EPA from applying those provisions.

The United States Supreme Court reversed the lower court's decision. The Court conceded that trade secrets, though intangible, may constitute property interests protected by the fifth amendment. The Court, however, held that the data-consideration and data-disclosure provisions of the Act do not effect a "taking" of these property interests. With the possible exception of data submitted during the period between 1972 and 1978, the submitters of data could have no reasonable investment-backed expectation that the information would remain confidential. When Monsanto submitted the registration data, it was on notice of the conditions under which the EPA was authorized to use and disclose the submitted data. The company was unaware that the EPA could reveal much of the health, safety, and efficiency data at any time necessary to carry out EPA duties under FIFRA. As long as these conditions are rationally related to a legitimate government objective, the submission of the data in exchange for the privilege of registration is not a "taking."

The Court held that the challenged provisions may effect a "taking" of the company's property interests with respect to data submitted during the period between 1972 and 1978. Under the statutory scheme then in effect, the applicant was allowed to protect some trade secret information from disclosure. If the EPA were now to disclose this information or use it in evaluating subsequent applications, the original applicant's reasonable investment-backed expectations would be frustrated. The Court held

that this would constitute a taking only if the arbitration procedures in the Act did not provide adequate compensation for the loss in market value suffered because of the disclosure.

The Court further ruled that any taking of private property that may occur through the EPA's use or disclosure of the data is a taking for a public use. Even though private parties may benefit from the challenged provisions of the Act, these provisions were primarily intended for the good of the general public. Moreover, the purposes of protecting public safety and promoting competitiveness within the industry are well within Congressional police powers.

ENVIRONMENT—*United States v. Johnson & Towers, Inc.*, 53 U.S.L.W. 2109 (3d Cir., Aug. 15, 1984).

The Environmental Protection Agency (EPA) attempted to criminally prosecute a truck repair company and two of its employees whom federal agents saw illegally dumping toxic chemicals into a trench that emptied into navigable waters. The company pleaded guilty to violation of the criminal provision of the Resource Conservation and Recovery Act (RCRA) which sanctions any person who knowingly treats, stores, or disposes of any hazardous waste without an EPA permit. The individual defendants, however, argued that the RCRA criminal provision applies only to "owners and operators" and not to employees like the defendants who are not responsible for obtaining a permit.

The court of appeals rejected the defendants' argument, holding them subject to criminal prosecution under the Act. The court found that the statute was broadly written in order to protect the public health and should be construed to effectuate such purpose. In order to convict, however, the EPA is required to show that each defendant knew that the corporation was required to have a permit and was aware that the corporation did not have such a permit. In some instances, this knowledge may be inferred from the defendant's position in the company and other relevant circumstances.

LAND MANGEMENT—*County of Skamania v. Washington*, 102 Wash. 2d 127, 685 P.2d 576 (June 28, 1984).

The Washington Supreme Court held unconstitutional the state's Forest Products Industry Recovery Act of 1982 because the Act violated the state's fiduciary duties to trust beneficiaries. The invalidated statute dealt with contracts for the sale of timber on lands held in trust for public schools, the University of Washington, and others. The trust was established by the Washington Enabling Act and Article 16 of the Washington constitution.

Pursuant to its trust responsibility, the state Department of Natural Resources sold to private companies at public auction the right to cut timber from the trust lands. These timber sales were intended to generate income for the school trust. The contracts generally provided that the company would cut timber from the lands within two to three years, and would pay a price based upon the anticipated price of lumber at the time of harvest. The companies were also required to post a small performance bond and a 10 percent deposit. The contracts were similar to futures contracts as the state bore the risk of rising prices, and the company bore the risk of falling prices.

The contracts were entered into in 1978 and 1979. The prices bid by the companies reflected an anticipated upswing in the economy and a resulting rise in housing starts and timber prices. When the opposite happened and timber prices plummeted, the timber companies faced large economic losses. Many companies threatened default and/or bankruptcy. The legislature responded with the Forest Products Industry Recovery Act of 1982. The Act permitted companies to terminate their contracts by paying a \$2,500 administration fee and forfeiting their initial 10 percent deposit. The companies also were allowed to obtain an extension to the contract by harvesting or beginning to harvest a portion of their contract timber. The trial court found that the Act released over \$90 million in contract rights which the companies were obligated to perform and that the state received very little, if anything, in return. The court ruled the Act breached the state's fiduciary duties to the trust beneficiaries, in violation of the state constitution.

The state supreme court upheld the trial court's decision. The court ruled that federal land grant trusts are enforceable and impose upon the state the same fiduciary duties applicable to private trustees. These duties require the state to seek full market value of any asset of the trust which is transferred out of the trust, including contract rights. In pursuing any other objective, legitimate or otherwise, the state may not sacrifice the beneficiaries' interests. The court held that the primary objective of the Act, however, was to benefit the timber industry and the state economy in general. The Act thus constituted a breach of the state's duty of undivided loyalty to the trust and resulted in a failure to manage prudently the trust assets.

WATER—*United States v. Anderson*, \_\_\_ F.2d \_\_\_, 11 Indian L. Rep. 2136 (9th Cir., July 10, 1984) (nos. 82-3597, 82-3625).

The federal government initiated this water rights adjudication in the Chamokane Basin in Washington, including the rights of the Spokane Indian Reservation. The adjudication was complicated by the fact that

the reservation lands include parcels which were removed through allotment or homesteading and subsequently repurchased by the tribe and returned to trust status. The Spokane Tribe argued it was entitled to its full *Winters* rights with a priority date as of the date of the creation of the reservation. Additionally, the tribe challenged the State of Washington's assertion of jurisdiction over the use of water by non-Indians on the non-Indian land within the reservation.

The court of appeals held that the tribal water rights on land reacquired following allotment and sale to non-Indians retained a priority date as of the creation of the reservation. The court reasoned that when title to allotted lands passed to a non-Indian, the appurtenant right to share in the tribal reserved waters passed with it. This ensured that the Indian allottee got his full benefit from the allotted land. The allotted lands, therefore, retained their original priority date when returned to tribal ownership. The court noted, however, that these rights may have been lost in the interim through non-use by the non-Indian landowners. The lands reacquired after homesteading are entitled to reserved water rights but with a priority date as of reacquisition. The land removed from the reservation through homesteading never acquired federal water rights and must, therefore, acquire priority through state law in accord with existing rights.

The court further held that, in the absence of federal preemption, the state has jurisdiction over the use of water by non-Indian landholders within the reservation. In distinguishing earlier Ninth Circuit precedent, the court considered significant the fact that the Chamokane Basin arises and continues for much of its length outside of the reservation. The court found that the state's interest in developing a comprehensive water program for the basin weighed heavily in favor of permitting state regulatory jurisdiction in the area. It stated that the state's exercise of jurisdiction will not infringe on the tribal right to self-government or affect the tribe's economic welfare because the tribe's water rights have been quantified and will be protected by the federal water master.