

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 02-1863

GREENFIELD MILLS, INCORPORATED, JUDI MEDLOCK,
GENE LEWIS, et al.,
Plaintiffs – Appellants,
v.

JOHN GOSS, as Director of the Indiana Department of
Natural Resources, GARY ARMSTRONG, NEIL LEDET, et al.,
Defendants – Appellees,

On Appeal from the United States District Court for the
Northern District of Indiana, Fort Wayne Div., No. 1:00 CV 219
The Hon. William C. Lee, Chief Judge

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

JURISDICTIONAL STATEMENT

The jurisdictional statement of the Plaintiffs-Appellants is complete and correct.

STATEMENT OF THE ISSUES

Appellants filed their appeal seeking relief from the District Court's ruling granting Appellees' Motion for Summary Judgment on all issues. The issues for this appeal may be stated, as follows:

1. Did the District Court err in finding Defendants' maintenance activities and draining of the 1.75 acre supply pond were exempt maintenance

activities and not subject to the recapture provision, thus not a violation of the Clean Water Act (“CWA”)?

2. Did the District Court err in dismissing Plaintiffs’ Fifth Amendment partial takings claim under 42 U.S.C. §1983 by ruling that the Plaintiffs should have first brought an inverse condemnation claim in state court?

3. Did the District Court err in finding no denial of procedural due process rights under 42 U.S.C. §1983 and the Fourteenth Amendment?

STATEMENT OF THE CASE

In their Complaint, the Plaintiffs claimed that the Defendants released thousands of cubic yards of sediment into the Fawn River and onto their property and thus, violated the CWA, 42 U.S.C. §1983, the Fifth Amendment and the Fourteenth Amendment, for events occurring on May 18, 1998.¹ *See* D.Ct. Docket, No. 1:00-CV-0219. On May 18, 1998, the Defendants, while making necessary repairs, opened the flow control gates at the Fawn River State Fish Hatchery (“Hatchery”) and drained the 1.75-acre supply pond.

Subsequently, all parties filed Motions for Summary Judgment. On March 11, 2002, after significant briefing on the issues, the District Court granted the Defendants’ Motion for Summary Judgment on all issues and denied the Plaintiffs’ Motion for Summary Judgment. The U.S. District Court for the Northern District of

¹ The Defendants-Appellees refer to Plaintiffs’-Appellants’ brief as “(Pl. Br. __)”, and refer to Plaintiffs’-Appellants’ short appendix as “(Pl. App. __).” The Defendants-Appellees have included a supplemental appendix bound with this brief, referred to as “(Supp. App. __).”

Indiana held that the Defendants did not violate the Clean Water Act nor did they violate the Plaintiffs' Fifth Amendment rights by taking their property or the Plaintiffs due process rights. Final judgment was entered on March 12, 2002.

STATEMENT OF THE FACTS

The Indiana Department of Natural Resources ("DNR") owns and operates the Fawn River State Fish Hatchery ("hatchery") located on the Fawn River in Orland, Indiana. Defendants David Clary and Tom Meyer, are the property manager and assistant property manager, respectively, and are responsible for the operation of the hatchery and the flow control gates located on hatchery property. (Supp. App. 1, 13) The hatchery raises smallmouth bass, walleye, muskies, channel catfish and rainbow trout for stocking Indiana's lakes and rivers. (Supp. App. 13) The hatchery consists of fourteen (14) rearing ponds, two administrative/services buildings, and a residence for the Assistant Property Manager. (Supp. App.13) The hatchery property straddles SR. 327 with eight (8) rearing ponds east of SR. 327 (the "East Unit") and the remaining rearing ponds and buildings on the west side of SR. 327. (Supp. App. 13) The Fawn River runs through the hatchery from east to west (generally) and passes right behind the main administration building. (Supp. App. 13) The Fawn River has been dammed just west of the main building, forming an approximately 1.75 acre supply pond, which feeds (by gravity) the six rearing ponds to the west side of SR 327. (Supp. App. 13-14)

The water level of the supply pond is regulated by two different structures: 1) the main flow control structure located at the southern end of the dam, and 2) an

emergency spillway located at the northern end of the dam. (Supp. App. 14) A bypass channel upstream of the supply pond is used to divert water before it reaches the supply pond. (Supp. App. 14) The supply pond's flow control structure consists of six separate gates – three upper and three lower – which sit on a concrete apron. (Supp. App. 14) These gates are manipulated individually, and a top gate must be raised in order to raise the gate directly below it. (Supp. App. 14) The gates are made of horizontal oak boards fitted together.² (Supp. App. 14) The gates are slotted into vertical I-beams. (Supp. App. 14)

Defendant Tom Meyer first noticed the poor condition of the I-beams on the supply pond's flow control structure sometime in the later half of 1996. (Supp. App. 14) The I-beams showed areas where the webbing had rusted through, affecting the structural integrity of the water flow control structure. (Supp. App. 14) He informed Dave Clary of his observations. (Supp. App. 1, 14) On March 31, 1997, Dave Clary called a local welder to inspect the flow control structure. (Supp. App. 1, 14) The welder inspected the flow control structure, and discussed the repair project, strategies and cost with hatchery personnel. (Supp. App. 1, 14) Hatchery personnel drafted a project proposal and sent it to Gary Armstrong, Hatcheries Supervisor, on April 16, 1997. (Supp. App. 1, 14) These plans, along with others, were submitted to Gary Armstrong, for funding approval on October 23, 1997.

² Since the actions of May 18, 1998, the flow control structure has been repaired and the boards are no longer oak, they are a synthetic material.

(Supp. App. 14) The plans were to draw down the supply pond, cut out the rusted sections of the I-beams and replace them with the new beams of the same size.

(Supp. App. 14)

The hatchery staff then discovered a problem with the river intake plumbing in the supply pond on March 12, 1998; the river pump would not hold its prime, rendering this hatchery water supply source nonfunctional. (Supp. App. 2, 15) Repair attempts on March 13, 1998, to valves and plumbing inside the hatchery failed to correct the problem. (Supp. App. 15) A new “foot valve” and cover screen were purchased and installed approximately mid-April 1998, but the priming problem still existed. (Supp. App. 2, 15) Through a process of elimination, it was determined that the problem with the river pump holding its “prime” had to be with the piping in the river inlet structure. (Supp. App. 15) Repairs would require exposing the plumbing in the river inlet structure. (Supp. App. 15) Defendants Clary and Meyer discussed repair strategies for the intake plumbing. (Supp. App. 2, 15) They decided a draw-down of the hatchery supply pond would facilitate plumbing repairs for the system, allow debris screen problems to be diagnosed and corrected, allow visual inspections in the areas of the flow control structure which were previously impossible to observe, and would serve as a “test draw-down” for the proposed flow control structure repair project. (Supp. App. 2, 15) As use of the pump system would be required for the Walleye pond harvesting beginning approximately June 1, 1998, they decided to perform the draw-down sometime before then. (Supp. App. 2)

On May 18, 1998, Defendants Meyer and Clary proceeded with drawing down the supply pond. (Supp. App. 3, 15) At approximately 8:30 a.m., the top three flow control gates were raised and secured in the “up” position. (Supp. App. 3) They had difficulty hooking the chain hoist onto a lower flow gate, but eventually succeeded in attaching it onto the southernmost lower flow control gate. (Supp. App. 15) It then took a great deal of physical effort just to start raising the lower gate. (Supp. App. 3, 15) Defendants Meyer and Clary slowly raised one lower gate, checking the water level in the river intake structure to see if the fill line plumbing was exposed. (Supp. App. 3, 15) This went on for sometime and eventually the hatchery supply pond was drawn down to a meandering channel. (Supp. App. 15) The plumbing in the river intake structure was eventually exposed. (Supp. App. 16) By this time, it was approximately 11:00 a.m. (Supp. App. 4) Defendants Meyer and Clary then traveled upstream to the rock dam, and then over to the East Unit, to observe the effects of the drawdown. (Supp. App. 4, 16) While the water level below the rock dam was several feet lower, the water level immediately upstream of the rock dam appeared nearly normal, as did Milldam Lake, which is the portion of the Fawn River immediately upstream of the flow control structure. (Supp. App. 4, 16)

At approximately 12:30 p.m., Defendant Clary drove to Cardinal Supply in Angola, Indiana to pick up some necessary repair parts while Defendant Meyer went to the local hardware store to purchase the rest. (Supp. App. 4, 16) Around 2:00 p.m., Neil Ledet, the fisheries biologist, returned to the hatchery and observed that the supply pond had been drained. (Supp. App. 8) At approximately the same

time, Plaintiff Gene Lewis arrived at the hatchery making angry accusations to Defendants Meyer and Ledet without first asking for any explanations. (Supp. App. 4, 8) Defendants Meyer and Ledet determined that any further discussions would be futile and broke off the conversation. (Supp. App. 4, 8) Defendant Ledet then discussed the situation with Larry Koza, the assistant fisheries biologist. (Supp. App. 8) They decided to inspect the bypass and river channels. (Supp. App. 8) While they were at the bypass channel, they decided to remove the boards (stop logs) that were in place, to divert as much clean water into the river below the dam as possible, bypassing the hatchery supply pond. (Supp. App. 8)

After terminating the conversation with Plaintiff Gene Lewis, Meyer began affixing chains to the bottom flow gate. (Supp. App. 5) Soon thereafter, Defendant Clary returned. At the same time, Neal Lewis (counsel for Plaintiffs) arrived on the scene and demanded that the flow control gates be closed. (Supp. App. 5, 16) Defendant Meyer informed Mr. Neal Lewis that they were attempting to do just that. (Supp. App. 5) Defendants Meyer and Clary discussed the situation and decided that it would be best to abandon their repair efforts, finish attaching the chains, and close the structure – which is what they did. (Supp. App. 5, 16) The opened flow control gates (the three upper and one lower gate) were closed by 3:00 p.m., and the supply pond was refilled by approximately 4:00 p.m. (Supp. App. 5, 16)

While one of the three lower flow control gates was opened for maintenance purposes, “massive” amounts of buried sediment were not cut out and flushed into

the Fawn River or onto the Plaintiffs' property. (Supp. App. 5, 13) None of the Defendants ever intended to "drain" the supply pond in order to rid it of excess sediment. (Supp. App. 6,10, 17) All of the Defendants, as DNR employees, are charged with protecting, managing and enhancing Indiana's natural resources and did not intentionally take any action, which might, even potentially, damage the environment. *Id*

SUMMARY OF THE ARGUMENT

1. The CWA was established in 1972, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Section 301 of the CWA makes it unlawful to discharge any pollutant into navigable waters of the United States except as authorized by permit. Plaintiffs allege that two of the permitting processes were necessary in this case, a National Pollutant Discharge Elimination System ("NPDES") permit under Section 402, and discharge of dredged or fill material under Section 404. The District Court accurately held that neither a Section 402 or Section 404 permit was required in this case.

2. Under the Fifth Amendment to the U.S. Constitution, applicable to the States through the Fourteenth Amendment, the government cannot take private property for public use without just compensation. Plaintiffs have failed to allege any viable Fifth Amendment taking claim. There was no direct physical taking of the Plaintiffs' real property, no interference in the Plaintiffs' property right in their

land or in the water, and no indirect taking of the use of Plaintiffs' property.

Furthermore, Plaintiffs have failed to allege any inverse condemnation.

3. The Fourteenth Amendment to the U.S. Constitution prohibits states from "depriving any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To support a cause of action under Section 1983 for deprivation of due process, the Plaintiffs must allege facts demonstrating: 1) that they have been deprived of a constitutional, statutory, or other legal right; and 2) that the deprivation was caused by someone acting under "color of state law." As correctly determined by the District Court, there is no evidence that the Defendants acted deliberately, and there is no basis for a due process claim.

ARGUMENT

STANDARD OF REVIEW

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Haefling v. United Parcel Service, Inc.*, 169 F.3d 494, 497 (7th Cir. 1999). The Court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *Id.* The proper standard of review for a district court's granting of summary judgment is *de novo*. *Id.*

I. The District Court Did Not Err When It Determined That Defendants Did Not Need Any Permits Under The Clean Water Act.

A. No Section 404 permit required.

The District Court correctly held that no Section 404 permit was needed for Defendants maintenance activities on May 18, 1998. The CWA requires that a Section 404 permit is needed for “the discharge of dredged or fill material” into navigable waters of the United States at specified disposal sites. 33 U.S.C. §1344(a). While the U.S. EPA administers the NPDES program, the Secretary of the U.S. Army Corps of Engineers administers the permits, subject to his and the EPA’s discretion. Section 404(f) of the CWA lists exemptions to the prohibited discharges of dredged or fill material. Specifically, Section 404(f)(1)(B) states that “the discharge of dredged or fill material . . . for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures . . . is not prohibited.” However, Section 404(f) contains an exception to the non-prohibited discharges. The exception is commonly referred to as the “recapture provision.” The recapture provision states that:

[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

§404(f)(2) (33 U.S.C. §1344(f)(2)).

“To be exempt from the permit requirements, one must demonstrate that proposed activities both *satisfy* the requirements of §404(f)(1) and *avoid* the exception to the exemptions of §404(f)(2).” *U.S. v. Sargent County Water Resources Dist.*, 876 F.Supp

1090, 1098 (D.N.D. 1994), *quoting U.S. v. Akers*, 785 F.2d 814, 819 (9th Cir.), *cert. denied* 479 U.S. 828 (1986), (emphasis in original))

In the present case, Defendants were performing maintenance work on the flow control structure and the plumbing intake valve. (Supp. App. 2, 12, and 15) Defendants clearly established that the flow control gates were raised solely for the purposes of making a maintenance inspection to the flow control gates and the I-beams and to perform maintenance to a related valve on the river intake plumbing. (Supp. App. 15) Plaintiffs point to no evidence showing that the raising of the gates on the flow control structure was for any other purpose besides maintenance. As found by the District Court in its Order, “the record is clear and undisputed that there were problems with the intake valve and the dam control mechanisms that required the Defendants to perform maintenance on the dam.” (Pl. App. 19) The District Court held that “the activities here fall squarely within the exceptions for dam maintenance.” (Pl. App. 20) Therefore, the Defendants maintenance activities satisfy the requirements of Section 404(f)(1)(B), and no Section 404 permit was required.

The Defendants must next show that they have avoided the recapture provision in Section 404(f)(2). Plaintiffs try to rely on 33 C.F.R. §323.4, which states, *inter alia*, that “. . . Maintenance does not include any modification that changes the character, scope or size of the original fill design. . .” This reliance is misguided. Plaintiffs also state that case law clarifies that any maintenance to the

dam and related intake structures was not allowed if the discharge of dredged materials exceeded the “original fill design” to those very same DNR structures.

The “original fill design” as stated in 33 C.F.R. §323.4(a)(2), was not changed in any way by the events of May 18, 1998. The “original fill design” of the dam would include the original specifications of the dam. Therefore, it refers to the dam structure itself and the size of the impounded waters. In this case, that would mean the size of the supply pond. The size of the supply pond was not changed due to the events of May 18, 1998. Although the supply pond was drained on that day, it re-filled to its original size. Therefore, the “original fill design” was never changed and a permit was never needed.

Defendants recognize that the permit exceptions listed in Section 404(f)(1) do not apply if the conditions in Section 404(f)(2) are met. Plaintiffs rely heavily on the *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985) *cert. denied*, 474 U.S. 817 (1985) case, claiming that the DNR, by opening the flow control gate, in some way changed the flow, circulation, or reach of the Fawn River. The Court in the *Huebner* case simply restates Section 1344(f)(2) which says that, “discharges require a permit if they bring an area of the navigable waters into a use to which it is not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.” *United States v. Huebner*, 752 F.2d 1235 at 1240. As noted above, however, the undisputed facts in this case do not show a prohibited discharge. Moreover, the Court in *In re Carsten*, distinguished the *Huebner* Court

stating that reviewing courts have broadly construed provisions of Section 1344(f)(2). *In re Carsten*, 211 B.R. 719, 732 (Bkrtey. D. Mont. 1997).

The *Carsten* court observed that the plain language of Section 1344(f)(2) entails two clauses and, along with the CFR, creates a two-prong test. *In re Carsten*, 211 B.R. at 732. The CFR adds: (1) “Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration;” and (2) “a discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.” 33 C.F.R. §323.4(c). The court reasoned that the second prong of the test can only be reached if the first prong is met. *In re Carsten* 211 B.R. at 732.

In this case, the court need not get past the first prong of the test. The events of May 18, 1998, did not cause “significant discernible alterations” of the flow or circulation of the Fawn River. Therefore, the second prong of the test is irrelevant. The Court also cited the statement of Senator Muskie where he stated, “while it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede the circulation or reduce the reach or size of the water body.” *Id.* at 732, *quoting*, 3 *Legislative History of the Clean Water Act of 1977* at 474.

Huebner, along with several other cases dealing with Section 1344 were discussed in detail in *U.S. v. Sargent*. In *Sargent*, the United States District Court stated that “reviewing courts have consistently held that Section 1344 exemptions be narrowly construed in order to avoid adverse impacts on wetlands.” *Sargent*, 876 F.Supp. at 1098, *See United States v. Huebner*, 752 F.2d at 1240-41; *Akers*, 785 F.2d at 819; *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 926 (5thCir.1983); *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F.Supp. 1166, 1176 (D.Mass.1986), *aff’d*, 826 F.2d 1151 (1stCir.1987), *cert. denied*, 484 U.S. 1061, (1988). The Court went on to discuss the differences between several cases (including *Huebner*) and the case before the Court. In those cases, the defendants claimed an exemption under Section 1344(f)(1)(A) or (C) and “were undertaking a large-scale conversion of a wetland area by removing existing vegetation, depositing dredge or fill material into low-lying areas in an attempt to convert the areas to agricultural use, or constructing drainage ditches in order to remove water from wetlands.” *Sargent*, 876 F.Supp. at 1100-01. The Court stated that it recognized that “Congress intended to preserve wetlands by prohibiting the discharge of fill material. It wanted to protect an invaluable resource.” *Id.* at 1103.

It is clear from the case law and the legislative history of the CWA that discharges causing minor harm to aquatic resources clearly fit within the exemptions of the CWA. Here the events of May 18, 1998, did not convert extensive areas of water into dry land nor did they impede the circulation or reduce the reach or size of the Fawn River. Both Defendants Meyer and Clary have stated that the

levels of the upper portion of the DNR reservoir, or Milldam Lake, appeared normal on May 18, 1998. (Supp. App. 4, 16)

The District Court stated in its Order that “the record is undisputed that the purpose of the drawdown was maintenance related and the Plaintiffs cited to no cases or regulatory authorities which define “original fill design” in the manner that they suggest.” (Pl. App. 19) “If this court were to adopt such an interpretation, it is questionable whether any activity or repair on a dam could ever qualify as “maintenance” under the CWA – a result this court does not believe was intended by the legislation.” *Id.* The Court further stated in its Order that “the maintenance to the dam structures would not (and did not) change the character, scope or size of the reservoir nor did it permanently alter the character or size of the supply pond and plaintiffs have presented no evidence to the contrary.” *Id.*

Plaintiffs have also tried to argue that Defendants have caused a change in the use of the Fawn River by the chemical eradication of some aquatic plant life in 1994 and 1995, and that this somehow violated the CWA. First, the Plaintiffs have brought forth no evidence showing that the events of 1994 and 1995 are related to the events of 1998. Secondly, the fact that chemical eradication was performed at one time on the Fawn River does not, in any way violate the recapture provision. Plaintiffs try to make an argument that the application of the chemicals to Milldam Lake caused a change in use. The purpose of the chemical application was to “maintain a little bit higher oxygen level during the summer months.” (Supp. App. 30-31) DNR never intended, nor did it ever effectuate a change in the use of the

Fawn River. Therefore, no permit was required. Plaintiffs' argument that the DNR created a discharge incidental to a purposeful change in use is completely without merit and no recapture occurred.

The District Court was correct when it held that “no recapture occurred as a matter of law.” (Pl. App. 23) The Court concluded that the maintenance exception did apply and no recapture occurred. Thus, the Defendants “were not required to have a §404 permit at the time they performed maintenance on the dam.” *Id.*

B. No Section 402 permit required.

The District Court correctly held that no Section 402 permit was required for Defendants actions on May 18, 1998. Under Section 402 of the CWA, a NPDES permit is required for the “discharge of a pollutant” from a “point source” into the navigable waters of the United States. 33 U.S.C. §1342. Furthermore, Section 502(12) of the CWA defines the term “discharge of pollutants” as “any addition of any pollutant to navigable waters from any point source.” 33 USC §1362(12)(A). *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580, 583 (6th Cir. 1988). Cobbling the various regulatory provisions and definitions together, the D.C. Circuit determined in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C.Cir. 1982) that “five elements must be present: (1) a pollutant³ must be (2)

³ The CWA defines “pollutant” as, *inter alia*, “dredged spoil . . . rock, sand . . . discharged into water.” 33 U.S.C. §1362(6).

added (3) to navigable waters⁴ (4) from (5) a point source.”⁵ The failure of any of these elements negates the NPDES requirement.

Plaintiffs argue that accumulated silt was allegedly discharged downstream. The Defendants did not add this silt to the Fawn River or to the supply pond. As courts dealing with the issue of sediments have held, the movement of naturally occurring sediments and other constituents of waterways do not fall within the jurisdiction of the Clean Water Act because “constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants.” *Appalachian Power Company v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976). Therefore, the Defendants were not required to obtain a NPDES permit before opening any or all of the flow control gates of the supply pond.

Moreover, even assuming river sediments constitute a “pollutant” under the CWA, which they do not, the sediments at issue here were discharged through the flow control gates of the hatchery’s supply pond dam. In *Gorsuch, supra*, the sole issue was whether the EPA Administrator had a non-discretionary duty to require NPDES permits for dam discharges. The *Gorsuch* court deferred to the EPA’s interpretation that dam discharges were not intended to be regulated by the NPDES program. *Gorsuch*, 693 F.2d at 161. EPA has not modified its

⁴ The CWA defines “navigable waters” as “waters of the United States.” 33 U.S.C. §1362(7).

interpretation that such discharges are unregulated and, therefore, required no permit.

Plaintiffs have failed to show an active removal or excavation of any sediment from the supply pond and its alleged redeposit elsewhere in the Fawn River. Furthermore, there was no “discharge of a pollutant” subjecting the maintenance activities of May 18, 1998, to a Section 402 permit. The record is clear that any movement of soil or sediment was clearly incidental to a maintenance activity and the Defendants did not open the flow control gates for the purpose of excavating and redepositing soil or sediment downstream. Therefore, as a matter of law, Defendants were not required to obtain a Section 402 NPDES permit.

II. The District Court Did Not Err When It Determined That Plaintiffs Fifth Amendment Takings Claim Was Barred.

The Fifth Amendment to the U.S. Constitution prohibits the government from taking private property for public use without just compensation. U.S. Const. amend. V. Plaintiffs misstate the District Court’s order in their brief when they state that “the district court found that all elements of Plaintiffs’ Section 1983 Fifth Amendment takings claim were met, but concluded that Plaintiffs failed to exhaust Indiana inverse compensation remedies.” (Pl. Br. 43) The District Court never addressed the elements of the Plaintiffs’ takings claim. The District Court simply found that because the Plaintiffs failed to pursue an inverse condemnation claim in state court, their claim was not ripe. (Pl. App. 32)

⁵ The CWA defines “point source” as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C.

Plaintiffs have failed to specifically allege how they believe that their property has been taken. It is unclear how **any** taking occurred in this case. There was no direct physical taking of the real property, direct physical taking of the water, flora, fauna of the river, or any indirect taking of the use of the property. Thus, Defendants-Appellees are unsure what exactly the Plaintiffs' theory is for a takings claim violation.

There has also been no interference in the Plaintiffs' property right in their land or in the water. The Plaintiffs' property right in the land has not been interfered with because even if it were true that the rush of water downstream momentarily flooded the abutting land, such a temporary act of flooding is likewise not actionable. The flooding of land constitutes a taking only when the flooding is permanent or inevitably recurring. *Turner v. U.S.*, 901 F.2d 1093, 1045 (Fed.Cir.1990).

The Plaintiffs' property right in the water has not been interfered with because the Plaintiffs only have a limited interest in the riverbed. Although the Plaintiffs do have riparian rights to the Fawn River, such as ownership of a portion or all of the streambed underlying the river, depending upon how their property is situated, the benefits enjoyed by riparian owners are limited to unimpeded river access and construction of wharves, landings or pier – all subject to state action for the public good. *Potomac Steam-Boat Co. v. Upper Potomac Steam-Boat Co.*, 109 U.S. 672, 682 (1884). The United States Supreme Court addressed the issue of

§1362(14).

riparian owners' private property rights in *United States v. Chandler-Dunbar Company*, 229 U.S. 53 (1913). The Supreme Court stated that:

...whether this private right to the use of the flow of water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows, or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

United States v. Chandler-Dunbar Co., 229 U.S. at 69. See *United States v. Willow River Power Co.*, 324 U.S. 499, 508-509 (1945).

In the present case, the Plaintiffs wholly fail to allege any interference with their riparian rights to the Fawn River.

It is impossible for the Defendants to have taken the water, flora, or fauna of the Fawn River because the Plaintiffs do not have any property rights to the fish or aquatic life in the river. Plaintiffs allege only that the opening of the Fawn River dam caused damage to the fish and aquatic life in the Fawn River. The Plaintiffs' claim that fish were killed, water clarity was impaired, invertebrate animals were killed, clams and mussels were killed, the stream was uninhabitable to animal and plant life, gravel stretches were covered, and that mud created reefs and filled eddies and the channel from bank to bank in many locations. Even if this were true, they are not actionable because the Plaintiffs do not have such rights. The Indiana Supreme Court held 100 years earlier, that no individual has a property right in fish or game while in its natural state. *Smith v. State*, 58 N.E. 1044, 1045-1046 (Ind. 1900). Rather, the Indiana Supreme Court stated that the taking of fish or the killing of game is not a right, but a privilege granted by the state under such

conditions as it may see fit to impose. *Smith*, 58 N.E. at 1046. Thus, the State, not the Plaintiffs, owns the fish. In addition, Ind. Code § 14-25-1-2 declares that water in a natural river is a “natural resource and public water of Indiana; and subject to control and regulation for the public welfare as determined by the general assembly.”

Finally, there has been no indirect taking of the use of the Plaintiffs’ property. Pursuant to the Fifth Amendment to the United States Constitution, “a taking is recognized not only for the physical seizure or invasion of property by the government, but also when government regulations have the effect of impinging upon a vested property right.” *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316-317 (1987). However, to assert a taking of Plaintiffs’ property, Plaintiffs must first show that either the property has been seized or that their property rights have been infringed. Here, Defendants have not seized or deprived Plaintiffs of their property.

Plaintiffs claim that they have no inverse condemnation remedy as all beneficial uses of their property have not been lost. Their arguments are inconsistent. Traditional Fifth Amendment takings law recognizes two types of takings: 1) a regulatory taking, and 2) an actual physical invasion. Each of these takings has different constitutional standards to determine if compensation is required. If the taking is a regulatory taking, such as a zoning requirement as in the *Mendenhall v. City of Indianapolis*, 717 N.E.2d 1218 (Ind.Ct.App. 1999) case, the constitutional standard used to determine if compensation is required is the “all

beneficial uses have been destroyed” standard. *Mendenhall*, 717 N.E.2d 1218 at 1227-1228, *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1015 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); and *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). However, if the taking is a physical occupation, then even “minimal permanent physical occupation of real property required compensation under the clause.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

Regardless of what type of taking occurs, a regulatory or a physical invasion, the aggrieved party must first bring an action in state court. This Court recently held that litigants who assert a takings claim under 42 U.S.C. §1983 must meet the Court imposed ripeness requirements of the *Williamson County* case prior to bringing a federal claim. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, (1985); *Daniels v. The Area Plan Commission of Allen County*, No. 01-1158, 2002 WL 3101882 * 10 (7th Cir. 2002). This Circuit, unlike others, has “consistently maintained a strict requirement that Takings Clause litigants must first take their claim to state court even when plaintiffs . . . are alleging a taking for private purpose.” *Id.* All of the above cited takings cases were first brought in state court for a determination of: 1) if a taking occurred and 2) if so, what the compensation was to be. The same holds true for an inverse condemnation claim. Regardless of whether the taking is a regulatory taking, impairment of value or physical invasion, the case must first be brought before the state court to determine what compensation, if any, is due. The Supreme Court has

held that a takings claim does not accrue until available state remedies have been tried to no avail. *Williamson*, 473 U.S. at 195.

The *Williamson County* case set out a two-part test. Under this test, federal courts are precluded from adjudicating a takings claim until litigants have met both requirements. *Id.* The requirements are: 1) the “Final Decision Requirement” – the plaintiff must demonstrate that he or she received a ‘final decision’ from the relevant government entity; and 2) the “Exhaustion Requirement” – the plaintiff must have sought “compensation through the procedures the State has provided for doing so.” *Id.* The federal courts have reasoned that, “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Daniels* 2002 WL 3101882 at * 13, quoting *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997).

This Court held in *SGB Financial Services, Inc., v. Consolidated City of Indianapolis – Marion County*, 235 F.3d 1036, 1037 (7th Cir. 2000), that “a state violates the Constitution only by refusing to pay up.” And if the State is not violating the Constitution, there is no basis for relief under Section 1983. The Indiana Court of Appeals stated that “an action for inverse condemnation is premature until such time as the landowner can establish that there are not available avenues by which the landowner can put his property to an economically beneficial or productive use.” *Galbraith v. Planning Department of the City of Anderson*, 627 N.E.2d 850, 854 (Ind.Ct.App.1994). See *Mendenhall*, 717 N.E.2d at

1227-1228. Under *Williamson County*, the plaintiffs are first required to seek compensation through the state court's inverse condemnation proceedings, unless such a proceeding would be futile, or if the party is seeking purely equitable relief, as Indiana law does not allow inverse condemnation claims for those seeking equitable relief. *Daniels*, 2002 WL 3101882 at * 17. In the *Daniels* case, the Plaintiffs were not required to bring an inverse condemnation claim in state court before filing in federal court because the plaintiffs were not seeking monetary relief but were instead seeking injunctive relief. *Id.*

Here, it is unclear whether Plaintiffs are alleging a regulatory taking or physical taking. Regardless of the takings theory at issue, whether or not Indiana recognizes an inverse condemnation claim is irrelevant. To determine if a taking has occurred, one must look to the two constitutional standards explained above. If Plaintiffs are alleging that a regulatory taking occurred, they must show that all beneficial use has been lost. If not all beneficial uses have been lost, then no taking has occurred under a regulatory takings theory. Plaintiffs admit in their own brief, that "all beneficial uses have not been lost." (Pl. Br. 43) Therefore, by their own admission, Plaintiffs do not have a claim for a regulatory taking.

On the other hand, if Plaintiffs are alleging a physical invasion taking, they must show that the value of their property has decreased in some way. The loss of all beneficial use test does not apply. But to do this, they must first bring an inverse condemnation claim in state court.

Thus, regardless of what theory the takings claim is brought under, regulatory or physical invasion, the Plaintiffs must first bring an inverse condemnation action in state court. By failing to do so, Plaintiffs have not yet been denied just compensation. There is therefore, no proof that a constitutional violation has occurred. Their failure to pursue a claim in state court, as required, bars them from bringing this action in federal court. As such, the District Court was correct in ruling that the Plaintiffs Fifth Amendment takings claim was not ripe for adjudication and barred by the decisions in *Williamson* and *SGB*. (Pl. App. 32)

III. The District Court Did Not Err When It Held That The Defendants Did Not Violate Any Of Plaintiffs' Due Process Rights.

The Fourteenth Amendment applies the Fifth Amendment protection to the states, prohibiting state governments from depriving a person of life, liberty, or property without due process of law. U.S. Const. amend XIV, §1. To support a cause of action under Section 1983 for deprivation of due process, the Plaintiffs must allege facts demonstrating: (1) that they have been deprived of a constitutional, statutory, or other legal right; and (2) that the deprivation was caused by someone acting under “color of state law.” *Flagg Bros. v. Brooks*, 436 U.S. 149, 154 (1978).

The due process clause has both procedural and substantive components. Substantive due process guarantees citizens the right to be free from “constitutionally arbitrary executive action,” and “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’” *County of*

Sacramento v. Lewis, 523 U.S. 833, 843 (1998). For that reason, state actors sued in their personal capacity enjoy qualified immunity when performing a discretionary function so long as their conduct is reasonable in light of clearly established law and the information they possess. The Supreme Court put it this way:

[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The Supreme Court has also held that a state actor's negligent act causing unintended harm does not implicate the due process clause. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). For procedural due process, the act must be more than negligence. *Id.* Injury caused by one's failure to use due care is not actionable under a due process theory. *Id.*

The record in this case contains no evidence that Defendants intended to purposefully harm Plaintiffs. Even if Defendants' actions were negligent, which they were not, the actions were not "arbitrary in the constitutional sense." *County of Sacramento*, 523 U.S. at 843. Since negligent deprivations of life, liberty, or property are not actionable under Section 1983, there has been no due process violation in this case.

The District Court was correct when it cited to *West By and Through Norris v. Waymire*, 114 F.3d 646, 651 (7th Cir. 1997) (citing *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997)), stating that “the defendant must make a deliberate choice; an inadvertent omission won’t do.” (Pl. App. 35) Furthermore, the District Court pointed out that even if the Defendants actions of May 18, 1998, were intentional, as the Plaintiffs allege, it does not violate due process as long as an adequate state post-deprivation remedy is available. (Pl. App. 35 citing *Hudson v. Palmer*, 468 U.S. 517 (1984) Plaintiffs have failed to cite any evidence showing that the Defendants’ actions were intentional and therefore, their claim for due process violations must fail.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

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Certificate of Filing on Electronic Medium

I do hereby certify the on the 18th day of September, 2002, I caused an electronic PDF format version of this brief to be uploaded to the Seventh Circuit's website. I also certify that I have included a diskette containing a PDF version of this brief with the hard copies of the brief filed in this case.

Amy E. McDonnell

Certificate of Circuit Rule 31(e)

I do hereby certify that pursuant to Circuit Rule 31(e), as amended effective December 1, 2001, counsel for the Defendants-Appellees certifies that the documents in the Appendix are not available in digital or electronic format.

Amy E. McDonnell

Certificate of Filing and Service

I do hereby certify that on the 18th day of September 2002, I caused an original and sixteen copies of the foregoing Brief of Appellees and the attached Supplemental Appendix, along with a diskette containing the contents of the brief in PDF format, to be dispatched to the U.S. Postal Service, first-class, postage prepaid, for delivery to the Clerk of the United States Court of Appeals for the Seventh Circuit. I further certify that on the 18th day of September, 2002, I caused two copies of the brief and Supplemental appendix, and one copy of the brief's diskette, to be served by U. S. Mail, first-class, postage prepaid, on the following:

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