

Case No. 02-1863

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GREENFIELD MILLS, INC., et al.,

Plaintiff-Appellants,

v.

JOHN GOSS, as Director of the Indiana
Department of Natural Resources, et al.,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Indiana
Fort Wayne Division

The Honorable William C. Lee
Chief Judge

District Court No. 1:00CV0219

APPELLANTS' REPLY BRIEF

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I. Defendants (Appellees) have made Unsupported or Erroneous Statements of Fact.

A. Amount of Sediment Released and Effect on the Fawn River and Greenfield Mills Lake

In this case the pivotal fact issue is whether or not substantial quantities of sediment were carved from the IDNR controlled reservoir and discharged through the IDNR dam into Fawn River, resulting in serious damage to the wetland properties owned by Plaintiffs. Defendants have wholly failed to produce any evidence to dispute Plaintiffs' proofs on this issue.

While the parties do contest the size of the reservoir that was drained, ultimately, that issue has nothing to do with a final resolution of liability in this cause.¹ Only the amount of dredged materials discharged via the IDNR dam and newly deposited into Fawn River is relevant.

The only evidence on this issue was put in by Plaintiffs, and it shows overwhelmingly that a huge amount of sediment was carved out of the reservoir

¹ Defendants state the size of the reservoir dammed by the IDNR is only the small “supply pond.” This is in dispute, but not relevant to resolution of the litigation. Plaintiffs evidence in the Record is that the IDNR reservoir was drained to a channel for at least one mile in the body of water marked as the “Orland Millpond” on site identification diagram of the I.U. Report. (App. 2) “The Orland Reservoir is all the flat water behind the Orland Dam extending about 1 mile upstream.” (I.U. report, App. 3 at note 5). Professor Willard personally inspected the Orland Reservoir within only a few days, and a considerable draw down was still evident at the time of his visit on May 22, 1998. (App. 20) Photographs of the upper IDNR reservoir a/k/a Mill Dam Lake also were taken on May 24, 1998 by Plaintiffs Gene and Sharon Lewis. (App. 135) Those photographs show the upper IDNR Reservoir had not completely refilled and was still drawn to a channel some 6 days after the event. A drained mud bottom (mud flats) and exposed water lilies can be seen in those photographs as well as the upper edges of the cut channel still evident. (App. 145-46).

above the IDNR dam and ended up in Fawn River and Greenfield Mills Lake, where it remains. (App. 1-42, 51-57, 67-73). The comprehensive I.U. study of the river from the IDNR dam to Greenfield Mills Lake 5 miles downstream was filed and served with the complaint on 5/16/00, over two years ago. Defendants have submitted no competing studies in the intervening period.

Plaintiffs also supplied the only eye-witness evidence attesting to the condition before and after 5/18/98 of Fawn River and Greenfield Mills Lake. These witnesses have intimate knowledge of the affected stretch of Fawn River below the IDNR dam. (App. 40-42, 127-128, 129-130, 132-148).

Defendants Clary and Meyer don't dispute that on 5/18/98 they opened the IDNR dam gates, leaving them open most of the day; and that from the beginning of the operation until the end, the water rushing out through the opened dam was dirty brown from the sediment it was carrying. (App. 106). They don't dispute that at least the lower portion of the reservoir was drained to a channel, and that the bottom of the reservoir was carved out by the force of the rushing water and hydraulically dredged into Fawn River below. They admitted this in their depositions. (*See, Appellants' Brief*, 6-9). Defendant Clary, the manager in charge of the operation, admitted in cross-examination that the sediment carved out of the reservoir that day "had to be deposited" into the stretch of river between the IDNR dam and the downstream bridge at County Road 1100. (App. 97). The two IDNR biologists witnessing the event were so concerned by the literally "black" water going into Fawn River that they attempted to divert some of the upstream water

around the dam. (Neil Ledet, Sup. App. 8 and App. 113). The IDNR Defendants' and employees' own testimony admits to a discharge of dredged materials in alarming quantities.

Only Defendants' legal argument attempts to dispute the quantity of materials. This is done by making unsupported statements of fact, or citing to otherwise incompetent evidence. Defendants' brief makes three erroneous statements about the amount of sediment dredged into the river.²

First, Defendants say that "massive amounts of buried sediment were not cut out and flushed into the Fawn River or onto Plaintiffs' property." (Def. brf. 8, citing Defendants Clary and Meyer, Sup. App. 5 and 13). This is an incorrect and unsupported statement of fact.

Defendants cite only page 5 and 13 of the Defendants Supplemental Appendix. An examination of those portions of the record reveals that nothing on those pages supports the statement of fact made in Defendants' Brief to this Court. Nor can such a far reaching implication be derived from anything supplied by Defendants to this Court. Neither Clary nor Meyer attempt to testify that they ever traveled or inspected the section of river from below the IDNR dam to Greenfield Mills Lake after the event of 5/18/98. They do not attempt to say they performed any studies, nor do they offer any opinions about how much sediment was dredged from the reservoir that day or where it went. They don't claim to have the qualifications to

²In the action below, Plaintiffs made fully briefed and formal objection to these statements, although Plaintiffs' objection was never ruled upon by the trial court. (App. 153-177).

offer opinions on these issues. Defendant Clary specifically admitted in deposition that he had never been down the river and "is in no position" to offer any opinions as to how the river has or hasn't changed because of the 5/18/98 event. (App. 176-77).

All that Defendants Clary and Meyer say in the pages of their affidavits cited in Defendants' brief is that they did see silt and discolored water "immediately downstream of the supply pond," i.e. immediately below the dam; that the water in the supply pond (lower reservoir) was still discolored after they closed the dam gates and after the reservoir had re-filled; and that at about 5:00 or 6:00 p.m. that same day they traveled to two bridges on the river, and they claimed that the "water clarity was unremarkable," and the river appeared normal." (Sup. App. 5, 16).

Defendants never identify where these bridges are, nor attempt to establish any competency of Defendants for the observations, let alone how such casual observations might or might not be relevant to determining where the slug of mud traveling down Fawn River might or might not yet be located as of the times of observation.³

Nothing supplied by Defendants indicates that Meyers, Clary, or any qualified IDNR official or scientist has ever investigated the 4-5 miles of river downstream of their dam where the sediments were transported and deposited. One might

³The bridges can be located on the map in the record supplied by Plaintiffs. (App. 2; Shrt. App. 39). The County Road 1100 bridge is approximately 4-5 miles downstream from the IDNR dam, on the east portion of Greenfield Mills Lake. (App. 133, 136; map, Shrt. App. 39, near the number 930 to the east of Greenfield Mills on the north-south road). The other bridge, on State Road 120, is upstream of the IDNR dam more than a mile and, therefore, above the sediment release site. (App. 149, Shrt. App. 39, east of the Town of Orland on the east-west road).

question this astounding lack of interest by an agency charged with protecting the environment.

The casual, incompetent, and otherwise irrelevant observations of Meyers and Clary are the only evidence Defendants offers with which they claim to dispute the exhaustively documented scientific and lay evidence produced by Plaintiffs of a massive release of sediment via the IDNR dam causing permanent destructive changes to Fawn River and Greenfield mills lake.

Second, Defendants at p. 13 of their brief say that the events of May 18, 1998 "did not cause any 'significant discernible alterations' of the flow or circulation or reach of the Fawn River." For this statement of fact, no citation is given.

Finally, Defendants say at p. 15 of their brief that 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." There is, again, no citation for this statement of fact.

The fact issue of how much sediment was dredged out of the reservoir on 5/18/98 and its effects on Fawn River are not fairly in dispute. There is no genuine issue that what Defendants did on 5/18/98 caused severe damage and alterations to the flow, circulation and reach of Fawn River below the IDNR dam all the way to and including Greenfield Mills Lake.⁴

Defendants' erroneous or unsupported statements of fact are used

⁴ Indeed, this is why Plaintiffs filed their own motion for summary judgment on Section 404 of the Clean Water Act ("CWA").

throughout their brief as the linchpin of their arguments, and should be disregarded.

B. Defendants' Statement re: Repairs to the IDNR Dam

Defendants' statement of fact at p. 4, footnote 2 also has no citation and no source in the record. This unsupported statement that Defendants have actually repaired the "flow control structure," i.e., IDNR dam gates, prior to filing their brief here serves to reinforce Plaintiffs' argument that no repairs to the dam itself were made on 5/18/98 nor were any repairs intended to be made that day. (*Appellants' Brief*, 10-13).⁵

It is true Defendants planned, at some unspecified point in the future, to perform dam maintenance—but such was not the intent of the activities on May 18, 1998.

Q. [B]e careful here . . . my point is . . . there are two things going on, there were some future things you planned to do, right?

A. Correct.

(App. 99, Meyers)

As previously noted in *Appellants' Brief*, the Defendants have continually and improperly confused the issue of unscheduled future maintenance with the May 18, 1998 operation. (*Appellants' Brief*, pp. 11, note 9). On cross examination, the Defendants testimony on the issue was quite clear that no repairs or maintenance to the dam was intended on May 18, 1998.

⁵On the personal knowledge of counsel, the repairs to the IDNR dam referenced by the Defendants were performed this spring, 2002, some 4 years after the events at issue here.

Q. Whose idea was it to lower the millpond on May 18 ...?

A. Well, I think it arose as a joint discussion how to repair the [hatchery] plumbing to the intake structure.

(App. 91, Defendant Clary, comment added)

Our intentions were only to expose the [hatchery] piping. We had no idea it was going to be required to lower it [the reservoir] to that level.

(App. 93, Defendant Clary, comment added).

Q. So again, neither you nor Tom Meyer—in the morning of May 18, neither of you expected to fully drain the millpond, is that correct?

A. Yes.

Q. So you could not have had any intention to fully inspect the dam gates down to the bottom because you didn't intend to fully drain it, right?

A. Yes.

(App. 89, Defendant Clary).

Well, the—the only actual repair we effected that day, if you can call it a repair, was attaching the clevis and/or clevises and attaching a chain to the north bottom gate. That was kind of an afterthought while—while we were going through that process, because we had such a hard time hooking on, that would alleviate the problem at some future point.

(App. 107(b)). Meyer unequivocally admitted no maintenance to the dam was intended.

Q. And you didn't actually plan to repair anything on the flow gates [of the dam] on May 18th of 98, did you?

A. That is Correct.

(App. 99, comment added). Defendants' legal argument claiming the purpose of maintenance to the Dam on May 18, 1998 contradicts Defendants' admissions and should be disregarded.

C. Defendants' Statements of Fact re: No Taking

Defendants say at p. 9 of their brief:

There was no direct physical taking of the Plaintiff's real property, no interference in the Plaintiffs' property right in their land or in the water, and no direct taking of the use of Plaintiffs' property. Furthermore, Plaintiffs have failed to allege any inverse condemnation.

There are no citations for these statements of fact.

As discussed *supra*, Defendants have produced no competent evidence to dispute Plaintiffs' evidence that their private river property was covered in materials dredged from the IDNR reservoir at Orland on May 18, 1998, and that this caused massive permanent damage to the river and Greenfield Mills Lake. Without any support in the record, Defendants say that there was no physical invasion of Plaintiffs' property.

Defendants also claim here that Plaintiffs failed to allege inverse condemnation. This appears to be a challenge to the sufficiency of Plaintiffs' pleading on the takings count under Section 1983. Numerous references to the complaint will show that Plaintiffs properly pleaded all elements of their takings claim. (Docket no. 1, (ownership of the property, p. 2, par. 5; p. 3, par. 1; p. 6, par. 17); (taking alleged, p.25, par. 15);(damage to property interests, p.3, par.3).

II. Argument on Section 404 Clean Water Act

A. Maintenance Exemption Issue

Defendants claim that they were doing "maintenance" on 5/18/98 and therefore are exempted from the requirement of a permit under Section 404. (Def. brf. 11). But maintenance to a plumbing fixture is not a "maintenance" that Defendants can use to claim the exemption.

Only maintenance on the dam itself would qualify Defendants for an exemption. 33 U.S.C.1344(f)(1)(B). Plaintiffs have already fully addressed this issue, and Defendants have offered nothing which refutes Plaintiffs' arguments and evidence.⁶ (*Appellants' Brief*, 10-13, 25-26).

B. Recapture Clause

It is well known that draining reservoirs creates a danger of hydraulic dredging and discharge of materials into streams below them. IDNR engineers admitted this. (App. 116-117). For this reason, any draining of a reservoir must be done slowly and carefully with engineering controls to prevent destruction of the downstream environment. (*Id.*). Regardless of Defendants' claimed contentions about maintenance, Congress's clear intent in writing the recapture provision was to prevent what happened here.

Defendants themselves seem to concede in their brief that Defendants' subjective

⁶Plaintiffs do note that for the first time, Defendants use the term "related" implying some relationship between the plumbing under repair and the dam, but Defendants have not explicitly tried to tell the court that this hatchery plumbing line is any part of the dam itself, because it is not. (Def. brf. 11; see i.e.; Sup. App. 19).

intent is not relevant. They cite to both *In re Carsten*, 211 B.R. 719,732 (Bkrtcy. D. Mont. 1997) and to the often quoted remarks of Senator Muskie reiterating the bipartisan explanation of the purpose of the recapture clause. (Def. brf. 13-14). Both authorities say proof of alterations or impairment to the flow, circulation or reach of the affected waters is sufficient alone to trigger the recapture clause.

Defendants bear the burden of proof that they were 1) doing dam maintenance in the first instance, and 2) that they did not violate the recapture clause. *U.S. v Brace*, 41 F.3d 117, 124 (3d Cir. 1995). They have done nothing to fairly meet that burden. All that Defendants have done is repeat the same conclusory and unsupported opinions of legal counsel. Defendants say that there were no "significant discernible alterations of the flow or circulation of the Fawn River;" that "the events of May 18, 1998 did not convert extensive areas of water into dry land nor impede the circulation or reduce the reach or size of the Fawn River." (Def. brf. 13-15). As discussed earlier, there is no foundation in the record for these statements by Defendants.

Plaintiffs therefore say that even if there were a fact issue about the dam maintenance exemption, there clearly is no fact issue on this record that the recapture clause was violated, and Plaintiffs are entitled to summary judgment under Section 404.

III. Argument on Section 402 Clean Water Act

The district court seemed to have found that all elements of a Section 402

violation were proved. However, it went on to rule that since Defendants did not have a "purpose of excavating and redepositing soil downstream" that Defendants needed no permit. (Op. 29). Plaintiffs believe that this erroneously injects a fault requirement into the Act.

Defendants argue that their discharge of buried sediment from the reservoir floor did not constitute the "addition" of a pollutant under Section 402, because the sediment was already in the reservoir. (Def. brf. 17). This issue was extensively briefed by Plaintiffs below in the summary judgment motions. The district court agreed with Plaintiffs that there was an "addition." (Op. 23-28).

There is nothing in the statute to indicate that Congress ever intended to excuse the permit requirements for discharging pollutants buried under the floor of a water-body and there is nothing in the statute indicating any intent to distinguish between adding pollutants to the water in related vs. unrelated water-bodies. *Dubois v USDA*, 102 F. 3d 1273, 1298 (1996). If Defendants' argument is carried to its logical conclusion, one could remove sediment or any other pollutant from any place anywhere in a watershed, dump it into another part of the watershed, and escape liability under the Act.

Defendants cited several cases for their "no addition" argument. In *Appalachian Power Company v Train*, 545 F.2d 1351, 1377-78 (4th Cir. 1976), the court held that the EPA could not force the coal industry to treat its discharge water to remove both its own contaminants and those already in the source stream. In other words, they couldn't be forced to make the water literally cleaner than when it came to them. In

National Wildlife Fed. v Consumers Power Co. 862 F. 2d 580 (6th Cir.1988) the court ruled that since the fish in Lake Michigan were already suspended in the water, when the power company ground them up in their turbines and flushed the pieces back into the lake, there was no "addition."

Regardless of the wisdom of the 6th Circuit's ruling in *Consumers Power*, both that case and *Appalachian Power* had one thing in common. The pollutant at issue literally was already suspended in the water prior to its discharge by the defendant. Here, it was not.

Most courts have held that any resuspension of sediment from the streambed itself is the "addition" of a pollutant. *Rybachek v U.S. E.P.A.* 904 F.2d 1276, 1285-1286 (9th Cir. 1990); *U.S. v M.C.C. of Florida Inc.* 772 F. 2d 1501 (11th Cir. 1985). (Numerous cites to the subsequent history are omitted. The U.S. Supreme Court vacated the judgment portion only. The conclusions of fact and law remain the law of the case and the law of the 11th Circuit. See, *U.S. v M.C.C. of Florida, Inc.* 967 F.2d 1559 for entire history). In *Comm. Save Mokulumne River v East Bay Mun. Util. Dist.* 13 F. 3d 305 (9th Cir. 1993), *cert den* 513 U.S. 873 (1994), the court specifically held that the defendant's dam was a point source under Section 402, and that there was an addition of a pollutant caused by the dam, since the dam reservoir served to "collect and channel surface runoff containing acid mine drainage into the reservoir" and then released it through the dam into the river. *Id.* at 309. The facts are essentially the same here, except the listed pollutants here are

sand and dredged spoil. 33 U.S.C. 1362(6).

Defendants also cite *National Wildlife Fed. v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) for their argument that no Section 402 permit was needed. In *Gorsuch*, the issue was whether or not EPA could be forced to regulate all dams for routine operations under Section 402. The issue was if Section 402 required permits for mere "water quality" changes of the water passing through the dam. *Id.* at 165. The only water quality changes disputed as pollutants were low dissolved oxygen, cold, and supersaturation (too much oxygen). *Id.* The *Gorsuch* court pointedly distinguished any actions which would cause already deposited sediments to pass through a dam. "Sluicing is a deliberate attempt to have the river carry accumulated sediment downstream." *Id.* at 164, n.15. In *Gorsuch*, there was no evidence in the record of any significant problem with sediment releases. *Id.* at note16.

Moreover, all parties in *Gorsuch*, including the EPA agreed that a dam can in some instances be a "point source." *Id.* at n. 22, (citations omitted).

IV. Argument on Section 1983 Fifth Amendment Takings

Defendants' arguments here are identical to those raised in their earlier motion to dismiss for failure to state a claim. First, they say in conclusory fashion that they simply caused no damage to or interference with Plaintiffs' property rights. Second, they say that Plaintiffs have no property rights in the river. Finally, they say that Plaintiffs' claim is premature, because they need to exhaust Indiana's inverse

condemnation remedies first. The district court ruled against Defendants on the first two arguments earlier in its opinion and order of 1/23/01 denying Defendants' motion to dismiss. (Docket no. 51, pp 18-20).

A. Defendants' "No Taking" Argument

Defendants offer no evidence here to contradict all the evidence supplied by Plaintiffs that massive damage and trespass to their properties occurred because of the hydraulic dredging event of 5/18/98. They offer no argument against the clear federal law that physical invasion cases are considered the most egregious violations of the Fifth Amendment and are prohibited if they cause any significant harm to private property. (*Appellants' Brief*, 19-20).

Defendants suggest that this case is about dead fish. It is not. This is a "physical invasion" takings case. Plaintiffs proved without contradiction that they own the property and that the Defendants physically invaded it on a massive scale—and never left.

B. No Property Rights Argument

As the district court pointed out in its earlier opinion denying Defendants' motion to dismiss, the U.S. Constitution protects property rights, but it is generally state law that creates them. (Docket no. 51, citing *Board of Regents of State Colleges v Roth*, 408 U.S. 564, 577 (1972)). As the district court also said "here it is undisputed that the Fawn River is non-navigable under Indiana law." (Docket no. 51, at 19).

Defendants have never argued that the Fawn River owned by Plaintiffs is navigable under state law. "[D]efendants do not contest that Plaintiffs have a right to have the Fawn River flow past their property free of contamination from any upstream user." (Docket no. 48, Def. Rply Brf Supporting Mot. to Dsms, 14). In their brief here, they again admit that Plaintiffs own the riverbed itself. (Def. brf. 19). Ownership of the riverbed is an incident of title peculiar to non-navigable streams. *E.g. Ross v Faust*, 54 Ind. 471 (1876); *Ridgeway v Ludlow*, 58 Ind. 248 (1877); *Vance v. Wade*, 146 N.E. 399, 84 Ind. App. 134 (1925).

The common law of Indiana has long recognized special non-navigable riparian rights. As early as 1893, in applying Indiana law, the Seventh Circuit stated:

A riparian proprietor upon a non-navigable stream is entitled, in the absence of grant, license, or prescription limiting his rights, to have the stream which washes his lands flow as it is wont by nature to flow, without material diminution or alteration.

Every riparian proprietor has the right to insist that the stream shall flow to his lands in the usual quantity and quality, and at its natural place and height.

Indianapolis Water Co. v. American Strawboard Co. 53 F. 970, 974 (7th Cir. 1893).

In *Penn American Glass Co. v. Schwinn*, 98 N.E. 715, 177 Ind. 645 (1921) the court held that discharging and depositing large amounts of sand into the bed of a non-navigable stream violated property owners' riparian rights. *Accord, Pumpelly v Green Bay Co.* 13 Wall. 166, 80 U.S. 166, 20 L.Ed. 557 (1871). "The doctrine of riparian rights attained its maximum authority on non-navigable streams." *United*

States v Willow Ridge River Power, 324 U.S. 499, 506 (1944).

What Defendants have done here is to quote from and cite federal cases only involving navigable streams. (Def. brf. 19-20). From this they bootstrap into the erroneous argument that the only rights Plaintiffs have in their river property are the rights of access and to build wharves or piers. Defendants citations and this argument are inappropriate in this case. Defendants have conceded throughout the case that Plaintiffs' property is non-navigable for purposes of state law property rights. If they now wish to claim the river is navigable under state law, that is their burden of proof, and they have provided no proof.

C. Exhaustion of State Inverse Condemnation Remedy

Defendants agree that Indiana law presently allows compensation for takings only if all beneficial uses have been destroyed. “[A]n 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 Dept. of the City of Anderson*, 627 No.E. 2d 850, 854 (Ind. Ct. App. 1994) (*emphasis added*, quoted verbatim by Defendants at pp 23-24 of their brief). However articulated, the result of the rule is the same. Only property owners who can prove a complete taking have any rights under Indiana law.

Federal courts agree that in Fifth Amendment takings claims, if there is an available state law inverse condemnation remedy, then the plaintiff must exhaust it

first. *E.g. SGB Financial Services, Inc. v Consolidated City of Indianapolis-Marion County, Indiana*, 235 F.3d 1036, 1037-38 (7th Cir. 2000). Conversely, if there is not an adequate state law inverse condemnation remedy, no exhaustion is required.

It is beyond dispute that the Fifth Amendment of the U.S. Constitution protects against even partial takings, particularly in physical invasion cases. (*Appellants' Brief*, 43). Indiana inverse condemnation law, however, does not protect against partial takings and offers no remedy for them.

In this case, Plaintiffs have not suffered a complete taking. Defendants cite to the cases in their brief, as they did in the district court, stating the rule that Indiana simply does not recognize partial takings. (Def. brf. pp. 23-24).

Defendants' efforts to explain away this apparent paradox are without merit. First, they say simply: "Regardless of the takings theory at issue, whether or not Indiana recognizes an inverse condemnation claim is irrelevant." (Def. brf. 24). Defendants' statement is dramatically at odds with status of the federal judiciaries' answer to this issue, including this Circuit. *SGB Financial Services Ind. v. Consolidated City of Indianapolis-Marion County*, 235 F.2d 1036, 1037-8 (7th Cir. 2000).⁷

Defendants' second flawed effort is to announce without any citation to any authority that: "The loss of all beneficial use test does not apply." (Def. brf. 25). There cannot be any citation for this statement because it is not Indiana law, as

⁷The issue of partial taking was not raised as an issue, and therefore, not addressed

Defendants already acknowledged, repeatedly.

In the most recent Indiana appellate cases, the courts make no distinctions as to what kind of taking it is—either regulatory or physical. In fact, the case most squarely addressing the issue initially involved a physical taking of property. In *Mendenhall v City of Indianapolis*, 717 N.E.2d 1218 (Ind. App. 1999) the police seized plaintiff's property by padlocking his business. Plaintiff signed a contract with the local government not to use his property for an adult store in the future in order to get his property back. The court ruled plaintiff still had no inverse condemnation remedy unless he could prove he had been deprived of all economically beneficial or productive use. *Id.* at 1227-8. .

Here, Defendants have pointed to no Indiana case showing that Plaintiffs would have a clear remedy in the state courts. The only cases they have cited announce the rule that Indiana won't recognize partial takings claims. Plaintiffs are only required to exhaust a present and viable inverse condemnation law. Plaintiffs are not required to single-handedly make new state law before they shall be allowed to vindicate their federal rights in federal court. Plaintiffs have no remedy for taking under Indiana law in this case, and no exhaustion requirement should have been applied by the district court.

V. Procedural Due Process Violation

A. Substantive due process not an issue

Contrary to the implication in Defendants' brief substantive due process is not

an issue on this appeal. Plaintiffs' dismissed that claim in the lower court.

B. Qualified Immunity

This issue has been more extensively briefed by Plaintiffs in the proceedings below. (Docket no. 44). Defendants' earlier motion to dismiss was denied. (Docket no. 51).

Here, no ruling by the district court on qualified immunity appears in its opinion on the summary judgment motions because it was not raised by Defendants.

Nor have Defendants disputed anywhere that qualified immunity under Section 1983 is no defense to the official capacity claims for injunctive relief only. *Dennis v. Dunlap*, 209 F.3d 944, 959 (7th Cir. 2000).

And Defendants do correctly state the test for qualified immunity for the defendants sued personally. They have immunity only if they don't "violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Def. Brf. 26, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Violations of constitutional rights can be so blatant that no prior history of such activities will have resulted in cases on point, and in such cases the lack of prior precedent should not provide a defendant with qualified immunity. *Jacobs v. City of Chicago*, 215 F.3d 758, 766 (7th Cir. 2000).

The unlawfulness of physical occupation of private property without due process under the Fifth Amendment has been clear for many years. "When faced with a constitutional challenge to a permanent physical occupation of real property, this

court has invariably found a taking." *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 427 (1982). Failure to provide notice and hearing before depriving a citizen of property is a violation of the Due Process guarantee. *Davis v. Sherer*, 468 U.S. 183, 192 n.10 (1984). Specifically, "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material ... so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution." *Loretto*, *supra*, at 427, citing *Pumpelly v Green Bay Co.*, 13 Wall. 166, 80 U.S.166, 20 L. Ed. 557 (1871). Also, as noted *supra.*, Indiana law has vested broad property rights to owners of non-navigable streams for over 100 years.

In Defendants' brief they seem to raise qualified immunity as a defense by quoting from *Harlow*, *supra*, but they have made no argument as to how these Defendants should benefit from that rule. Plaintiffs maintain that it is clear that any reasonable government official should know that a massive physical trespass onto private property without any due process is unconstitutional. Moreover, Indiana state law required both notice and opportunity for hearing before Defendants drained the reservoir. The state had provided a mechanism for constitutional due process, but employees of the very agency charged with enforcing that law ignored it. I.C. 14-26-2-10; I.C.14-22-2-6; Op. 33-34.

C. Merely Negligent vs. Recklessness or Deliberate Indifference

Defendants claim in a conclusory fashion that Defendants' conduct that day was merely negligent, and therefore Plaintiffs have no due process violation as a matter

of law. Plaintiffs thoroughly addressed this in their main brief and maintain that this issue of degree of fault on these unique facts is clearly a question for the jury. (*Appellants Brief*, pp. 44-46, and referencing facts at pp. 6-9 for knowledge of harm and pp. 3-13 for an inference of bad faith pre-text).

VI. CONCLUSION

Plaintiff-appellants respectfully request that this court:

1. Reverse the entry of judgement in favor of Defendants on Section 1344 CWA claim, and order the district court to grant Plaintiffs' motion for summary judgment under the CWA, Section 1344.
2. Reverse the district court's holding that Section 1342 was not violated because Defendants' dredging was alleged to be unintentional;
3. Reverse the district court's grant of summary judgment to Defendants on the Section 1983 Fifth Amendment taking claim;
4. Reverse the district court's grant of summary judgment to Defendants on the Section 1983 Fourteenth Amendment due process claim.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I hereby certify that Appellants' Brief complies with the type-volume limitations of F.R.A.P. 32(a)(7), and that this Reply Brief contains 5,459 words, including all foot notes, but excluding the Table of Contents, Table of Citations, and Certificates of Counsel. Counsel is relying upon the word count prepared by Word Perfect 8.0 in making this certification.

Neal Lewis

CIRCUIT RULE 31(e)(1) CERTIFICATION

I hereby certify that one copy of this Brief containing nothing more than the text with the label of the disc including the case name and docket number has been filed with this Brief, or downloaded to the 7th Circuit via internet pursuant to its published instructions, together with a copy of the disc served on each party separately represented by counsel.

Neal Lewis

PROOF OF SERVICE AND FILING

I hereby certify that a copy of this Brief was served upon the following Counsel for Defendants at the following addresses, by first class U.S. Mail, postage prepaid this ____ day of _____, 2002. I further certify that this document was filed by mailing in accordance with F.R.A.P. 25(a)(2)(B) on the same date as above by over night U.S. Mail, prepaid addressed to the Clerk of the 7th Circuit.

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