

**UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

ORDER

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

- v. -

D.C. No. 155-CV-2012

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

D.C. No. 165-CV-2012

Intervenor-Plaintiff-Appellant, Cross-Appellee,

- v. -

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

No. 13-01234

Following the issuance of the Order of the District Court dated July 23, 2012 in Civ. 155-2013 and Civ. 165-2013, Jacques Bonhomme (Bonhomme), the State of Progress (Progress) and Shifty Maleau (Maleau) each filed a Notice of Appeal. Bonhomme takes issue with the decision of the lower court with respect to its holding that: Bonhomme is not a real party in interest contrary to FRCP 17 because he is a front for Precious Minerals International; Bonhomme is not a “citizen” entitled to file a citizen suit under Clean Water Act (CWA) § 505, 33 U.S.C. § 1365, because he is a foreign national; Maleau’s mining waste piles are not “point sources” under CWA § 502(12), (14), 33 U.S.C. § 1365(12), (14), because piles are not conveyances; Ditch C-1

is not a navigable water because it is a point source; and Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culvert – a “point source” – because Maleau first adds the pollutants to navigable water via Ditch C-1. Maleau takes issue with the decision of the lower court with respect to its holding that Reedy Creek is a water of the United States under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12), because it does not fit the traditional understanding of “navigable waters,” the jurisdictional term in the statute, CWA §502(7), 33 U.S.C. § 1362(7). Progress takes issue with the decision of the lower court with respect to its holding that Ditch C-1 is not a water of the United States because it does not fit the traditional understanding of “navigable waters,” the jurisdictional term in the statute, CWA § 502(7), 33 U.S.C. § 1362(7).

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. §1311 (a). [Bonhomme argues that he is the real party in interest under FRCP 17 and that the court below erred in granting Progress’ and Maleau’s motion to dismiss on this issue. Progress and Maleau argue that Precious Minerals International is the real party in interest under FRCP 17 and that the court below did not err in granting their motion to dismiss on this issue.]

2. Whether Bonhomme – a foreign national – is a “citizen” under CWA § 505, 33 U.S.C. 1365, who may bring suit against Maleau. [Bonhomme argues that he is a “citizen” as defined in CWA §§ 505(g), 502(5), 33 U.S.C. §§ 1354(g), 1362(5), and that the court below erred in granting Progress’ and Maleau’s motion to dismiss on this issue. Progress and Maleau argue that Bonhomme is not a “citizen” under CWA §§ 505(g), 502(5), 33 U.S.C. §§ 1365(g), 1362(5), because he is a foreign national and that the court below did not err in granting their motion to dismiss on that issue.]

3. Whether Maleau’s mining waste piles are “point sources” under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14). [Bonhomme argues that they are point sources under § 502(12), (14), 33 U.S.C. § 1362(12), (14) and that the court below erred in granting Progress’ and Maleau’s motion to dismiss on this issue. Progress and Maleau argue that the waste piles are not “point sources” under § 502(12), (14), 33 U.S.C. § 1362(12), (14), and that the court below did not err in granting their motion to dismiss on that issue.]

4. Whether Ditch C-1 is a “navigable water/water of the United States” under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14). [Bonhomme and Progress argue the Ditch is a “navigable water/water of the United States” under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14), and that the court below erred in granting Maleau’s motion to dismiss on this issue. Maleau argues that the Ditch is not a “navigable water/water of the United States” under CWA § 502(7), (12), 33 U.S.C. § 1362(12), (14), and that the court below did not err in granting his motion to dismiss on this issue.]

5. Whether Reedy Creek is a “navigable water/water of the United States” under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12). [Bonhomme and Progress argue that Reedy Creek is a “navigable water/water of the United States” under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12), and that the court below did not err in finding against Maleau on this issue. Maleau argues that Reedy Creek is not a “navigable water/water of the United States under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12), and that the court below erred in finding for Bonhomme on this issue.]

6. Whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1. [Bonhomme argues that he does not violate the CWA because Maleau indirectly adds arsenic to Ditch C-1 via his waste piles and that the court below erred in denying his motion to dismiss on this issue. Progress and Maleau argue that Bonhomme is liable regardless of who added the arsenic to Ditch C-1 because he owns the culvert/point source discharging the pollutant into Reedy Creek and that the court below did not err in denying Bonhomme’s motion to dismiss on this issue.]

SO ORDERED.

Entered this 14th Day of September, 2013

[NOTE: No decisions decided or documents dated after September 1, 2013 may be cited either in briefs or in oral arguments.]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PROGRESS**

**USDC DP
ELECTRONICALLY FILED
DATE FILED: JULY 23, 2012**

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JACQUES BONHOMME, :
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 Plaintiff, :
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 - v. - :
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SHIFTY MALEAU, :
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 Defendant. :
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155-CV-2013, 165-CV-2013

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OPINION AND ORDER

STATE OF PROGRESS, :
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 Plaintiff, :
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 and :
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SHIFTY MALEAU, :
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 Plaintiff-Intervenor, :
 :
 - v. - :
 :
JACQUES BONHOMME, :
 :
 Defendant. :
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CONSOLIDATED CASES

ROMULUS N. REMUS, United States District Judge:

Procedural Background

After proper notice, Jacques Bonhomme sued Shifty Maleau for violating the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2012), under the jurisdiction of the citizen suit provision of that statute, CWA § 505, 33 U.S.C. § 1365. Bonhomme alleges that Maleau has piled gold mining overburden, waste rock, and dirt adjacent to Ditch C-1 (or “the Ditch”) in Jefferson County, State of Progress. Bonhomme alleges that Maleau arranged these mining waste piles in such a configuration that stormwater runoff from the piles has eroded channels between the intersections of the piles and between the piles’ intersections with Ditch C-1, and

adds arsenic in rainwater runoff to Ditch C-1 through those channels. Finally, Bonhomme alleges that the Ditch carries the arsenic through a culvert under his farm road to discharge into Reedy Creek (or “the Reedy” or “the Creek”), an interstate, navigable water. Bonhomme asserts that the Ditch is a navigable water under EPA regulations because it is a tributary of Reedy Creek, an interstate, navigable water.

Later, after proper notice, the State of Progress filed a citizen suit against Bonhomme alleging that he violated the CWA by discharging arsenic from his culvert – a point source – into Reedy Creek. Maleau intervened as a matter of right in Progress’s action against Bonhomme under CWA § 505(b)(1)(B). Progress and Maleau moved to consolidate their case with *Bonhomme v. Maleau* because the facts and law are the same. Bonhomme did not object to this motion. This Court granted the motion to consolidate. The defendant in each suit filed motions to dismiss.

Factual Background

The two very long and detailed complaints contain the following factual allegations. Maleau operates a gold mining and extraction operation adjacent to the traditionally navigable Buena Vista River in Progress. He trucks the overburden and slag from that operation to his property in Lincoln County and places it in piles adjacent to Ditch C-1 in Jefferson County, Progress. When it rains, rainwater runoff flows down the piles and percolates through them, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1, leaching and carrying arsenic from the piles into the water in the Ditch. Ditch C-1 is a drainage ditch dug into saturated soils to drain them sufficiently for agricultural use. It was constructed in 1913 by an association of landowners, including the predecessors in interest of Bonhomme and Maleau. Restrictive covenants in their deeds require them to maintain the Ditch on their properties. The Ditch contains running water except during annual periods of drought lasting from several weeks to three months. The water in the Ditch is derived primarily from draining groundwater from the saturated soil, with some rainwater runoff after rain events. From Maleau’s property line, Ditch C-1 runs three miles through several agricultural properties before it discharges through a culvert underneath a farm road on Bonhomme’s property directly into Reedy Creek. All of the properties, including Bonhomme’s and Maleau’s, that Ditch C-1 runs through lie in Progress.

Reedy Creek is about fifty miles long. It begins in the State of New Union where it is used as the water supply for Bounty Plaza, a service area on Interstate 250 (“I-250”) selling gasoline and food. I-250 is a federally-funded, east-west interstate highway. In both states, farmers whose land adjoins the Creek divert the water for agricultural purposes, primarily irrigation. They sell their agricultural products in interstate commerce. Just before reaching Bonhomme’s property, Reedy Creek flows into the State of Progress, where it flows for several miles before ending in Wildman Marsh. Wildman is an extensive wetlands and a stopover essential to over a million ducks and other waterfowl during their twice annual migrations from

the Arctic to the tropics and back. Much of the wetlands is contained within the Wildman National Wildlife Refuge, which is owned and maintained by the United States Fish and Wildlife Service. The area is a major destination for duck hunters from Progress, New Union and five neighboring states. It attracts hunters from around the nation and even a few foreign countries. Hunting there is acknowledged to add over \$25 million to the local economy from interstate hunters. Bonhomme's property fronts part of the wetlands, and he has used it (along with his large hunting lodge that sits on his property on the edge of the marsh) in the past primarily for duck hunting activities with his business and social friends and acquaintances.

Before suing Maleau, Bonhomme tested the water in Ditch C-1 both upstream and downstream of Maleau's property and the water in the Reedy both upstream and downstream of the outflow of Ditch C-1. Upstream of the Maleau property, arsenic is undetectable in Ditch C-1. Just below the Maleau property, arsenic is present in Ditch C-1 in high concentrations. As Ditch C-1 flows from the Maleau property toward Reedy Creek, the concentration of arsenic decreases in proportion to the increasing flow in the Ditch. In Reedy Creek above the discharge from Ditch C-1, arsenic is undetectable. However, just below the discharge of Ditch C-1 into Reedy Creek, arsenic is present in the Creek in significant concentrations. Arsenic is also detectable at lower levels throughout Wildman Marsh. Arsenic is commonly associated with gold mining and extraction and is a well-known poison. This alleged pattern of arsenic concentration, if proven, strongly suggests the arsenic in Reedy Creek and Wildman Marsh originates from Maleau's mining waste piles. These alleged facts are assumed to be true at the motion to dismiss stage. But they must be proven at trial. Speculation of other origins of the arsenic in Reedy Creek and Wildman Marsh are irrelevant at this stage of the proceeding.

Bonhomme alleges that arsenic fouls the waters of Reedy Creek, Wildman Marsh, and wildlife residing in or visiting the marsh sufficiently that he is afraid to continue to use the marsh for his hunting parties. He has decreased his hunting parties from eight a year to two a year. Maleau does not contest these allegations except to suggest that the decrease in Bonhomme's hunting parties is more likely a result of the general decline of the economy over the last few years, a decline mirrored by declining profits of Precious Metals International, Inc. (or "PMI"), for whose benefit those parties have been held.

The Court takes judicial notice that the Attorney General of Progress held a press conference when he filed suit saying that the state was acting in its prosecutorial discretion to protect both the waters of the state, including Wildman Marsh, and Maleau, a citizen of the state and one of the region's largest employers. According to the Attorney General, Bonhomme, as President of PMI, filed suit against Maleau to injure his ability to compete with PMI. The Court also takes judicial notice that, at his own press conference, Bonhomme accused the Progress Attorney General of political payback to Maleau, filing suit against Bonhomme in return for major contributions that Maleau gave to the Attorney General's election campaign. Bonhomme accused Maleau of being an unfair business competitor, artificially lowering his cost of production by ignoring environmental protection requirements, and hiring undocumented aliens

at minimum wage and housing them in abandoned chicken coops. Bonhomme further accused Maleau of trucking dirt and rock fifty miles from his gold mining operation in Progress adjacent to the Buena Vista River, long held to be a navigable water. Bonhomme alleged that if Maleau left his mining wastes adjacent to the traditionally navigable Buena Vista River, runoff from his waste piles would be carried to the Buena Vista, clearly requiring a CWA permit. Bonhomme accused Maleau of moving the piles adjacent to Ditch C-1, a lesser water, in hopes of avoiding the water pollution abatement requirements.

Procedural and Legal Issues

The first issue raised by Maleau is that Bonhomme is not a proper plaintiff, both because he is not the real party in interest and because he is not a citizen of the United States. Another issue raised by Maleau is that Maleau could not violate CWA § 301(a), 33 U.S.C. §1311(a) by adding a pollutant to navigable waters from a point source unauthorized by a CWA permit, because Maleau's waste piles are not point sources and the waters involved are not navigable waters. Bonhomme and Progress both argue that Ditch C-1 and Reedy Creek are navigable waters/waters of the United States and subject to the jurisdiction of the CWA. Although (1) Bonhomme's ability to be a plaintiff in the case, (2) whether Maleau's waste piles are point sources, and (3) whether Ditch C-1 is navigable were not part of Progress's cause of action against Bonhomme, Progress filed briefs supporting Maleau on the first two issues and supporting Bonhomme on the third issue in an effort to expand the state's CWA jurisdiction while protecting their citizen, Maleau. As for the last issue, Bonhomme argues that he cannot be liable for the discharge of arsenic from Ditch C-1 through the culvert under Bonhomme's farm road to Reedy Creek because he did not add arsenic to the water in Ditch C-1. Maleau argues that he is not liable in Bonhomme's suit because neither Ditch C-1 nor Reedy Creek are navigable, but if the court holds that Reedy Creek is a water of the United States, he argues in the alternative along with Progress that Bonhomme is the one liable for the discharge of arsenic into Reedy Creek.

Procedural Issues

Maleau alleges that Bonhomme cannot maintain his suit under Rule 17(a) of the Federal Rules of Civil Procedure because he is not the real party in interest. FED. R. CIV. PRO. 17(a). Maleau first raised this issue in his answer to Bonhomme's complaint, providing Bonhomme and PMI (not a party to the action) an opportunity to correct their pleadings by adding PMI as a party, which they have not done. Bonhomme is a 3% shareholder in PMI (the largest shareholder) and is also on the Board of Directors of PMI. PMI owns five gold mines around the world, including two in the United States. It is in direct competition with Maleau and his mining business. PMI conducted or paid for the sampling and analyses to support Bonhomme's contention that the arsenic in Reedy Creek and Wildman Marsh comes from Maleau. PMI pays the attorney and expert witness fees for Bonhomme in this case. Bonhomme does not live at his lodge adjacent to Wildman Marsh but uses it only for hunting parties composed primarily of

business clients and associates of PMI. PMI cannot maintain this suit by buying a plaintiff. Because PMI rather than Bonhomme is the real party in interest but is not the plaintiff, Bonhomme's suit is dismissed.

As if this were not enough, Bonhomme is a French national, not a citizen of the United States. Section 505 of the CWA is entitled "Citizen Suits" and authorizes "any citizen" to maintain suit against violations of the statute. 33 U.S.C. § 1365. It is true, as Bonhomme points out, that section 505(g) defines "citizen" to mean "a person or persons having an interest which is or may be adversely affected" and section 502(5) defines "person" to mean individuals, corporations, partnerships, government entities, etc. 33 U.S.C. §§ 1365(g), 1362(5). Bonhomme argues that "citizen" therefore means persons, individuals, and various entities without regard to nationality. On the other hand the CWA, including sections 505(g) and 502(5), does not expressly authorize foreign nationals to commence citizen suits. The Supreme Court has held that by defining the narrow phrase "navigable waters" as the arguably broader concept of "waters of the United States," section 502(7), Congress did not deprive the term "navigable" of all meaning. *Solid Waste Agency of N. Cook Cnty v. U. S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001); 33 U.S.C. § 1362. Similarly, the CWA's definition of the narrow concept of a "citizen" of the United States as the broader concept of a "person," does not deprive "citizen" of its meaning. Indeed, from the specification of the various entities in the definition of "person," it is evident that Congress intended to broaden potential citizen suit plaintiffs beyond individuals, rather than beyond citizens of American nationality. Of course, Progress is not a "citizen" of the United States either. But it is at least a domestic entity. In any event, Bonhomme has not challenged Progress' ability to bring its cause of action on that basis.

It might be thought that Maleau must give notice of a citizen suit prior to intervening in Progress' citizen suit against Bonhomme. However, CWA § 505(b) contains no such requirement. 33 U.S.C. § 1365(b). In any event, Progress did not challenge Maleau's intervention on that ground and Bonhomme does not challenge Maleau's presence in these consolidated cases on that ground.

CWA Legal Issues

The Clean Water Act prohibits the discharge of pollutants except in compliance with CWA permits. 33 U.S.C. § 1311(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). It is undisputed that arsenic is a pollutant. Beyond that, the parties' views of the facts and of the statute differ markedly.

Bonhomme alleges that Maleau's overburden and slag piles are point sources, citing *Sierra Club v. Abston Const. Co.*, 620 F.2d 41 (5th Cir. 1980). EPA's regulations define "waters of the United States" to include tributaries of navigable waters. 40 C.F.R. § 122.2 (2013). Bonhomme alleges that Reedy Creek is a navigable water, that Ditch C-1 is a tributary of Reedy

Creek, and that Ditch C-1 is therefore also a navigable water. Maleau responds that overburden piles are not point sources, citing *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) and *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976), because a pile of dirt and stone is not a “discernible, confined and discrete conveyance,” which is the CWA’s definition of “point source,” 33 U.S.C. § 1362(14). Indeed, that definition lists a dozen examples of point sources and none of them remotely resemble a pile of dirt and stone. Piles are not normally considered to be conveyances.

Maleau also argues that Ditch C-1 is not navigable water because it has never floated a boat and is too small to do so in the future. Moreover, ditches are listed as point sources in CWA 502(14), and a ditch cannot be simultaneously two elements in the water pollution offense. Although Bonhomme and Progress contest this, Maleau has definitive precedent on his side, *Rapanos v. United States*, 547 U.S. 715, 735-36 (2006).

Indeed, Progress and Maleau in their cause of action allege that if anyone violates the CWA in this factual situation, it is Bonhomme, because Bonhomme owns the culvert from which Ditch C-1 discharges the arsenic into Reedy Creek. Culverts are well established to be point sources, *Dague v. Burlington*, 935 F.2d 1343, 13154-55 (2d Cir. 1991), *rev’d on other grounds*, 505 U.S. 557 (1992), and the Supreme Court has held that the owners of point sources do not have to initially add pollutants to water to be liable under the CWA as long as their point sources convey the pollutants to navigable waters. *South Fla. Water Mgmt. Dist.*, 541 U.S. 95 at 105. Assuming that Reedy Creek is navigable water, that is just what Bonhomme’s culvert does. However, Bonhomme argues that Maleau’s actions are the but-for cause of adding arsenic to Reedy Creek and that if Maleau did not add arsenic directly from his waste piles to a tributary of Reed Creek, he added it indirectly to Reedy Creek through Bonhomme’s culvert. The CWA and the Environmental Protection Agency, however, do not define “discharge” or “addition” in terms of causation, direct addition or indirect addition. Instead, it prohibits the addition of arsenic from a culvert to Reedy Creek; it prohibits Bonhomme’s actions, not Maleau’s actions. *See* 33 U.S.C. § 1311.

That brings us to the question of whether Reedy Creek is navigable water, a pivotal issue in both causes of action. No one alleges that Reedy Creek is or ever has been used for waterborne transportation or could be so used with reasonable improvements, the traditional definition of navigable waters. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). Bonhomme and Progress argue, however, that Reedy Creek is used as a water supply for interstate travelers on I-250, making it necessary for interstate commerce. They also point out that Wildman Marsh, the terminus of Reedy Creek, is necessary for the interstate migration of birds, supporting interstate commerce in duck hunting. EPA’s definition of “waters of the United States” includes waters used in interstate commerce. 40 C.F.R. § 122.2. Of course, the Supreme Court rejected that argument in *Rapanos*, ruling that rivers must be highways of interstate commerce to fall within the definition of “navigable waters” under the CWA. In essence it ruled that to fall within Commerce Clause jurisdiction, a waterway must be within the

first prong of *U.S. v. Lopez*, 514 U.S. 549 (1995), rather than within the second or third prongs of *Lopez* jurisdiction, as Bonhomme and Progress argue. They argue that Reedy Creek and its uses are almost identical to those of the Rito Seco Creek in Colorado, which the Tenth Circuit held to be navigable in *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979). However, *Earth Sciences* was a pre-*Rapanos* decision and is no longer good law. Nevertheless, Bonhomme and Progress argue that Reedy Creek is a water of the United States because it is an interstate water and EPA's regulations include interstate waters in its definition of the "waters of the United States." 40 CFR 122.2. They also argue that the waters and wetlands in Wildman Marsh National Wildlife Refuge are "waters of the United States" because the refuge is federal property and the water on it is therefore included in the "waters of the United States." The Supreme Court did not consider or reject these arguments in *Rapanos*. The interstate nature of water pollution is the reason why Congress enacted water pollution control legislation in the first place. *See, e.g.*, Act of Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903 (1965) (addressing water pollution only in interstate waters). The argument that water on the federal wildlife preserve is water of the United States is true to the plain meaning of "waters of the United States" in the statute. EPA's definition of "waters of the United States" includes "tributaries" of waters of the United States. 40 CFR § 122.2. This is a reasonable interpretation, because it would be difficult or impossible to prevent pollution of a navigable stream without preventing pollution of its tributaries, which are the origins of most of the water in the stream.

Conclusion

Bonhomme is not a proper plaintiff and his suit accordingly is dismissed. Even if Bonhomme could maintain his suit, this Court would find for Maleau on all issues, except that Reedy Creek is a water of the United States. This Court denies Bonhomme's motion to dismiss because Progress adequately stated a cause of action.

SO ORDERED.

DATED: July 23, 2012

Progress City, Progress

Romulus N. Remus

United States District Judge