App. 1

United States Court of Appeals,
Sixth Circuit.

No. 16-2126

David A. HERR; Pamela F. Herr, Plaintiffs–Appellants,

v.

UNITED STATES FOREST SERVICE; Sonny Perdue, Secretary of Agriculture; Tom Tidwell, Chief of the United States Forest Service; Kathleen Atkinson, Regional Forester for the Eastern Region of the United States Forest Service; Linda Jackson, Forest Supervisor, Ottawa National Forest; Tony Holland, District Ranger, Watersmeet–Iron River Ranger Districts, Defendants–Appellees,

SWC, LLC; Timothy A. Schmidt; Friends of Sylvania; Upper Peninsula Environmental Coalition, Intervenors–Appellees.

Filed: July 26, 2017

JUDGMENT

BEFORE: SUTTON and DONALD, Circuit Judges; ZOUHARY, District Judge.

On Appeal from the United States District Court for the Western District of Michigan at Marquette.

THIS CAUSE was heard on the record from the district court and was argued by counsel. IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is REVERSED.

App. 3

865 F.3d 351
United States Court of Appeals,
Sixth Circuit.

David A. HERR; Pamela F. Herr, Plaintiffs–Appellants,

v.

UNITED STATES FOREST SERVICE; Sonny Perdue, Secretary of Agriculture; Tom Tidwell, Chief of the United States Forest Service; Kathleen Atkinson, Regional Forester for the Eastern Region of the United States Forest Service; Linda Jackson, Forest Supervisor, Ottawa National Forest; Tony Holland, District Ranger, Watersmeet–Iron River Ranger Districts, Defendants–Appellees,

SWC, LLC; Timothy A. Schmidt; Friends of Sylvania; Upper Peninsula Environmental Coalition, Intervenors–Appellees.

No. 16-2126

Argued: June 15, 2017
Decided and Filed: July 26, 2017
Rehearing En Banc Denied January 4, 2018*.

Appeal from the United States District Court for the Western District of Michigan at Marquette. No.

* Judge Donald would grant rehearing for the reasons stated in her dissent.

2:14–cv–00105—R. Allan Edgar, District Judge.

Attorneys and Law Firms

ARGUED: Steven J. Lechner, MOUNTAIN STATES LEGAL FOUNDATION, Lakewood, Colorado, for Appellants. Mark R. Haag, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Howard A. Learner, ENVIRONMENTAL LAW & POLICY CENTER, Chicago, Illinois, for Intervenors.

ON BRIEF: Steven J. Lechner, MOUNTAIN STATES LEGAL FOUNDATION, Lakewood, Colorado, for Appellants. Mark R. Haag, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Howard A. Learner, ENVIRONMENTAL LAW & POLICY CENTER, Chicago, Illinois, Robert L. Graham, JENNER & BLOCK, LLP, Chicago, Illinois, for Intervenors.

Before: SUTTON and DONALD, Circuit Judges; ZOUHARY, District Judge.*

Opinion

SUTTON, J., delivered the opinion of the court in which ZOUHARY, D.J., joined. DONALD, J. (pp. 359–61), delivered a separate dissenting opinion.

OPINION

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

SUTTON, Circuit Judge.

David and Pamela Herr bought lakefront property on Crooked Lake in the Upper Peninsula of Michigan, hoping to use the lake's waters for recreational boating and fishing. The United States Forest Service had other plans. Most of Crooked Lake lies in the federally owned Sylvania Wilderness yet some of it remains under private ownership. Congress gave the Forest Service authority to regulate any use of Crooked Lake and nearby lakes "subject to valid existing rights." The Forest Service promulgated two regulations, one prohibiting gas-powered motorboats, the other limiting electrically powered motorboats to no-wake speeds throughout the wilderness area. Both regulations exceed the Forest Service's power as applied to the Herrs and the other private property owners on the lake. Under Michigan riparian-rights law, in truth littoral-rights law, lakeside property owners may use all of a lake, making the Herrs' right to use all of the lake in reasonable ways the kind of "valid existing rights" that the Forest Service has no warrant to override.

I.

Crooked Lake stretches three miles from one end to the other connected by a series of meandering channels and bays. Nestled within an old growth forest, the lake offers a variety of outdoor activities for public and private visitors from kayaking to bird watching to hiking along its shore. Fishing

apparently attracts a lot of visitors as well, as the glacier lakes in the area contain "world-class smallmouth bass fisheries." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 813 (6th Cir. 2015). Ninety-five percent of the land surrounding the lake belongs to the federally protected Sylvania Wilderness, a nature preserve open to the public. The remaining five percent, positioned in the northern bay, belongs to approximately ten private landowners who own the property under state law.

The United States first purchased land in the area in 1966, about 14,000 acres surrounding the southern portion of Crooked Lake, to supplement the Ottawa National Forest. In 1987, Congress enacted the Michigan Wilderness Act, 101 Stat. 1274, dedicating these and other lands to the National Wilderness Preservation System as part of the Sylvania Wilderness, an area encompassing over 18,000 acres and 36 lakes.

"Subject to valid existing rights," the Michigan Wilderness Act directs the Forest Service to administer this area "in accordance with the provisions of the Wilderness Act of 1964." Pub. L. No. 100–184, § 5, 101 Stat. 1274, 1275–76 (1987). The Wilderness Act of 1964 provides that the Forest Service, a branch of the Department of Agriculture, "shall be responsible for preserving the wilderness character" of the land. 16 U.S.C. § 1133(b). It also addresses motorboat use, explaining that "subject to existing private rights ... there shall be ... no use of ... motorboats" within any wilderness area. *Id.* §

1133(c). "[W]here these uses have already become established," the Act provides that they "may be permitted to continue subject to such restrictions as the [Forest Service] deems desirable." *Id*. § 1133(d)(1).

In 1992, the Forest Service amended the management plan for the Ottawa National Forest. Through what became known as Amendment No. 1, the Service prohibited the use of sailboats and houseboats on all portions of Crooked Lake within the Sylvania Wilderness. In 1993, several landowners filed a lawsuit challenging the prohibitions, see *Stupak–Thrall v. United States*, 843 F.Supp. 327, 328–29 (W.D. Mich. 1994), ominously referred to as *Stupak–Thrall I*.

Stupak–Thrall I ended in a victory for the Forest Service but not for the law of this Circuit. By an equally divided vote, the en banc court affirmed the district court's decision to uphold Amendment No. 1, allowing the sailboat and houseboat restrictions to remain but leaving no controlling law in its wake. *Stupak–Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996) (en banc). Neither the concurring nor the dissenting opinions at the en banc stage, nor indeed the vacated panel decision in *Stupak–Thrall I*, agreed with the district court's rationale for upholding these restrictions. *Compare Stupak–Thrall*, 89 F.3d at 1271 (Moore, J., concurring), with *id*. at 1290 (Boggs, J., dissenting); *Stupak–Thrall v. United States*, 70 F.3d 881, 889 (6th Cir. 1995) (vacated).

The Forest Service issued another amendment to its plans for Crooked Lake in 1995. Known as Amendment No. 5, it prohibited the use of "any motor or mechanical device capable of propelling a watercraft by any means" on the wilderness portion of Crooked Lake. R. 49–4 at 1. This amendment came with an exception: one electric motor no greater than 24 volts in size or 48 pounds of thrust. Amendment No. 5 also prohibited the operation of any watercraft "in excess of a 'slow-no wake speed,' " defined as a maximum of five miles per hour. *Id.*; R. 50–8 at 23. The Forest Service eventually incorporated these restrictions into the 2006 Forest Plan and a subsequent 2007 Forest Order, which subjected violators of Amendment No. 5 to criminal liability.

Kathy Stupak–Thrall, once again joined by the Gajewskis, filed a second lawsuit. *See Stupak–Thrall v. Glickman*, 988 F.Supp. 1055 (W.D. Mich. 1997) (*Stupak–Thrall II*). The property owners won this round, securing an injunction prohibiting enforcement of Amendment No. 5. The district court held that the motorboat restrictions interfered with Thrall's " 'valid existing right' to use gas motor boats on Crooked Lake" and thus fell outside the Forest Service's regulatory authority. *Id.* at 1062. It also held that Amendment No. 5, as applied to Thrall and the Gajewskis, effected a regulatory taking under the Fifth Amendment. *Id.* at 1064.

After this decision, the Forest Service "facilitate[d]

the sale of the Gajewski property ... to a third-party conservation organization," The Conservation Fund, which agreed "to resell the property after encumbering it with a conservation easement" paid for by the Forest Service. R. 53–44 at 13. Because this development "substantially" reduced motorboat use on Crooked Lake, the Forest Service voluntarily dismissed its appeal. *Id*. That left the other piece of property involved in that case protected by the injunction. To this day, Kathy Stupak–Thrall (and her guests) remain the only people free to use motorboats, though not sailboats or houseboats, on all of Crooked Lake.

When the Amendment No. 5 regulations first went into effect, David and Pamela Herr were occasional visitors to Crooked Lake. In 2010, they made a commitment to the place, purchasing two waterfront lots on the lake's northern bay. The Herrs bought the land with the intention of using gas-powered motorboats. The seller confirmed these intentions, telling the Herrs that he had used motorboats in the past "without hindrance by the Forest Service." R. 4 at 11.

That turned out to be true for the Herrs as well, at first. The Forest Service not only allowed such use at the time but facilitated it for them and others. It regularly sold boating permits to visitors and residents—allowing them access to the lake—and allowed motorboat use through its public boat landing, located in a federally-owned portion of the northern bay just outside the wilderness area.

The Forest Service changed course in 2013. It stopped offering motorboat access at the landing dock and sent a letter to the Herrs informing them that it planned to "fully enforce" the existing motorboat restrictions on the federal wilderness portion of the lake, though not the private portion of the lake. R. 4–5 at 2. The Herrs sued the Forest Service under the Administrative Procedure Act (APA), seeking to enjoin it from enforcing the motorboat restrictions against them. See 5 U.S.C. § 702. Two environmental-protection organizations and two property owners (Tim Schmidt and Sylvania Wilderness Cabins) intervened to support the Forest Service.

At the Forest Service's urging, the district court dismissed the case. It held that the federal courts lacked subject matter jurisdiction over the dispute because the statute of limitations had run on any APA challenges to the 2007 Forest Order. We reversed. The limitations period, we explained, amounted to a claims-processing rule and did not create a limit on our subject matter jurisdiction. The limitations period had not lapsed anyway, we added, because the Herrs never had an opportunity to challenge the validity of the rule's application to them until 2010, when they bought the land, and the Service had not enforced Amendment No. 5 against them until 2013. *Herr*, 803 F.3d at 813, 819.

On remand, the district court ruled for the Forest Service again, this time on the merits. The court

held that the Herrs' rights to use Crooked Lake did not "exist" at the time of the Michigan Wilderness Act's enactment, meaning that the reservation of "valid existing rights" did not apply to them. *Herr v. U.S. Forest Serv.*, 212 F.Supp.3d 720, 727–28 (W.D. Mich. 2016).

Here we are. Again.

II.

After nearly a quarter century of litigation over the recreational uses of Crooked Lake, the parties share some common ground about the resolution of today's dispute. The parties agree with, or at least do not dispute, these features of the legal landscape.

One: The Property Clause of the United States Constitution enables Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Though Congress has broad discretion to determine what regulations it "needs" on its own property, *see Kleppe v. New Mexico*, 426 U.S. 529, 539–40, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), it does not have the same authority over private property, *see Camfield v. United States*, 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260 (1897). If private property affects public lands, the government may regulate the private property to the extent needed to "protect[ ]" the relevant "federal property." *Kleppe*, 426 U.S. at 538, 96 S.Ct. 2285 (discussing *Camfield*); see Allison H. Eid, The Property Clause

and New Federalism, 75 U. Colo. L. Rev. 1241, 1242 (2004). By way of example, Congress has authority to prevent an individual from leaving an unmonitored fire near any public "forest, timber, or [ ] inflammable material," even if the fire is on private property. *United States v. Alford*, 274 U.S. 264, 266–67, 47 S.Ct. 597, 71 L.Ed. 1040 (1927). Congress likewise may prohibit private landowners from fencing in public property, though the fences remain on the private side of the property line. *Camfield*, 167 U.S. at 525, 17 S.Ct. 864.

Two: The national government exercised its Property Clause power here through the Michigan Wilderness Act, which granted the Forest Service authority over the Sylvania Wilderness. This specific grant of authority allowed the Forest Service to regulate the public's use of Crooked Lake for boating and related recreation, "subject to valid existing rights."

Three: State-law riparian and littoral rights represent a form of protected rights under the Act. *See* Forest Service Manual § 2320.5(16), http://www.fs.fed.us/cgibin/Directives/get_dirs/fsm?2300; Forest Service Br. 25. Riparian rights give property owners authority to use rivers that run through or adjacent to their property. *Dyball v. Lennox*, 260 Mich.App. 698, 680 N.W.2d 522, 526 (2004). Littoral rights give property owners authority to use lakes on or adjacent to their property. *Bott v. Comm'n of Nat. Res. of State of Mich. Dep't of Nat. Res.*, 415 Mich. 45, 327 N.W.2d 838, 841 (1982). This case concerns littoral rights.

Under Michigan law, a littoral landowner owns the rights to the bed of any inland lake, like Crooked Lake, "to the thread or midpoint of the water." *Id.* at 841; *Lorman v. Benson*, 8 Mich. 18, 22 (1860). But littoral landowners also share a right to the reasonable use of the water's full surface. *Bott*, 327 N.W.2d at 842; *see* 78 Am. Jur. 2d, Waters § 35; *Holton v. Ward*, 303 Mich.App. 718, 847 N.W.2d 1, 4–6 (2014). That means the surface of Crooked Lake, even the part in the Sylvania Wilderness, does not belong exclusively to the federal government. So too of the surface of Crooked Lake outside the Sylvania Wilderness; it does not belong exclusively to the State or the private property owners. The surface belongs jointly to the federal government and the private owners of state land on Crooked Lake, both of which maintain a littoral right to "reasonable use" of the lake's surface. *See Tennant v. Recreation Dev. Corp.*, 72 Mich.App. 183, 249 N.W.2d 348, 349 (1976); *Rice v. Naimish*, 8 Mich.App. 698, 155 N.W.2d 370, 372 (1967); *see also Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 499, 19 L.Ed. 984 (1870); *Hilt v. Weber*, 252 Mich. 198, 233 N.W. 159, 168 (1930).

With these background principles in place, we can turn to the question at hand: Does the Forest Service's ban on using any motorboats or any other boat that exceeds five miles per hour violate the "[1] subject to [2] valid existing [3] rights" clause of the Michigan Wilderness Act? Yes, as an examination of each part of the clause confirms.

"Subject to." "[S]ubject to" means "subordinate" or "subservient." Black's Law Dictionary 1278 (5th ed. 1979). That means the Forest Service's regulations must respect the Herrs' littoral rights, as the Service's ability to regulate begins where the Herrs' "valid existing rights" end. To the extent the Herrs have the right to use a motorboat under Michigan law on Crooked Lake, the Forest Service must honor that right—must in short be "subject to" it.

"Existing." But did these littoral rights exist at the time Congress passed the Michigan Wilderness Act in 1987? Yes. Littoral rights, like most property rights, run with the land. *Thompson v. Enz*, 379 Mich. 667, 154 N.W.2d 473, 483 (1967) (opinion of Kavanagh, J.). The question is not whether the Herrs had littoral rights on Crooked Lake before Congress passed the Act. It is whether the prior property owners had those rights before Congress passed the Act. They did. And they sold those rights along with the rest of the property to the Herrs in 2010. In reaching a contrary conclusion, the district court erred, as the Forest Service concedes. The Act does not refer to "valid rights of existing owners"; it refers to "valid existing rights." Because littoral and riparian rights run with the land, the Herrs purchased those "existing" rights along with others when they bought the Crooked Lake property.

"Valid Rights." That brings us to the nub of the dispute. As the Forest Service sees it, littoral and riparian rights permit property owners to use the

waters only in reasonable ways, and a ban on motorboat use and a five-mile-an-hour limit on other boat use amounts to a reasonable limit for a remote body of water like Crooked Lake. The premise is correct. State law may indeed impose reasonable limits on littoral and riparian rights. *See* Mich. Comp. Laws § 324.80108; *Miller v. Fabius Twp. Bd., St. Joseph Cty.*, 366 Mich. 250, 114 N.W.2d 205, 208 (1962). But the conclusion is not. When the statute refers to "valid existing rights," it asks whether the property owners have such rights under state law, not federal law, and certainly not federal law as construed by a federal agency. The Herrs plainly have such rights under state law, as ample Michigan authorities confirm. Recreational boating, the Michigan courts have repeatedly indicated, amounts to a reasonable use. See *Burt v. Munger*, 314 Mich. 659, 23 N.W.2d 117, 119–20 (1946); *Rice*, 155 N.W.2d at 372; *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211, 211–12, 218 (1902); *Pierce v. Riley*, 81 Mich.App. 39, 264 N.W.2d 110, 114 (1978); *Tennant*, 249 N.W.2d at 349.

Not just these legal authorities, but the facts as well, point in this direction. Landowners and visitors have used motorboats on Crooked Lake since the 1940s. *Stupak–Thrall II*, 988 F.Supp. at 1059. Longstanding prior use is one indicator that a co-riparian (a term used by Michigan courts to cover littoral and riparian landowners) acts reasonably relative to others. *Dumont v. Kellogg*, 29 Mich. 420, 425 (1874).

No doubt, Michigan could have regulated motorboat use on Crooked Lake during this time. See Mich. Comp. Laws § 324.80108. And it may even be possible that it could have banned motorboats, though at the risk of imposing a regulatory taking under the State or Federal Constitutions. See *Difronzo v. Vill. of Port Sanilac*, 166 Mich.App. 148, 419 N.W.2d 756, 758 (1988). But the key point is that it never did. All agree that Michigan law permits motorboat use on the northern bay of the lake, outside the Sylvania Wilderness. The best evidence of reasonable use under Michigan law is what Michigan law allows on this lake. To our knowledge, no co-riparian has challenged the Herrs' (or anyone else's) use of gas-powered motorboats on this part of Crooked Lake.

No less significantly, the Forest Service long allowed motorboat use on all of the lake after it obtained this regulatory authority. And it still does with respect to one property owner. Until 2013, the Service not only allowed motorboat use, but it also facilitated such use by selling boating permits and allowing the public to use a loading dock on federal land. It never appealed the injunction in Stupak–Thrall II, which means that one of the ten property owners on the lake (and her guests) currently may use motorboats on all of the lake. How odd to allow one property owner to operate motorboats on the lake, while trying to exclude the other nine. If motorboat use is objectively unreasonable for one, it is objectively unreasonable for all.

That does not mean the Herrs have a right to use any size boat at any speed on any part of the lake, as the district court worried. The Herrs have a right to reasonable use of the lake. That means a right to travel at reasonable speeds within the lake. But the Forest Service has not shown that it would be unreasonable under Michigan law to travel on 95% of the lake above a low-wake-zone speed. If you think otherwise, try being at one end of a three-mile lake with a five-mile-an-hour speed limit as an unexpected storm sets in.

A pre-existing use, we suppose, may not invariably amount to a right in all settings. But Michigan law tells us that boating is typically one stick in the bundle of littoral and riparian rights. Only if boating on this lake would be unreasonable under state law could we say otherwise. The long history of pre-existing use confirms that it is not unreasonable to use a gas-powered motorboat at speeds above five miles per hour on Crooked Lake.

The Forest Service tries to ground its authority to ban gas-powered motorboats in state law and the Wilderness Act itself. Neither source delivers. The Forest Service tells us that it can regulate littoral and riparian rights under the Property Clause to the same extent that state regulators can regulate them. Maybe; maybe not. But we need not decide. For the Michigan Wilderness Act does not grant the Forest Service a power coextensive with Congress' plenary authority under the Property Clause. It instead delegates a power limited by existing rights—

"subject to valid existing rights." For that reason, any "police power" the Forest Service may have must respect pre-existing property rights, not just the limits of state power. Unless or until the State permissibly says otherwise, littoral property rights include the right to reasonable use of the water's surface for recreational motorboating. No matter how reasonable the Forest Service may think this regulation is, it has no power to nullify the Herrs' pre-existing right under Michigan law to use the lake for recreational motorboating.

That the Wilderness Act contemplates "desirable" regulation of pre-existing motorboat use ignores the fact that the Michigan Wilderness Act makes the Forest Service's authority to enforce the Wilderness Act subject to independent limitations. Though the Michigan Wilderness Act provides that the Forest Service is to manage this area "in accordance" with the Wilderness Act, it also provides that such management is "[s]ubject to valid existing rights." Pub. L. No. 100–184, § 5, 101 Stat. 1274, 1275–76 (1987). That limitation remains controlling.

All of this does not leave the Forest Service or the Herrs' neighbors without options. Fellow riparians may enjoin unreasonable uses under state law through the state and federal courts. They may petition the State of Michigan to change the boating rules on the surface of Crooked Lake. Or they may pay the Herrs for an easement on their property, which would limit motorboat use in the same way the Gajewskis' property became limited. Even the

serenity of nature sometimes comes at a price.

For these reasons, we reverse.

DISSENT

BERNICE B. DONALD, Circuit Judge, dissenting.

I agree with the majority that the Herrs have valid existing rights to which any regulation by the Forest Service must be subservient. I agree also that the district court erroneously concluded that the Herrs' rights were not "existing" because the Herrs purchased their land after the Forest Service passed Amendment No. 5. Where I disagree, however, is with the majority's conclusion that a federal agency, in the same manner as a state, may not impose reasonable restrictions on littoral and riparian rights, when expressly authorized by Congress to do so.

First, as the Supreme Court has held, "[t]he general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." *Kleppe v. New Mexico*, 426 U.S. 529, 540, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976) (citing *Camfield v. United States*, 167 U.S. 518, 525, 17 S.Ct. 864, 42 L.Ed. 260 (1897)). This also "includes the power to regulate in a manner affecting non-federal property." *Burlison v. United States*, 533 F.3d 419, 432 (6th Cir. 2008). As such, the power of

Congress to regulate under the Property Clause "may have some effect on private lands not otherwise under federal control." *Id*. (quoting *Kleppe*, 426 U.S. at 546, 96 S.Ct. 2285). Second, as even the majority notes, Congress has authorized the Forest Service to regulate the Sylvania Wilderness. This authority, "subject to valid existing rights," is coextensive with Congress' own authority under the Property Clause when the Forest Service acts to preserve the wilderness character of the Sylvania Wilderness. It thus follows that the Forest Service possesses a power that is "analogous to the police power of the several states," and where the Forest Service does not exceed the scope of the permissible police power of the state, it may exercise this power.

It is important then that we first examine the scope of the state's power to regulate littoral and riparian rights. In Michigan, "[t]he rights associated with riparian ownership generally include ... the right to a reasonable use of the water for general purposes such as boating, domestic use, etc." *Tennant v. Recreation Dev. Corp*., 72 Mich.App. 183, 249 N.W.2d 348, 349 (1976). These rights, however, are not without limitation. To protect the public safety, Michigan permits regulation of the operation of vessels on the waters of the state. Mich. Comp. Laws § 324.80108. To this end, Michigan courts have upheld restrictions from local governments as they relate to the riparian and littoral rights of citizens within their jurisdictions. *See, e.g., Square Lake Hills Condominium Ass'n v. Bloomfield Twp*., 437 Mich. 310, 471 N.W.2d 321, 326 (1991) (permitting

Bloomfield Township to regulate boat docking and launching on inland lakes under the township's police power); *Miller v. Fabius Twp. Bd.*, 366 Mich. 250, 114 N.W.2d 205, 209 (1962) (allowing time regulations on water skiing).

Recognizing that the state may impose such regulations, the majority nevertheless concludes that the Forest Service may not regulate Crooked Lake in this manner because Michigan has not imposed such restrictions itself. But Forest Service's powers, while restricted, do not depend on state action. Put another way, state law determines the scope of the Forest Service's authority to regulate the surface of Crooked Lake because Congress has placed the specific constraint of "subject to valid existing rights"; rights that are determined by state law. But state regulation is not a prerequisite to the Forest Service's ability to regulate. The determining factor, rather, is whether the regulation is a proper exercise of the state's police power. And, as previously mentioned, Michigan state law confirms that restrictions on kinds of vessels and speed of motorboats are permissible.

The next question is the reasonableness of the restriction. "The reasonableness of an ordinance ... depends upon the particular facts of each case. The test for determining whether an ordinance is reasonable requires us to assess the existence of a rational relationship between the exercise of police power and the public health, safety, morals, or general welfare in a particular manner in a given

case." *Square Lake Hills*, 471 N.W.2d at 324 (citation omitted). As the district court noted, Amendment No. 5's restrictions are rationally related to achieving the Michigan Wilderness Act's goal of preserving the wilderness character of Sylvania. Also, these restrictions are certainly reasonable. Amendment No. 5 does not ban the use of all motorboats on the surface of Crooked Lake; rather, it merely restricts the use of gas-powered motorboats, the size of the motor, and the speed at which a boat may travel on ninety-five percent of the lake.

The majority approaches the issue of reasonableness by looking at whether recreational boating constitutes reasonable use under Michigan law. I agree that the use of gas-powered motorboats is generally not unreasonable under Michigan law; but this alone is not dispositive of whether the Forest Service's ban of such use on Crooked Lake is unreasonable. Neither is the fact that the Forest Service has previously allowed motorboat use on the entire surface of Crooked Lake. As the majority notes, a pre-existing use does not always amount to a right. Initially, what was reasonable in the past is not necessarily reasonable today. But more importantly, the Herrs' right to engage in recreational motorboating under Michigan law, which does not necessarily equate to a right to use gas-powered motorboats, is not immune from reasonable future regulation. "Congress chose to 'grandfather' private rights in the 'subject to valid existing rights' phrase, but in doing so, it never intended that those rights be ossified against further

regulation." *Stupak–Thrall v. United States*, 89 F.3d 1269, 1271 (6th Cir. 1996) (memo) (Moore, J., concurring in order affirming district court opinion by divided en banc vote).

Ultimately, I believe that Amendment No. 5 was squarely within the Forest Service's authority to enact, and that the restrictions do not infringe on the Herrs' "valid existing rights." For these reasons, I would affirm the district court. I respectfully dissent.

App. 25

212 F.Supp.3d 720

United States District Court,
W.D. Michigan, Northern Division.

David A. HERR and Pamela F. Herr, Plaintiffs,

v.

UNITED STATES FOREST SERVICE, Tom Vilsack, Tom Tidwell, Kathleen Atkinson, Anthony Scardina, and Norman E. Nass, Defendants,

v.

SWC, LLC, d/b/a Sylvania Wilderness Cabins, Timothy A. Schmidt, Friends of Sylvania, Upper Peninsula Environmental Coalition., Intervenors–Defendants.

Case No. 2:14–cv–105
Signed 06/13/2016

Attorneys and Law Firms

Steven J. Lechner, Mountain States Legal Foundation, Lakewood, CO, for Plaintiffs.

Ryan D. Cobb, U.S. Attorney, Grand Rapids, MI, for Defendants.

Opinion

OPINION

HON. R. ALLAN EDGAR, UNITED STATES DISTRICT JUDGE

The waters of Crooked Lake in the western portion of Michigan's Upper Peninsula bear the seeds of endless litigation. *See Stupak–Thrall v. United States*, 843 F.Supp. 327 (W.D. Mich. 1994), affirmed, 70 F.3d 881 (6th Cir. 1995), rehearing en banc granted and opinion vacated, 81 F.3d 651 (6th Cir. 1996), affirmed en banc by an equally divided court, 89 F.3d 1269 (6th Cir. 1996), cert. denied, 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997) ("*Stupak–Thrall I*"); *see also Stupak–Thrall v. Glickman*, 988 F.Supp. 1055 (W.D. Mich. 1997) ("*Stupak–Thrall II*"). The story begins with Congress' enactment of the Wilderness Act of 1964 (Wilderness Act), which established the Natural Wilderness Preservation System. See 16 U.S.C. § 1131–1136. In 1987 Congress enacted the Michigan Wilderness Act (MWA), which created the Sylvania Wilderness Area (Sylvania) from portions of the Ottawa National Forest. Sylvania is managed by the U.S. Forest Service. Ninety-five percent of the land surrounding Crooked Lake lies within the Sylvania Wilderness Area, while five percent, located at the north end of the lake, is privately owned. The Plaintiffs in this case, David and Pamela Herr, purchased property within this five percent section in 2010. Their claim is that the Forest Service lacked authority to promulgate an amendment (Amendment Five) to the area's forest plan, beginning in 1996. The amendment states that:

> Beginning April 1, 1996, only electric motors with a maximum size of 24 volts or 48 pounds thrust (4 horsepower equivalent) or less will be permitted on Big Bateau, Crooked, and Devil's Head Lakes within the Sylvania Wilderness. All watercraft on these lakes are restricted to a slow no-wake speed.

Stupak–Thrall II, 988 F.Supp. at 1058 n.2 (quoting Amendment Five). Amendment Five applies to the portion of the Lake that is within the Sylvania Wilderness Area (the ninety-five percent). *See Stupak–Thrall I*, 843 F.Supp. at 333. Plaintiffs seek to enjoin the Forest Service from enforcing the motorboat restrictions against them, their guests, licensees, and successors. The case is now before the court on cross-motions for summary judgment, as well as the motion by Defendant–Intervenors for summary judgment.[1]

I.

Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);

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[1] Defendant–Intervenors Timothy A. Schmidt (owner of Sylvania Wilderness Cabins—"SWC"), Friends of Sylvania, and the Upper Peninsula Environmental Coalition have joined this case in order to support the Forest Service's regulation of motorboats on Crooked Lake. ECF No. 14, 28. Mr. Schmidt, like Plaintiffs, own property on Crooked Lake.

Celotex Corp. v. Catrett, 477 U.S. 317, 322–323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp*., 477 U.S. at 324–25, 106 S.Ct. 2548. The nonmoving party cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." *Id*. at 324, 106 S.Ct. 2548 (quoting Fed. R. Civ. P. 56(e)). The evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004) (citing *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994)). However, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. *Anderson*, 477 U.S. at 251–52, 106 S.Ct. 2505. Ultimately, the court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id*. at 252, 106 S.Ct. 2505; *see also Leahy v. Trans Jones, Inc*., 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); cf. *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind created factual issue).

II.

Plaintiffs claim that the Forest Service engaged in unlawful agency action by promulgating Amendment Five, which regulates motorboat usage on Crooked Lake. PageID.62–66. To succeed on their claim, Plaintiffs must demonstrate that the Forest Service's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In deciding whether an agency's action is arbitrary or capricious, the Court must follow a two-step analysis, as outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue,

> the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842–43, 104 S.Ct. 2778. "A court's review of an agency's action for arbitrary and capricious conduct is an extremely deferential one." *Ukrainian Autocephalous Orthodox Church v. Chertoff*, 630 F.Supp.2d 779, 784 (E.D. Mich. 2009) (citing *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778). However, no deference to an agency's decision or action is necessary "when the issue is whether the agency acted within its authority and power or when the constitutionality of its action is questioned." *Stupak–Thrall I*, 843 F.Supp. at 330 (listing string cite). Notably, "an agency literally has no power to act ... unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

A. Authority to Regulate

In determining whether Amendment Five should be upheld, the Court must first determine whether the Forest Service had the authority to regulate Crooked Lake. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374, 106 S.Ct. 1890 (noting Congress must give the agency power to act). Upon review of this issue, it is clear that the Forest Service is authorized to regulate Crooked Lake under the Wilderness Act of 1964 and the MWA, through the United States Constitution's Property Clause.

There is no doubt that Congress has the constitutional authority to regulate Crooked Lake pursuant to the Property Clause. U.S. Const. Art. IV, § 3, cl. 2. This Clause provides that "Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Id. (emphasis added). The Supreme Court has held that " 'needful' regulations 'respecting' government property will sometimes include the exercise of power over purely private property, in order to ensure adequate protection of the federal interest." *Stupak–Thrall I*, 70 F.3d at 885 (citing *Camfield v. United States*, 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260 (1897) (holding that Congress could prohibit fences on private property that blocked access to federal lands)); *Kleppe v. New Mexico*, 426 U.S. 529, 538, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976) (holding that Congress, under the Property Clause, may regulate wild animals on public land); *United States v. Alford*, 274 U.S. 264, 47 S.Ct. 597, 71 L.Ed. 1040 (1927) (upholding congressional laws that prohibit building fires on or near any federal property and the failure to extinguish them); *see also Burlison v. United States*, 533 F.3d 419, 432–33 (6th Cir. 2008) (finding that, under the Property Clause, Congress may impose regulations over public land that may affect private property rights in easements over the public land). The Forest Service's authority to regulate Crooked Lake is grounded in Congress's authority to do so under the Property Clause. *See Stupak–Thrall I*, 843 F.Supp. at 331–32.

In general, under the Property Clause, Congress has broad authority to decide what are "needful" regulations "respecting" federal property. See *Kleppe*, 426 U.S. at 536, 96 S.Ct. 2285 ("[W]e must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."). Here, Congress clearly used this broad authority when it enacted both the Wilderness Act of 1964 and the MWA. The regulatory objective of these two enactments is to "preserve the wilderness character" of designated wilderness areas, such as Sylvania. 16 U.S.C. § 1133(b); Pub. L. No. 100–184, 101 Stat. 1274(Dec. 8, 1987). Based on this objective, it is clear that Congress intended for the Forest Service to create rules and regulations to preserve Sylvania, even if those regulations affect private lands. *See Burlison*, 533 F.3d at 432–33 (noting Congress can regulate conduct that occurs both on and off federal land which affects federal land). Therefore, since Congress afforded the Forest Service the authority to create regulations in line with the purpose of the Wilderness Act and MWA, the only remaining question is whether Amendment Five falls within the scope of that purpose. To answer that question, the Court must apply the aforementioned two-part Chevron test to the Wilderness Act and MWA.

Under the first prong of *Chevron* (whether Congress' intent under the statute was clear in regard to the question at issue), both the Wilderness Act and MWA expressly discuss motorboat usage. With

specific reference to motorboats, the Wilderness Act provides that:

> Except as specifically provided in this chapter, and subject to existing private rights, there shall be no ... motorboats ... within any such [wilderness designated] area.

16 U.S.C. § 1133(c) (emphasis added). Moreover, in regard to preexisting motorboat usage, the Wilderness Act states that:

> Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already been established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable.

16 U.S.C. § 1133(d)(1) (emphasis added). Similarly, the MWA, which created Sylvania, provides that:

> Subject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964.

Pub. L. No. 100–184, 101 Stat. 1274, § 5.

Based on the plain language of the relevant sections of the Wilderness Act and the MWA, it is clear that Congress intended that the U.S. Forest Service (as

the Secretary of Agriculture's designee) would regulate motorboat usage to the extent necessary to preserve the nature and character of Sylvania. The Forest Service undoubtedly has the authority to regulate motorboat usage on Crooked Lake pursuant to the statutes enacted by Congress through the Property Clause. Moreover, under the first prong of *Chevron*, it makes clear that Congress has spoken in a general way to the precise question at issue here.

B. Scope of Authority

While Congress has authorized the Forest Service to deal with motorboats in Wilderness Areas, the next question becomes whether Amendment Five exceeds the scope of the statutory authority granted by Congress; that is, whether the U.S. Forest Service's action in promulgating Amendment Five was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To answer that question, the Court must focus on the meaning of the phrase "subject to valid existing rights" that Congress used in the MWA. *Chevron*, 467 U.S. at 842–44, 104 S.Ct. 2778. Since, under the plain language of the statute, Congress' intent is not clear, the Court must turn to the second prong of Chevron—whether the Forest Service's answer to the ambiguous statutory language is based upon a permissible construction of the statute. *See Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778 (noting that the second prong states that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether

the agency's answer is based on a permissible construction of the statute.").

i.

The "valid existing rights" specifically at issue are riparian rights.[2] The Forest Service asserts that it, like other government entities in Michigan, has authority to regulate motorboat traffic concurrent with Michigan law. Under Michigan law, riparian rights are not absolute, as they are subject to reasonable modification by the state and federal government when it serves the public interest. *See Stupak–Thrall I*, 843 F.Supp. at 331. For example, Michigan law is clear that local governments, pursuant to their inherent police powers, may reasonably regulate citizens' riparian rights for the protection of the health, safety, and welfare of the public. *Square Lake Hills Condo. Ass'n v. Bloomfield Twp.*, 437 Mich. 310, 318, 471 N.W.2d 321, 324 (1991); *see Thompson v. Enz*, 379 Mich. 667, 687–88, 154 N.W.2d 473, 483–84 (1967) (noting that riparian rights are subject to "reasonable use" limitations, meaning one's riparian right may not materially interfere with another's similar right). In addition,

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[2] The land at issue in this case is actually termed "littoral," which means "land that abuts or includes a lake." *Holton v. Ward*, 303 Mich.App. 718, 721 n.1, 847 N.W.2d 1, 4 (2014), *appeal denied*, 497 Mich. 980, 861 N.W.2d 20 (2015). However, Michigan courts often use the term "riparian" to "encompass both types of property." *Holton*, 303 Mich.App. at 721 n.1, 847 N.W.2d at 4 (citing *2000 Baum Family Trust v. Babel*, 488 Mich. 136, 138 n.1, 793 N.W.2d 633 (2010)).

Michigan courts have concluded that many regulations, which are similar in nature to the motorboat regulations included in Amendment Five, may be upheld since they are reasonable. *See, e.g., Hess v. West Bloomfield Twp.*, 439 Mich. 550, 486 N.W.2d 628 (1992) (allowing an ordinance regulating docking of boats); *Miller v. Fabius Twp. Bd., St. Joseph Cnty.*, 366 Mich. 250, 114 N.W.2d 205 (1962) (noting the court allowed time restrictions for waterskiing); *Cates v. Argentine Twp.*, No. 296861, 2011 WL 2586058 (Mich. Ct. App. June 30, 2011) (noting an ordinance required all riparian owners and public persons that dock their boats to be registered to the owners or occupants of the property to which they are attached); *Magician Lake Homeowners Ass'n, Inc. v. Keeler Twp. Bd. of Trustees*, No. 278469, 2008 WL 2938650 (Mich. Ct. App. Jul. 31, 2008) (upholding an ordinance that prohibits docking of boats overnight, from 12:00 a.m. to sunrise); *Twp. of Yankee Springs v. Fox*, 264 Mich.App. 604, 692 N.W.2d 728 (2004) (upholding an ordinance that regulates lake access); *Krause v. Keeler Twp.*, No. 220692, 2000 WL 33415991 (Mich. Ct. App. Jul. 28, 2000) (upholding an ordinance that prohibited overnight storing or keeping of boats on the lake, and placing, using, or maintaining docks or moors that abut a public access site). Under Michigan law, Plaintiffs undoubtedly have the riparian right to boat across the water of Crooked Lake; however, this right is subject to reasonable restrictions, which means Plaintiffs do not have the unrestrictable right to run gasoline powered motorboats at unrestricted speeds all over an

adjoining water body. In fact, the case law cited clearly demonstrates that boating size and speed are precisely the type of regulation that Michigan courts have upheld as reasonable. Moreover, whatever the nature of their riparian rights, Plaintiffs cannot expect that these rights are immune to reasonable regulation for all time to the end of the world, amen.

Similarly, the Forest Service (as part of the federal government) undoubtedly "has a power over its own property analogous to the police power of the several states." See *Kleppe*, 426 U.S. at 540, 96 S.Ct. 2285 (quoting *Camfield*, 167 U.S. at 525, 17 S.Ct. 864) ("The general government doubtless has a power over its own property analogous to the police power of the several states."). Consequently, any regulation imposed by the Forest Service must be reasonable, just as a state's regulation made pursuant to its police power must be reasonable. The motorboat restrictions created by Amendment Five are reasonable because the restrictions do not ban motorboat usage on Crooked Lake entirely; rather, it limits the size of the motor that a person may use, and the speed at which the boat may go across ninety-five percent of Crooked Lake. In addition, these regulations are reasonable because they are rationally related to achieving the MWA's goal of preserving the wilderness character of Sylvania. See PageID.3932–3940 (Environmental Assessment of the effects of motorboat usage in the Sylvania Wilderness); see also 16 U.S.C. § 1133(d)(1) ("[T]he use of ... motorboats, where these uses have already been established may be permitted to continue

subject to such restrictions as the Secretary of Agriculture deems desirable.") (emphasis added); Pub. L. No. 100–184, 101 Stat. 1274, § 5 (noting that the Secretary of Agriculture may administer regulations in accordance with the Wilderness Act). Overall, the Forest Service's motorboat regulations stemming from Amendment Five are reasonable, as Amendment Five regulates riparian rights to the same extent Michigan regulates riparian rights. As such, the Forest Service did not act arbitrarily or capriciously by enacting a regulation pertaining to motorboat size and speed on Crooked Lake.[3]

ii.

On somewhat narrower grounds, and as specifically applied to the Plaintiffs in this case, Amendment Five also reasonably flows from the MWA's "valid existing rights" language. Pub. L. No. 100–184, 101 Stat. 1274, § 5 (emphasis added). The Forest Service referenced a congressional committee report which

[3] The motorboat restrictions apply to all riparian owners on Crooked Lake except one—the Stupak–Thrall family. This is because in *Stupak–Thrall II*, 988 F.Supp. 1055, the district court enjoined the Forest Service from enforcing Amendment Five's motorboat restrictions against that riparian owner. The other plaintiffs in *Stupak–Thrall II* (the Gajewskis), who then owned a resort on Crooked Lake, claimed that the motorboat restrictions would harm their business. Ironically, the Gajewskis sold their resort to the Intervenors in this case (Timothy Schmidt and SWC), who now seek to uphold the Forest Service regulation because the unrestricted use of motorboats adversely impacts their business. PageID.9847–9850.

noted that "pre-existing motorboat use ... may be permitted to continue insofar as this use does not conflict with or adversely affect wilderness values." PageID.4063 (citing the MWA Congressional Committee Report) (emphasis added). It might then be reasonably said that what Congress intended was that only those riparian owners who had used motorboats on the lake in the past could continue to do so.[4] Thus, it could reasonably be said that Congress meant to, in effect, "grandfather" in those riparian owners who at the time of the enactment of the MWA had previously used motorboats on Crooked Lake. David and Pamela Herr, the Plaintiffs in this case, had no pre-existing right to use motorboats on the lake. They purchased their property in 2010—twenty-three years after Congress enacted the MWA, and fourteen years after Amendment Five had been in effect. It is certainly reasonable for the Forest Service to conclude that the Plaintiffs do not have "valid existing rights" that allow them to motorboat without restrictions on Crooked Lake.

Not surprisingly, however, Plaintiffs do not agree that this interpretation of "valid existing rights" is reasonable. Instead, Plaintiffs contend that because riparian rights run with the land in Michigan, Plaintiffs are entitled to run any size boat at any speed across the entirety of Crooked Lake (since

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[4] The plaintiffs in *Stupak–Thrall II*, 988 F.Supp. 1055, were longtime property owners who had used motorboats on the lake prior to the enactment of the Wilderness Act and the MWA.

their predecessor in title had this ability). While it appears that riparian rights in Michigan do run with the land, *Holton v. Ward*, 303 Mich.App. 718, 847 N.W.2d 1 (Ct. App. 2014), Plaintiffs' interpretation of "subject to valid existing [riparian] rights" effectively omits the word "existing" from the statute. See PageID.9966 (Defendant–Intervenors' Reply in Support of Summary Judgment) (citing *United States v. Mateen*, 764 F.3d 627, 631 (6th Cir. 2014) (noting that when determining the plain meaning of a statute, courts should look "at the language and design of the statute as a whole.")). By omitting the word "existing" from the MWA's phrase "subject to valid existing rights," Plaintiffs' ignore the "principle that [the courts] assume 'each term [in a statute has] a particular, nonsuperfluous meaning.' " *Mateen*, 764 F.3d at 631 (quoting *Bailey v. United States*, 516 U.S. 137, 146, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995)). The word "existing" relates to time; thus, when reading the phrase "subject to valid existing rights," it is clear that Congress intended the "valid rights" it was referencing to relate to the timing of the enactment of the MWA. If Congress intended for this phrase to apply to all valid rights, not just the ones in existence at the time the MWA was enacted, it would not have included the word "existing" in the phrase "subject to valid existing rights." See *id*. This interpretation of "subject to valid existing rights" affords meaning to each word of that phrase. Consequently, as applied to the Plaintiffs, Amendment Five reasonably regulates their motorboat usage.

III.

The Forest Service acted within its authority when promulgating Amendment Five modifying motorboat usage on Crooked Lake. Its actions in doing so were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Moreover, the Plaintiffs in this case are not immune from the motorboat restrictions on Crooked Lake. A Judgment will be entered denying Plaintiff's motion for summary judgment, and granting Defendant's cross-motion for summary judgment, and granting Defendant–Intervenors' motion for summary judgment.

United States Court of Appeals,
Sixth Circuit.

No. 16-2126

David A. HERR; Pamela F. Herr, Plaintiffs–Appellants,

v.

UNITED STATES FOREST SERVICE; et al., Defendants–Appellees,

SWC, LLC; Timothy A. Schmidt; Friends of Sylvania; Upper Peninsula Environmental Coalition, Intervenors–Appellees.

Filed: January 4, 2018

ORDER

BEFORE: SUTTON and DONALD, Circuit Judges; ZOUHARY, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court. Less than a majority of

* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

the judges voted in favor of rehearing en banc. Therefore, the petition is denied. Judge Donald would grant rehearing for the reasons stated in her dissent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Property Clause of the United States Constitution provides in pertinent part:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

U.S. CONST. art. IV, § 3, cl. 2.

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

The Wilderness Act of 1964 provides in pertinent part, 16 U.S.C. § 1131(a):

(a) Establishment; Congressional declaration of policy; wilderness areas; administration for public use and enjoyment, protection, preservation, and gathering and dissemination of information; provisions for designation as wilderness areas

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their

use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act.

The Wilderness Act of 1964 provides in pertinent part, 16 U.S.C. § 1131(c):

(c) "Wilderness" defined

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of

scientific, educational, scenic, or historical value.

The Wilderness Act of 1964 provides in pertinent part, 16 U.S.C. § 1133(d)(1):

(d) Special provisions

The following special provisions are hereby made:

(1) Aircraft or motorboats; fire, insects, and diseases

Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.

The Michigan Wilderness Act of 1987, section 3(b), provides in pertinent part:

Sec. 3. In furtherance of the purposes of the Wilderness Act of note. 1964 (16 U.S.C. 1131), the following lands in the State of Michigan are hereby designated as wilderness, and therefore as components of

> the National Wilderness Preservation System—. . .
>
> (b) certain lands in the Ottawa National Forest, comprising approximately eighteen thousand three hundred and twenty seven acres as generally depicted on a map entitled "Sylvania Wilderness—Proposed", dated November 1987, and which shall be known as the Sylvania Wilderness;

Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, § 3(b).

The Michigan Wilderness Act of 1987, section 5, provides in pertinent part:

> **Sec 5.** Subject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964 governing areas designated by that Act as wilderness areas except that with respect to any area designated in this Act, any reference in such provisions to the effective date of the Wilderness Act of 1964 shall be deemed to be a reference to the effective date of this Act.

Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, § 5.