

# COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
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## Procedure

Judge Dennis James Hubel issued a comprehensive opinion on motions filed in an action filed by a land developer against Multnomah County.

The court held that it had jurisdiction to review a petition for a writ of review under O.R.S. 34.030 since it rejected the defendant's argument that the petition was untimely. Judge Hubel held that a petition is "made" under the statute when the plaintiff files it, not when the clerk files it or when the plaintiff presents the petition in an ex parte proceeding.

The court also denied a motion for reconsideration, holding that a stop work order (SWO) issued by the County was void because defendant failed to comply with County regulations that required a finding of at least one of three emergency criteria before an SWO may be issued.

Judge Hubel also concluded that plaintiff had a property interest protected under the U.S. Constitution and that the County's issuance of an SWO had

interfered with that interest. Whether pre-deprivation procedures provided adequate procedural due process depended upon a factual dispute over whether excessive erosion conditions existed at the work site. The court held that post-deprivation procedures were adequate as a matter of law.

Plaintiff also claimed that the County intentionally interfered with its economic relations with the Oregon Division of State Lands (DSL) because the DSL refused to issue a lease that was necessary for plaintiff to expand. Judge Hubel granted a defense motion for summary judgment against this claim because plaintiff could not establish improper motive or means. The court held that the defendant had a privilege to interfere with plaintiff's relationship with the DSL based upon the defendant's legal duty to report instances of non-compliance with the County's land use and planning rules. Judge Hubel noted that even if the defendant held an improper motive, this would not diminish its duty to enforce local planning laws.

As for plaintiff's civil rights

claims under 42 U.S.C. § 1983, Judge Hubel rejected a challenge to an early SWO, finding it barred by the applicable statute of limitations. The court rejected plaintiff's argument that the limitations period should be tolled due to defendant's alleged active concealment of a legal remedy. Judge Hubel also rejected claims as to another SWO, finding that the allegations should not relate back to the original claims because they involved acts separate in time and substance. The court noted that violations of state or local laws did not constitute constitutional claims cognizable under § 1983. Finally, the court denied a summary judgment motion against plaintiff's claim that defendant violated First Amendment rights by issuing an SWO in retaliation against plaintiff's public statements. Frevach Land Co. v. Multnomah County, CV 99-1295-HU (Opinion, Jan. 26, 2001).  
Plaintiff's Counsel: Kelly Clark  
Defense Counsel:  
Tom Sponsler

## FTCA

A former prison inmate of the Oregon State Penitentiary voluntarily participated in research experiments, known as the "Heller Experiments," that tested the effects of high levels of radiation on the male testicular function. The Heller Experiments were funded by the United States Atomic Energy Commission but implemented and conducted by a private research organization.

Plaintiff alleges that he was the victim of a conspiracy to fraudulently induce him to participate in the Heller Experiments, and that he was lied to about the possible side effects of the radiation and about the nature and purpose of the Heller Experiments. Plaintiff filed an action against the United States, under the Federal Tort Claims Act ("FTCA") asserting a claim for, among others, negligent supervision.

The United States moved to dismiss the negligent supervision claim for lack of subject matter jurisdiction under the theory that the discretionary function exception to the FTCA bars plaintiff's suit. Judge Hogan, in granting defendant's motion to dismiss held that the decision by the Atomic Energy Commission and its agents to

exercise minimal supervision over the implementation and performance of the Heller Experiments was a discretionary function that is protected from suit by the FTCA. Judge Hogan reasoned that the United States satisfied the two prong discretionary function analysis espoused in Miller v. United States, 163 F.3d 591, 593 (9<sup>th</sup> Cir. 1998) because the decision to exercise minimal supervision over the Heller Experiments was discretionary in nature, as it was not covered by statute or regulation, and involved the type of judgment grounded in the competing policy considerations of limited resources and the need to defer research expertise to private research institutions. Id. Bibeau v. Pacific Northwest Research Foundation, et al., CV 95-6410-HO, (Opinion, January 22, 2001).

Plaintiff's Counsel:

Richard Yugler (Local)  
Roy Haber (Local)

Defense Counsel: David Ernst,  
Paul Fortino, Kent Thurber,  
James Sutherland

## Securities

An arbitration panel ("panel") recently found Defendants liable to Plaintiffs under the plain meaning of the California and Washington Securities Acts. Specifically, the

panel found Defendant Fiserv liable as a clearing firm that materially aided one of its corresponding brokers in a fraudulent transaction. Plaintiffs moved to confirm the arbitration decision. Defendant Fiserv cross moved to vacate the arbitration decision with respect to Fiserv, as a manifest disregard of the law. Defendant Fiserv argued that the panel manifestly disregarded applicable law when they declined to follow a Seventh Circuit case, Carlson v. Bear, Stearns, 906 F.2d 315 (7<sup>th</sup> Cir. 1990). Carlson applied the Illinois Securities Act, and found the defendant clearing firm performed ministerial duties, and was therefore not liable under the Illinois Act. Judge Marsh held that the panel was not bound by this Seventh Circuit case, and even if they were, Carlson was distinguishable both legally and factually. Moreover, Judge Marsh found that the panel's application of the California and Washington Acts was not contrary to the plain meaning of the statutes, nor to any other applicable law. Koruga, et al., v. Fiserv Correspondent Services, et al., 00-1415-MA. (Opinion February 7, 2001).

Plaintiffs' Counsel:

Robert S. Banks, Jr.

Defense Counsel:

Richard L. Baum,  
Erick J. Haynie