

9-1-2007

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COURT REPORTS

FEDERAL COURTS

UNITED STATES CIRCUIT COURTS

FIRST CIRCUIT

Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007) (holding that the Environmental Protection Agency properly granted authority to the State of Maine for the regulation of discharge of pollutants into territorial waters of certain Indian tribes and that the EPA erred by exempting two tribal-owned facilities from state regulation).

The Clean Water Act (“CWA”), grants power to the Environmental Protection Agency (“EPA”) to issue permits for the discharge of pollutants into navigable waters. The State of Maine (“Maine”) applied to take over discharge permitting in Maine. The application presented questions regarding Maine’s authority relating to the southern tribes, comprising the Penobscot Nation and the Passamaquoddy Tribe (“southern tribes”). After several extensions, the EPA approved Maine’s program for all areas outside the disputed Indian territory.

The EPA later decided that Maine had authority to regulate the nineteen discharge facilities that were located outside Indian territories, but discharged within territorial waters of the southern tribes. The EPA did not approve the State’s plan regarding two tribal-owned facilities located on tribal land that discharged into waters within the southern tribes’ territories. The EPA was concerned that Maine’s program might not ensure high enough water quality standards to protect the southern tribes’ right to fish for individual sustenance.

The southern tribes claimed the EPA erred in approving Maine’s program regarding the nineteen non-tribal facilities. They argued that the Settlement Acts, which govern Maine’s authority relating to Maine tribes, reserved the tribes’ authority to regulate pollution by non-Indians within tribal territory and that the EPA had an obligation to ensure tribal control over their natural resources. Maine defended the EPA in its decision regarding the nineteen non-tribal facilities, but contended that it erred in its decision with respect to the two tribal-owned facilities.

The Maine Indian Claims Settlement Act and the Maine Implementing Act (collectively “the Settlement Acts”), expanded Maine’s authority over Indian tribes in exchange for recognizing the tribes’ sovereignty in regard to internal tribal affairs. The Settlement Acts

stated that southern tribes and “any lands or natural resources owned by them” were subject to Maine law. However, another pertinent section of the Settlement Acts states that, within their territories, tribes have the rights and duties of a municipality, subject to laws of Maine, provided that the state not regulate internal tribal matters. The southern tribes believed that discharges into navigable waters in tribal territory from the nineteen facilities owned outside the territory and the two that lie in their territory fell under the scope of internal tribal affairs. Maine denied that even the two discharges lying within tribal territory fell under such category. The EPA disagreed with both positions, claiming the two discharges within tribal territory fell under the scope of internal tribal affairs, while the nineteen non-Indian facilities did not.

The United States Court of Appeals for the First Circuit agreed with both the EPA and Maine that the state should regulate the nineteen facilities that lay outside tribal territory per Maine’s approved program. The court had a difficult time deciding who should control the two discharges lying entirely in tribal territory because there was no precedence on whether the facilities were internal tribal affairs. The court paid attention to the intervenor’s argument that Maine had already acquired permitting authority over all sites within the state because the EPA did not disallow Maine’s application within the original time restrictions, they gave up their right to issue permits within the state afterwards. The court eventually rejected this notion because Maine and the EPA both agreed to extend the deadline. The court found that, because Maine did not take the discharge facilities “in trust,” as required for them to be regulated pursuant to statute, the statute did not apply. From this, the court decided that the matter was not one of internal tribal affairs, nor could federal law allow tribes to supersede either the CWA or Maine law. The court vacated the order and remanded the case so it could be amended in accordance with its decision.

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NINTH CIRCUIT

Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157 (9th Cir. 2007) (holding that claims seeking to enjoin the lining of a portion of the All-American Canal, thereby preserving seepage across the United States-Mexico border, were (1) moot due to the passage of the Tax Relief and Health Care Act of 2006; (2) barred because the district court lacked subject matter jurisdiction over deprivation of property claims; and (3) barred because the district court lacked jurisdiction over claims against the United States because the United States did not waive sovereign immunity).