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Northlake Marine Works, Inc. v. Wash. Dep't of Natural Res., 127 P.3d 726 (Wash. App. 2006)

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Northlake Marine Works, Inc. v. Wash. Dep't of Natural Res., 127 P.3d 726 (Wash. App. 2006)

In reviewing these cases, the court analyzed the APA claims advanced by both the Alliance and the Tribe. The court, citing *Aegis Waste Solutions, Inc. v. Concerned Taxpayers of Brunswick County*, held that under the “substantial evidence” standard, the reviewing court may reject an agency’s factual findings only when, on consideration of the entire record, a reasonable mind would necessarily reach a different conclusion. The court further rejected the Tribe’s and Alliance’s analysis that the Board’s decision did not adequately protect existing instream beneficial uses. The court found that the Board had adequately balanced the conflicting uses, and properly exercised its judgment before reaching its decision. The court also found that the Virginia Institute of Marine Science (“VIMS”) model was adequate for purposes of determining the potential impact of the project on the environment. The court noted that the Army Corps of Engineers’ Final Environmental Impact study corroborated the VIMS finding that the project would only have minimal impact on existing wetland vegetation and wildlife. In addressing the Tribe’s specific concerns, the court first rejected the Tribe’s assertion that the Board did not consider their rights prior to the issuance of the Permit. The court noted that the Board did consider the cultural impact the project would have on the Tribe, but that the balance weighed in favor of the project.

Finally, the court rejected the Tribe’s argument that the Treaty rights were a matter of federal law, and not state law. The court concluded that the United States Constitution’s Supremacy Clause, relied on by the Tribe, did not apply to the Treaty because the Treaty predates the Constitution by over 100 years. By extension, the Supremacy Clause covers treaties entered into with the United States after its creation, and no earlier than before the Articles of Confederation. Thus, the Treaty rights in question must be resolved under Virginia state law.

The court affirmed the court of appeals decisions regarding all the APA claims, but remanded the Treaty issue to the circuit court, holding that the circuit court has jurisdiction to resolve those claims.

Roger J. Lucas

WASHINGTON

Northlake Marine Works, Inc. v. Wash. Dep’t of Natural Res., 127 P.3d 726 (Wash. App. 2006) (holding that permits for private waterway use waterward of federal pierhead lines issued by the Washington Department of Natural Resources, the City of Seattle, and the Army Corp of Engineers, were in compliance with state law).

The Court of Appeals of Washington, Division One, addressed whether waterway permits issued by the State of Washington Department of Natural Resources (“DNR”), the City of Seattle (“City”), and

the Army Corp of Engineers (“Corps”) for private use by the Lake Washington Rowing Club (“Club”) complied with state law. The Club obtained these permits to build a ramp and floating dock in Waterway 23 at the north end of Lake Union, adjacent to Northlake Marine Works, Inc. (“Northlake”). Northlake challenged DNR and the City’s authority to issue the Club’s waterway permits in King County Superior Court. The trial court held in DNR’s favor, dismissing Northlake’s claims against the City and finding that Northlake had not exhausted administrative remedies prior to bringing suit. Further, the trial court found, ruling on the merits, that DNR had issued the Club’s permit in accordance with state law. The trial court dismissed DNR’s counterclaim against Northlake for trespass. Northlake appealed and DNR counter appealed.

The court first reviewed the relevant Washington law regarding waterways. Washington claims fee simple absolute ownership of the land beneath its waters and categorizes these waters according to location and function. Harbor areas, bounded by inner and outer harbor lines, are reserved for navigation. Waterways, within the harbor areas, serve as water streets between wharves and docks and the deeper waters outside the harbor lines. Washington law generally precludes building within designated waterways. However, the federal harbor system overlays the state system. In some cases, federal pierhead lines, analogous to the state harbor lines, are not coterminous. The dispute in this case concerned whether a state permit may be issued for private use between a state designated waterway line and the federal pierhead line falling waterward. Washington statutes, Wash. Rev. Code §§ 79.93.010, 79.93.020, and 79.93.040, provide for the administration of these waterways and recognize the disparities between the state and federal systems.

Relying on *Draper Machine Works v. Department of Natural Resources*, the court determined that W.R.C. §§ 79.93.010 and 79.93.020, which generally restricted waterways to public use and precluded their sale or lease, did not operate to forbid private construction in waterways waterward of federal pierhead lines where the federal government has issued a permit. However, Northlake claimed that according to the Supreme Court ruling in *Cummings v. Chicago*, the Corps was required to obtain local governmental consent, allegedly precluded by § 79.93.040, in order to grant the federal permit. The court found that although under § 79.93.040 the DNR does not have authority to *grant* use permits in waterway areas waterward of federal pierhead lines, the DNR may, as part of its management power over state waters, *participate* in the federal permitting process and thereby consent. Further, the court noted that a federal permit, once granted, authorized the DNR to collect rents for the approved use within the waterway. As both federal and state systems work together to maintain waterways and prevent encroachment by building, the court justified the holding. Thus,

where a federal pierhead line falls waterward of a state waterway line, the court permitted building within the resultant strip because navigation, which is the objective of both federal and state systems, is still protected by the federal pierhead line. The City, on the same grounds, complied with § 79.93.010 when it issued a street use permit for Waterway 23. The court affirmed the trial court on the merits, concluding that the Club was entitled to build the floating dock and ramp because it had obtained a federal permit and local governmental consent in compliance with the relevant statutes. However, the court reversed the trial court's ruling that Northlake had not exhausted its administrative remedies prior to bringing suit.

In ruling on DNR's counterclaim against Northlake for trespass, the court reversed and remanded the action to the trial court for further findings. The court also held that the trial court properly issued a writ of review regarding the City's issue of the street use permit in response to the City's cross-appeal.

Kathy Ott