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Jones v. City of Lakeland, 224 F.3d 518 (6th Cir. 2000)

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supply water to West Union it violated the Act by creating competition with Adams County.

Finally, the court was sensitive to West Union's concern for ensuring an adequate supply of water. The court stated that if Adams County had been unable to supply West Union with adequate water, resulting in an interruption in service, its ruling would not prevent West Union from filing a claim under breach of contract.

Brian L. Martin

Jones v. City of Lakeland, 224 F.3d 518 (6th Cir. 2000) (holding landowners were not precluded from bringing a private action under the Clean Water Act because their interests were not adequately represented under the state regulatory scheme).

Rudolph Jones ("Jones") and other landowners owned property along Oliver Creek in the City of Lakeland ("City"). Jones sued the City for discharging human, toxic, and other hazardous wastes and pollutants into Oliver Creek in excess of its National Pollutant Discharge Elimination System Permit ("NPDES permit"), violating the Clean Water Act ("CWA"), and the Tennessee Water Quality Control Act ("TWQCA"). The City asserted the CWA prevented private citizen suits in federal court if the Environmental Protection Agency ("Administrator") or a state had "already commenced and was diligently prosecuting an action to require compliance with a standard, limitation, or order of the Agency or state." The United States District Court for the Western District of Tennessee held the Tennessee Department of Environment and Conservation ("TDEC") was diligently prosecuting the City. Therefore, the district court dismissed Jones' claim for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

On appeal, the Sixth Circuit, found the CWA precludes citizen suits only if the Administrator or state is "diligently pursuing an enforcement action" against the accused in federal or state court. Because neither the Tennessee's Water Quality Control Board, nor TDEC, were federal or state courts, the CWA did not preclude Jones' suit. Furthermore, the court found that since TDEC's administrative enforcement failed to adequately address Jones' concerns, the enforcement did meet the CWA's "diligent prosecution" standard. Thus, the court held the trial court committed reversible error when it elevated the TDEC administrative enforcement action to court status as required by the CWA to preclude citizen suits.

The court next determined the CWA did not preclude Jones' suit because TWQCA, which authorized the TDEC enforcement action, was somewhat comparable to the CWA. Because of the similarities, the court analyzed the state regulatory scheme to determine if it afforded affected citizens a meaningful opportunity to participate in the administrative process. The court found TDEC denied affected

citizens access to courts and to meaningful participation in enforcement claims to protect their interests under the CWA. Because his interests were not represented by the TDEC administrative enforcement, Jones had a legitimate claim. The case was reversed and remanded.

Kevin Rohnstock

SEVENTH CIRCUIT

Kaukauna v. Fed. Energy Regulatory Comm’n, 214 F.3d 888 (7th Cir. 2000) (holding the Federal Energy Regulatory Commission’s interpretation of Hydropower Operators’ rights, as successors in interest, under a deed was unreasonable).

This action involved a canal connecting the Fox and Wisconsin Rivers. In 1846, Congress gave the State of Wisconsin all public lands and water rights necessary for both the canal’s construction and the Fox River’s improvement. Wisconsin completed the canal construction in 1951. Succumbing to monetary problems in 1853, Wisconsin transferred its “improvements” interest—including all rights of way, dams, locks, canals, and waterpower—to the Wisconsin Improvement Company (“Improvement Company”).

Falling into bankruptcy in 1866, the Improvement Company sold its interest to the Green Bay & Mississippi Canal Company (“Canal Company”). Concerned that a private company owned the canal, Congress entered into an agreement with the Canal Company. According to the agreement, the Canal Company deeded all property and property right’s between the Wisconsin River and the Fox River—including its locks, dams, canals, and franchises—to the United States (“1872 Deed”). Specifically, the United States owned all rights associated with navigation. Likewise, the Canal Company retained all property not needed for navigational purposes, including waterpower produced by the dams, the use of surplus water not needed for navigational purposes, and pieces or parcels of land necessary for the enjoyment of the Canal Company’s property.

The petitioners, the City of Kaukauna and others (collectively “Hydropower Operators”), operated hydropower projects at federally owned dams on the Lower Fox River. Such projects were downstream from a government-owned dam (“Menasha dam”), which controlled Lake Winnebago’s water level and regulated the Fox River’s flow upon leaving the lake. In September 1997, the Federal Energy Regulatory Commission (“FERC”) charged the Hydropower Operators \$338,984 for retroactive “headwater benefits,” pursuant to the Federal Power Act