

1-1-2002

## Wisconsin v. United States EPA, 266 F.3d 741 (7th Cir. 2001)

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Brian L. Martin, Court Report, Wisconsin v. United States EPA, 266 F.3d 741 (7th Cir. 2001), 5 U. Denv. Water L. Rev. 583 (2002).

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to enhance White's and Taylor's sentences pursuant to this guideline provision because their "record-keeping offense" cannot be said to reflect an effort to conceal a "substantive environmental offense" under the Safe Drinking Water Act or any other federal statute.

*Michael Barry*

## SEVENTH CIRCUIT

**Wisconsin v. United States EPA, 266 F.3d 741 (7th Cir. 2001)** (holding the Environmental Protection Agency had authority to grant Indian tribe "treatment-as-state" status; Indian tribe thus had authority to regulate water quality on the reservation, even though that authority may entail the power to regulate off-reservation activities).

The Mole Lake Band of Lake Superior Chippewa Indians ("Tribe") applied to the Environmental Protection Agency ("EPA") for treatment-as-state ("TAS") status in August 1994. TAS status would allow the Tribe to establish water quality standards for waters within its reservation, and require permits for any action that may create a discharge into those waters. The State of Wisconsin opposed the application, claiming it was sovereign over all navigable waters within the state. Wisconsin also feared the decision would threaten its plan to build a zinc-copper sulfide mine upstream from Rice Lake ("Lake"), located on the reservation. Despite Wisconsin's objection, the EPA granted the Tribe's application for TAS status. Wisconsin filed suit in district court seeking to revoke the EPA's grant of TAS status to the Tribe. The district court upheld the EPA decision, Wisconsin appealed, and the Seventh Circuit, reviewing the judgment *de novo*, affirmed.

In 1991, the EPA issued a final rule that established four requirements a tribe must meet to be granted TAS status. Wisconsin argued the Tribe had not met the third requirement, which states, "the functions to be exercised by the tribe must pertain to the management and protection of water resources which are held by the tribe, held by the United States in trust for the tribe, or otherwise within the borders of the reservation." The final rule specified a tribe seeking to satisfy this requirement must show it possesses inherent authority over the waters. The EPA presumed inherent authority if a tribe showed impairment of its waters would have a serious and substantial effect on the health and welfare of the tribe.

Wisconsin advanced three reasons the Tribe had not established inherent authority over its waters. First, the Lake was not within the borders of the reservation. Second, Wisconsin owned the underlying lakebeds; the tribe therefore did not have authority over those waters. Third, the Tribe had not shown its authority to regulate off-reservation

activities that would be affected by the Tribe's imposition of water quality standards.

The court first addressed Wisconsin's argument that the Lake was not within the reservation's borders. The court ruled that Wisconsin waived this argument on appeal because the state did not raise it to the EPA in the original proceeding.

In reaching its decision as to the second argument, the court assumed Wisconsin had title to the lakebed. It ruled, however, that Congress has ultimate authority to regulate the navigable waters of the United States. Further, the Constitution vests the federal government with exclusive authority over relations with Indian tribes. Because Wisconsin's ownership of the lakebeds would not preclude the federal government from regulating those waters, the court ruled Wisconsin could not complain about the federal government allowing a tribe to do so.

As to Wisconsin's final argument, the court held upstream, off-reservation dischargers conducting economically valuable activities to the state must ensure those activities do not result in contamination of the downstream on-reservation waters. This is true even if compliance effectively prohibited the activity altogether. The court stated once a tribe is given TAS status, it has the same right as that given to states to object to permits issued for upstream off-reservation activities. Since Illinois, for example, would have the right to regulate upstream dischargers in Wisconsin, so too did the Tribe. The court thus affirmed the district court's ruling, holding the EPA's grant of TAS status to the tribe was appropriate.

*Brian L. Martin*

**United States v. Alshabkhoun, 277 F.3d 930 (7th Cir. 2002)** (affirming the district court's finding of A&A farms liable for violating the Clean Water Act, and upholding the penalties assessed as reasonable).

A&A Farms ("A&A") owned 1,000 acres of farmland adjacent to the Wisconsin River. The farm constructed a drainage ditch to collect water and soil from the land, which was then conveyed to the river. A&A did not obtain a permit from the United States prior to constructing the ditch. Consequently, the Environmental Protection Agency ("EPA") issued an administrative compliance order stating that construction of the ditch, absent a permit, violated the Clean Water Act ("CWA"). The CWA prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters of the United States, except in accordance with a permit. Thus, the United States filed this suit against A&A under section 309 of the CWA. The district court entered partial summary judgment in favor of the government, and the parties entered into a Consent Decree ("Decree") to restore the wetlands.

The Decree was negotiated by both parties and approved by the