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## United States v. Alshabkhoun, 277 F.3d 930 (7th Cir. 2002)

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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

district court. The Decree required A&A to pay \$225,000 in penalties and to restore the wetlands according to an agreed upon schedule. It also allowed for deadline extensions if a Force Majeure prevented or delayed performance. Furthermore, A&A was required to give written notification of any alleged Force Majeure to invoke the provision. The decree also included a dispute resolution provision providing for the accrual of penalties during the proceedings unless A&A successfully filed a petition to stay its obligation to pay any penalty regarding the disputed matters.

A&A began restoration of the wetlands in November of 1999, subsequently filing a notice of dispute with the EPA in February of 2000. A&A requested relief from the decree, asserting that compliance was impossible. The EPA denied relief to A&A. Thereafter, A&A filed a Petition to Modify the decree with the district court. The court denied the petition and ordered A&A to pay fines amounting to \$507,850.40. A&A appealed.

A&A conceded that its construction of the ditch violated the CWA, however, it contended that the district court's enforcement of the Decree violated public policy on two grounds. A&A first asserted that the Decree's penalty provision violated public policy because it allowed penalties to accrue while the parties engaged in dispute resolution proceedings. Second, A&A asserted that the district court erred in penalizing A&A for non-compliance of the Decree because a flood in June of 2002 constituted a Force Majeure event under the Decree.

First, the appellate court noted that a Decree is a court order that embodies the terms agreed upon by the parties as a compromise to litigation. Further, for purposes of construction, a judicially approved decree is essentially a contract. The court observed, however, that a provision within a decree that fixes a stipulated penalty is unenforceable if it constitutes an unreasonable penalty or is void as a matter of public policy. A&A asserted that based on *United States v. Witco*, the stipulated penalty provision in the decree forced it to surrender its rights to invoke dispute resolution because penalties would accrue while the dispute was pending. The court stated that *Witco*, a Delaware federal court decision, was not "controlling authority" and was distinguishable from A&A's case. The court remarked that in *Witco*, the required clean-up was completed before the dispute resolution clause was invoked and the accrued penalties at issue were unrelated to any continuing environmental violation. In contrast, A&A invoked the dispute resolution procedures before the required clean-up was completed. Thus, A&A's penalties accrued because of its unwarranted delay in restoring the wetlands, as required by the decree. The court reasoned that the Decree was drafted and negotiated by both parties and entered into voluntarily.

Thus, the courts held A&A liable for the penalties that accrued during the dispute resolution proceedings because excusing A&A from the stipulated penalties would undermine the clear terms of the Decree and allow the parties to delay performance by invoking the dispute resolution clause with meritless claims. Further, the court held

that the stipulated penalties imposed under the Decree were reasonable because the penalties directly related to the environmental harm caused by A&A, and the amount assessed was less than 10 percent of the statutory authorized penalty.

The court addressed A&A's second argument, noting that, although the Decree provided for the extension of deadlines in the event of a Force Majeure, the provision required A&A to notify the EPA in writing if it intended to invoke the provision. Therefore, because A&A did not comply with the Decree's procedural requirements, it could not claim impossibility. Moreover, because the flood occurred seven months after the Decree's deadline, the court reasoned that the flooding did not warrant an excuse for the delay and, therefore was irrelevant. Thus, the court affirmed the district court's judgment.

*Christopher A. Griffin*

**United States v. Chemetco, Inc., 274 F.3d 1154 (7th Cir. 2001)**

(holding: (1) section 309(c)(2) of the Clean Water Act ("CWA") was unambiguous; (2) Congress intended the number of violation days to be a sentencing factor and not an element of a CWA offense; and (3) the fine imposed by the district court did not exceed the prescribed statutory maximum penalty).

Chemetco plead guilty to violating section 301 of the CWA. The district court ordered Chemetco to pay a fine based on the number of days it violated the CWA. Chemetco appealed its sentence, arguing that the district court misinterpreted the CWA and that the court's findings violated the rule set forth in *Apprendi v. New Jersey*.

Chemetco obtained a permit from the Illinois Environmental Protection Agency ("EPA") allowing construction and operation of a storm-water runoff control system. Chemetco also installed, without a permit, a secret pipe running from its property to a ditch tributary. For a period of ten years, Chemetco used the secret pipe to illegally release water containing toxic metals, until United States and Illinois EPA agents discovered it.

Chemetco was indicted for conspiring to violate the CWA and knowingly violating section 301 of the CWA. After conducting an investigation, the government recommended fining Chemetco for 949 days of violation. According to its calculations, Chemetco argued it was only liable for 71 days of violation. Chemetco also objected to the government's findings, citing the Supreme Court's recent decision in *Apprendi*. Chemetco further claimed that the government had to prove the number of days of violation beyond a reasonable doubt, and it had to be charged in the indictment with each day of violation.

The district court found that the indictment was sufficient because it informed Chemetco of the charges and put it on notice of the potential maximum penalty. Further, the district court found that