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## Montana v. United States Env'tl. Protection Agency, 137 F.3d 1135 (9th Cir. 1997)

Kimberley Crawford

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## COURT REPORTS

### FEDERAL COURTS

**Montana v. United States Env'tl. Protection Agency, 137 F.3d 1135 (9<sup>th</sup> Cir. 1997)** (holding Environmental Protection Agency ("EPA") regulations granting treatment-as-state ("TAS") authority to the Tribe valid and reflected appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members, and irrigation districts and irrigators who did not possess a National Pollutant Discharge Elimination System ("NPDES") permit had no significantly protectable interest allowing them to intervene).

The State of Montana challenged a grant by the EPA of TAS status to the Confederated Salish and Kootenai Tribes under the Clean Water Act ("CWA"), which allowed Tribes to establish water quality standards ("WQS") for water located within the boundaries of the Flathead Indian Reservation. The Tribes applied for TAS status with respect to all surface waters within the reservation. A large lake located within the boundaries of the reservation provided water for domestic, agricultural, and industrial purposes. The lands within the boundaries were controlled by Tribal and non-tribal entities. The Tribes identified several facilities on fee lands within the reservation that could potentially impair water quality and beneficial uses of tribal waters. These facilities included feedlots, mine tailings, dumps, and landfills. The State alleged the regulations established by the EPA which allowed the Tribes to exercise authority over non-members was broader than the inherent tribal powers recognized as necessary to self governance. The Flathead Joint Board of Control, two irrigation districts, and four individual irrigators who owned land situated within the boundaries of the Reservation in fee moved to intervene. The district court denied the intervention and entered summary judgment for the EPA and the Tribes. Montana appealed.

The EPA may treat Tribes as states for the purposes of promulgating water quality standards under CWA § 518(e). The EPA guidelines set forth in 40 C.F.R. § 131.8 require that (1) the Tribe be federally recognized and exercise governmental authority; (2) the Tribe have a governing body carrying out "substantial governmental duties and powers"; (3) the water quality standards program which the Tribe seeks to administer "pertain to the management and protection of water resources . . . [located] . . . within the borders of an Indian

reservation;" and (4) the Tribe reasonably expects to be capable of carrying out the functions of an effective water quality program in a manner consistent with the terms and purposes of the Clean Water Act and regulations. The dispute in this case pertained to the intent of the third requirement.

In *Montana v. United States*, the Supreme Court held that a Tribe has "inherent power" to regulate the activities of non-members if the regulated activities affect the "political integrity, the economic security, or the health or welfare of the Tribe." These potential impacts must be serious and substantial. Generally, however, a Tribe lacks authority over non-members on non-Indian land within a reservation. Montana argued that the scope of inherent tribal authority was a question of law for which EPA receives no deference. It further alleged that the EPA committed a mistake of law in the delineation of the scope of inherent tribal authority based on the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.

Although the court agreed that the EPA receives no deference in delineation of the scope of tribal inherent authority, it did not agree that the EPA committed any material mistakes of law in this delineation. The EPA acted carefully in establishing its regulations. In applying the standards of both *Montana* and *Brendale* to this case, the EPA found that the non-member activities posed a serious and substantial threat to Tribal health and welfare and that Tribal regulation was essential. The court agreed and recognized that threats to water may invoke inherent tribal authority over non-Indians.

Additionally, the court rejected the motion to intervene. It held that since the Intervenors held a NPDES permit, the transfer of the right to establish WQS from the state to the Tribes will have no immediate or any foreseeable, demonstrable effect. Thus, the court of appeals affirmed the district court's grant of summary judgment in favor of the Tribes.

*Kimberley Crawford*

**Palm Beach Isles Assoc. v. United States, No. 93-654L, 1998 WL 784551 (Fed. Cl. Oct. 19, 1998)** (holding no Fifth Amendment taking of submerged land when: 1) the submerged land is subject to a United States navigational servitude; 2) the majority of original parcel, of which the submerged land was a part, sold for a substantial gain; and 3) the remaining non-submerged land was not restricted from all use).

In 1956, the predecessors to Palm Beach Isles Associates ("PBIA") purchased a 311.7 acre parcel in Riviera Beach, Florida, for \$380,190 that included submerged lands in Lake Worth. In 1967, PBIA applied