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Palm Beach Isles Assoc. v. United States, No. 93-654L, 1998 WL 784551 (Fed. Cl. Oct. 19, 1998)

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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

for and the United States Army Corps of Engineers ("Corps") granted a permit to dredge and fill the property located within Lake Worth. However, PBIA did not undertake work pursuant to the permit. In 1968, PBIA sold 261 acres of the 311.7 acre parcel for approximately $1,000,000 and retained 50.7 acres, of which 49.3 acres were submerged lands below the mean high water mark, and 1.4 acres were adjoining shoreline.

In 1988, PBIA filed an application with the Florida Department of Environmental Regulation ("DER") to dredge and fill the 50.7 acres of lake-bottom and adjoining shoreline in order to develop single family homes.

In denying PBIA's application, DER found the proposed development would eliminate wetlands, disrupt marine life, adversely affect water quality and navigation of the waterway, and set a precedent for similar development. Lake Worth is part of the Atlantic Intracoastal Waterway, which is a federal navigational channel that subjects submerged lands below the mean high water mark to a navigational servitude of the United States. The proposed development was also contrary to public interest pursuant to Section 403.918(2) of the Florida Statutes. However, the DER, in the denial notice, stated that a design incorporating features resulting in minimal environmental impact such as docks and boardwalks could be pursued.

In 1989, PBIA filed a permit application with the Corps pursuant to section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401–467 (1988) and section 404 of the Clean Water Act, 33 U.S.C. §§ 1251–1387 (1988), twenty-two years after PBIA's first permit application had been approved. The Corps denied this application, stating that issuance would be contrary to 404(b)(1) guidelines and public interest, but stipulated that all viable development options of the 50.7 acre parcel had not been explored.

PBIA filed this suit for damages alleging that the Corps' denial of PBIA's application for a permit to dredge and fill the 50.7 acre parcel constituted a Fifth Amendment taking. Both sides filed cross-motions for summary judgment.

The court held that the United States was not obligated to compensate PBIA for the alleged taking of the submerged 49.3 acres because it was subject to a navigational servitude. The navigable waters of the United States are public property and under the exclusive control of the federal government under the Commerce Clause of the United States Constitution. In addition, the court held PBIA's claim of a *per se* taking of the remaining 1.4 acres of adjoining shoreline invalid because the entire parcel of either 311.7 acres or 50.7 acres must be considered for the purposes of assessing the critical property at issue. Here, PBIA made a substantial financial gain when it sold the 261 acres in 1968 and had not been denied all beneficial use of the remaining 1.4 acres by application denial of either the DER or the Corps. PBIA still had the right to apply for a permit from the Corps and a zoning variance from the state and local authorities that would

allow water dependent uses of the parcel. The court granted summary judgment in favor of the United States.

Elaine Soltis

United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998) (holding the defendant criminally liable for violating and conspiring to violate the Clean Water Act and other state and local laws by dumping industrial waste from his business into storm and sewer drains).

In September 1997, a grand jury indicted the defendant, Thomas Iverson for violating the Clean Water Act ("CWA"), the Washington Administrative Code ("WAC"), and the City of Olympia's Municipal Code. The prosecution charged Iverson with both violating and conspiring to violate these laws between 1992 and 1995. The indictments arose out of illegal disposal of industrial waste from Iverson's business, CH2O, Inc. ("CH2O").

Iverson was the company's founder and served as the president and chairman of the board. The company blended chemicals to create numerous products, including acid cleaners and heavy-duty alkaline compounds. The company shipped the blended chemicals to its customers in drums, and asked the customers to return the drums when finished. When the drums were returned, they were often not cleaned properly and contained a chemical residue which had to be removed before the drum was used again.

To remove the residue, CH2O instituted a drum-cleaning operation, which generated wastewater. On several occasions, the defendant asked the local sewer authority if it would accept the wastewater. However, because the metal content of the wastewater was so high, the sewer authority refused to accept it.

Subsequently, the defendant discharged the wastewater, and ordered his employees to discharge the wastewater, either on the industrial plant's property, through a sewer drain at an apartment complex the defendant owned, or through a sewer drain at the defendant's home. He continued these discharges for about eight years until he hired someone to dispose of the wastewater properly. CH2O either paid a waste disposal company to dispose of the wastewater, or shipped the drums to a professional outside contractor for cleaning. However, these procedures cost the company thousands of dollars each month and Iverson discontinued this program four years later.

Shortly thereafter, Iverson bought a warehouse in Olympia and restarted its drum-cleaning operation at the warehouse and disposed of its wastewater through the municipal sewer. Iverson did not obtain a permit to make these discharges. Iverson continued this method of wastewater disposal for three years, until CH2O learned it was under