



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

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Ms. Jo Lynn Traub, Director
Water Division (Mail Code: W-15J)
U.S. Environmental Protection, Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Subject: State of Wisconsin's Comments Regarding the Lac du Flambeau Band of Lake Superior Chippewa Indians' Application and Requests for Authority under §§ 303c, and 401 of the Clean Water Act

Dear Ms. Traub:

Thank you for the opportunity to comment on the Lac du Flambeau Band's application for jurisdiction over navigable waters for the purpose of establishing water quality standards and certification that federally permitted or licensed activities will meet those standards. On behalf of Governor Doyle, I am submitting the comments of the State of Wisconsin.

The State's primary concern in this matter is the potential for the Treatment as a State (TAS) designation to create a duplicative, patchwork of regulations and the potential to have the designation misapplied in an expansive way unintended by the Clean Water Act. For example, the water quality standards that the Tribe seeks would impact two upstream dischargers, the Lakeland Sanitary District and the Department of Natural Resources' Woodruff fish hatchery, facilities that are already properly regulated by the State of Wisconsin.

Our concerns also relate to the potential use of TAS authority to regulate activities not clearly subject to the Clean Water Act. A great deal of controversy followed the Lac du Flambeau Band's 1996 enactment of a water quality ordinance, intended to serve as an EPA approved water quality standard. That ordinance attempted to go beyond establishment of water quality standards as authorized by § 303c of the Clean Water Act. For example, it attempted to define what constitutes a point source to specifically include cranberry operations. It prohibited any affect on water quality as a result of "an action attributable to human activities" and it attempted to regulate motorized boats and shoreline development on all waters designated as outstanding tribal resource waters. While not all of these issues remain in the Lac du Flambeau Band's draft revised water quality standards ordinance which is included as part of Attachment N of the application, the concern remains that the grant of TAS status will be interpreted to provide a means for the Tribe to regulate matters which we believe are beyond the scope of the Clean Water Act.

Point sources are identified and regulated by § 402 of the CWA, and cranberry operators typically are exempt from needing § 402 discharge permits because of the agricultural return flow exemption in the definition of what constitute point sources in § 402 of the CWA. Boating and near shore development (e.g. placement of piers and removal of vegetation) do not result in a discharge to navigable waters and therefore are subject to neither water quality standards nor a water quality certification. While it may be possible that certain near shore developments may include wetland fills which require a § 404 permit, and a water quality certification, only wetland fills regulated under § 404 trigger the need for a water quality certification. The mere fact that a shoreline is being developed or altered does not give rise to a § 404 permit.

Because of the State of Wisconsin's concerns regarding off reservation impacts, the possibility of a duplicative "patchwork" of environmental regulation in Wisconsin, and the potential that TAS status may be employed to regulate activities not clearly the subject of the Clean Water Act, the State hereby objects to the Tribe's application for TAS status. The State recognizes that there are some limited areas under the Clean Water Act where the State of Wisconsin has no authority to set water quality standards – e.g., establishing water quality standards for point source discharges on the reservation and issuing water quality certifications for wetland fills on the reservation. The State's objection is therefore primarily aimed at the water quality standards authority sought by the Tribe beyond these two narrow areas. The legal basis for our objection follows.

Indian tribes have a limited ability to regulate activities of nonmembers on non-tribal land located within the boundaries of a reservation. The general rule is that, absent a congressional delegation of power, Indian tribes lack civil authority over such activities, but possess this authority when non-members "enter into [a] consensual relationship with the tribe or its members through commercial dealing, contracts, leases, or other arrangements" or when the conduct of non-members "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 565 (1981).

The Supreme Court ignited debate over the extent of tribal authority over activities on non-tribal lands in Brendale v. Confederate Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989) (a plurality opinion with the justices splitting 4:2:3). The issue presented in Brendale was the scope of the second Montana exception under the general rule, that is, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected." Id. at 430. In the end, the Court held that a tribes' authority over non-members on non-tribal land within a reservation is dependent on the tribes' power to physically exclude non-members from tribal lands and the tribes' sovereign interests in preserving their political integrity, economic security, and health and welfare. Id. at 423-425, 428-432 (White J., joined by Rehnquist, C. J., and Scalia and Kenney, JJ.); id. at 433-435, 443-444 (Stevens, J., joined by O'Connor, J.); id. at 454-455 (Blackmun, J., joined by Brennan and Marshall, JJ.).

The EPA promulgated its regulations specifying TAS application requirements in 1991, taking into account the Court's Montana and Brendale decisions. 56 Fed. Reg. 64,876. In its comment on the final rule, the EPA outlined its rationale for determining whether a tribe has jurisdiction over the activities of non-members impacting tribal waters. The EPA primarily relied on the second Montana exception to find that tribes possess inherent authority over tribal waters "when conduct threatens or has some direct effect on the political integrity, the economic security, or the health of welfare of the tribe." Id. (quoting Montana, 450 U.S. at 566). The EPA also found that the activities of non-members impacting tribal waters generally have a "serious and substantial" effect on tribes. Id. Therefore, the final rule establishes a rebuttable presumption in favor of tribal sovereignty over all waters located within a reservation. Id.

The State of Wisconsin takes the position that the EPA misconstrued and misapplied Brendale when it adopted its final rule implementing CWA Section 518(e). 56 Fed. Reg. 64,876. The agency emphasized the lack of a majority rationale in the case and concluded that the "primary significance of Brendale is its result." Id. The EPA then read Brendale as a simple reiteration of the second Montana exception. See id., (e.g. "In Brendale, the Court applied this test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe. [citations omitted]. Conversely, the Court found no Tribal jurisdiction where the proposed activities 'would not threaten the Tribe's . . . health or welfare.' [citations omitted]."). To the contrary, rather than mechanically apply Montana without further analysis, Brendale establishes a threshold question indicating whether Montana exceptions may be correctly applied at all. The seminal question is whether the lands over which the tribe claims inherent sovereignty are located on an "open area" or a "closed area" of the reservation?

"Open areas" are generally defined as an integrated part of the reservation not economically or culturally delimited by reservation boundaries, while "closed areas" are those where Indian tribes may physically exclude the presence of non-members. A-1 Contrs. v. Strate, 76 F.3d 930, 948 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997). In Brendale, the Court concurrently held that Indian tribes do not possess inherent authority over non-tribal lands in "open areas," but may claim inherent authority over non-tribal lands in "closed areas." Brendale, 492 U.S. 445-448; *see also* South Dakota v. Bourland, 508 U.S. 679, 688 (1993), ("six members of this Court in Brendale . . . determined that at least with regard to the 'open' portion of the Yakima reservation, the Yakima Tribe had lost the authority to zone land that had come to be owned in fee by non-Indians.").

No reading of the plurality in Brendale results in a holding that alleged or future impacts to tribal "health and welfare" are sufficient to create tribal authority in an "open area" over the activities of non-members on non-tribal lands. Rather, it is Justice Blackmun's dissent in Brendale that advocated the rule that Indian tribes retain inherent authority over *all* reservation lands, including fee lands. 492 U.S. at 468. It is Brendale's dissent, not its plurality opinion, which the EPA makes law under its final rule. 56 Fed. Reg. 64,876. In order to make the EPA rule consistent with Brendale's plurality opinion, the EPA must conduct a factual inquiry into whether the Lac du Flambeau tribe is an "open" or "closed" reservation. This approach would also be consistent with the EPA's stated attempt to incorporate the Brendale test into its regulations. See id. (" . . . EPA will examine the Tribe's authority in light of the evolving case law as reflected in Montana and Brendale.").

Furthermore, the EPA's effort to distinguish Brendale in its comment on the final rule is unavailing. Id. The EPA attempts to distinguish the tribal zoning authority at issue in Brendale from tribal authority over water quality management under the Clean Water Act by claiming they are somehow different powers. Id. First, the EPA's assertion in its response to public comments in 56 FR 64876 that water quality management but not land use planning involves a "core governmental function, whose exercise is critical to self-governance," is unfounded. To the contrary, it is well-established that the power to zone is fundamentally intertwined with the government's power to protect the "public health, safety, morals, or general welfare" of the community. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (U.S. 1926). Second, nothing in the jurisdictional analysis suggests that civil authorities are categorized by type of authority, whether it is land use planning or water standard administration. Third, even if the governmental concerns claimed by the tribe were a factor in the analysis, Brendale, as noted above, precludes such an analysis when lands are located on an "open area" of the reservation.

A large amount of Lac du Flambeau's reservation qualifies as an "open area" under Brendale. Over forty percent of the reservation's permanent population consists of non-members of the Lac du Flambeau Band; and these non-members own over one-third of all reservation lands in private ownership. Wisconsin Blue Book 808 (2005-2006). Perhaps most striking is the large number of lakes, including many of the largest on the reservation – such as Tippecanoe, Crawling Stone, White Sand, Wild Rice, Whitefish, Shishebogama, and Gunlock Lakes – whose riparian lands are either mostly or completely owned by nonmembers. Land Atlas & Plat Book, Oneida County (Rockford Map Publishers, Inc., 19th ed., 2000); Land Atlas & Plat Book, Vilas County (Rockford Map Publishers, Inc., 20th ed., 2005). Under Brendale, "because the Tribe no longer has the power to exclude non-members from a large portion of this area, it also lacks the power to define the essential character of the territory" under the Clean Water Act. 492 U.S. at 444. This is especially the case for the waters of the Tomahawk River in the extreme southeast portion of the reservation. The area in which Tomahawk River enters the reservation is in approximately 50% non Indian ownership and is not known by the Department to be used by the Tribe for spearing, netting or the gathering of wild rice. Therefore, should EPA properly apply the Brendale test to the Lac du Flambeau Reservation, it will find that it is an "open area" and not subject to the tribe's inherent sovereignty.

Nevertheless, whether these lands are "open" or "closed" areas, the navigable waters within the Lac du Flambeau reservation always have been and remain an "open area" held in trust by the state of Wisconsin for the use and enjoyment of the public. By virtue of the equal footing doctrine, under Art. IV, § 3 of the U.S. Constitution and Article V of the Northwest Ordinance of 1789, Wisconsin entered the Union with equal sovereignty authority over its navigable waters as that held by the original 13 states. U.S. Const. Art. IV, § 3; 1 Stat. 50, 52 (1789); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224 (1844). Under the prima facie theory adopted from England, it is presumed that each state holds absolute authority over its navigable waters, even after an individual acquires title by custom, prescription, or grant. See James R. Rasband, Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines, 32 Land & Water L. Rev. 1 (1997); Shively v. Bowlby, 152 U.S. 1 (1894). In Illinois Central R.R. v. Illinois, the U.S. Supreme Court further established the doctrine that the states

must hold such waters and the soils underneath as a trustee to support title for the common use. 146 U.S. 387, 452-53 (1892). The Court described this public trust doctrine as follows,

It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. . . . The state can no more abdicate its trust over property . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Id.

The public trust doctrine explicitly applies to Wisconsin through the Northwest Ordinance, 1 Stat. 50, 52, and the Wisconsin Enabling Act of 1846, 9 Stat. 56, and the Act of March 3, 1947, 10 Stat. 178. Upon its admission into the Union in 1848, Wisconsin not only acquired the equal footing of the existing states' sovereign authority over its navigable waters, but accepted a federal mandate to hold those waters forever in trust for the public. Wisconsin v. Baker, 698 F.2d 1323, 1326-1327 (7th Cir. 1983). Therefore, Art. IX, § 1 of the Wisconsin Constitution states that:

[T]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefore.

Wis. Cons. Art. IX, § 1 (2005).

Today, it is well-settled that Wisconsin possesses inherent authority to regulate navigation and to protect many public rights in navigable waters, including commercial navigation and recreational boating, swimming, fishing, and hunting. Muench v. Public Service Comm., 261 Wis. 492, 507-08, 511-12 (1952); St. Croix Waterway Ass'n. v. Meyer, 178 F.3d 515, 519, 521 (8th Cir. 1999). The federal government has also been delegated authority to regulate navigable waters under the Commerce Clause. U.S. Const., Art. 1, § 8, cl. 3 ("The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); Wisconsin v. Environmental Protection Agency, 266 F.3d 741, 747 (2001). The Clean Water Act, and Section 518(e) specifically as such, rests on this authority. Id. However, absent an express pre-statehood conveyance from Congress, Indian tribes are presumed to lack authority over state lands or waters. Montana v. United States, 450 U.S. 544, 554 (1981) ("Whatever property rights the language of the [Indian] treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed.").

Instead, it is presumed that the state is sovereign over its navigable waters. In interpreting an 1854 treaty with the Chippewa Tribe, including the Lac du Flambeau band, 10 Stat. 1109, the Seventh Circuit eloquently stated,

Because the people of Wisconsin have a compelling interest in seeing that powers reposed in their government are not surrendered to private, non-representative

groups, and because the continued vitality of our Union ultimately depends upon the continued faith of the public in their elected governments, we are loathe to adopt an interpretation of the 1854 treaty that would divest the State of [its] power [over its navigable waters].

Baker, 698 F.2d at 1333.

In the end, the Baker court held that the 1854 treaty failed to expressly reserve to the Chippewa exclusive rights in navigable waters. *Id.* at 1335. The 1854 treaty provided specifically as follows with respect to the Lac du Flambeau reserve,

The United States agree to set apart and withhold from sale, for use of the Chippewas of Lake Superior, the following-described *tracts of land*, viz: . . .

For the Wisconsin bands, *a tract of land* lying about Lac du Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

10 Stats. 1109, art. 2, § 3 (1854) (emphasis added).

Although the 1854 treaty reserved to the tribe a right to hunt and fish on these lands, the Baker court held,

[B]ecause circumstances in 1854 were not such as to justify an inference that the United States intended to reserve such rights, we agree . . . that the 1854 treaty did not convey to the Band sovereignty over navigable waters within its reservation and that exclusive sovereignty over them is in the *State*.

698 F.2d 1323, 1335 (emphasis in original).

The Baker holding is also consistent with the Supreme Court's holding in United States v. Holt State Bank, 270 U.S. 49 (1926). The issue in Holt was title to an area that had been known as "Mud Lake," a navigable water body that had been drained by the State of Minnesota in 1912. *Id.* at 53. The former Mud Lake had been within the exterior boundaries of the Red Lake Indian Reservation, which was created by operation of the 1854 treaty and a follow-up agreement, the Treaty with the Chippewa of February 22, 1855, 10 Stat. 1165. *Id.* at 58. Minnesota had not entered the Union until 1858. *Id.* at 55. Thus, the issue was whether Mud Lake had been reserved for the Chippewa under the 1854 and 1855 treaties, or instead passed to Minnesota upon statehood in 1858. If the former was correct, the Chippewa were the beneficial owners of the dried lakebed; if the latter were correct, Minnesota and its successors-in-title held unclouded title. The Supreme Court examined the 1854 and 1855 treaties and held that they had not overcome the presumption in favor of state ownership and sovereignty. Neither treaty contained "any affirmative declaration of the rights of the Indians" in navigable waters, "nor any attempted exclusion of others from the use of navigable waters." *Id.* at 58. Moreover,

[t]here was nothing [in the treaties] which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian, . . . [as] emphasized in the Enabling Act under which Minnesota was admitted as a state . . . which declared that the rivers and waters bounding the state “and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States.”

Id. at 58-59.

The Western District Court of Wisconsin has also held in United States v. Bouchard that Article 1 of an 1842 treaty with the Chippewa had extinguished their title to navigable waters as well as land; that the Chippewa did not reserve any sort of “beneficial ownership” of aboriginal waters under the treaty; and accordingly that the navigable waters passed to the State of Wisconsin upon its admission to the Union six years later, unencumbered by any aboriginal Chippewa sovereignty. 464 F. Supp. 1316, 1334, 1136-37 (W.D. Wis. 1978).

Based on the holdings in Baker, Holt, Bouchard and the treaties’ plain language, it is clear that the Lac du Flambeau’s claim of inherent authority over its waters must fail. Rather, those waters always have been and remain “open areas;” and upon Wisconsin’s admission into the Union, have been held in the public trust of the state. Moreover, because section 518(e) of the CWA does not confer any authority not originally inhering to the band under its treaties, neither can the Lac du Flambeau band claim authority over its tribal waters under the CWA.¹

In conclusion, the EPA should deny the Tribe’s request for authority under §§ 303c and 401 of the Clean Water Act because the reservation is an alienated “open area” not subject to the authority of the tribe under the Brendale test. Furthermore, the public trust doctrine as prescribed by the Northwest Ordinance, the Wisconsin Enabling Acts, and the Wisconsin Constitution, precludes the navigable waters of Wisconsin from ever being characterized as a “closed area.”

¹ The Seventh Circuit erred in Wisconsin v. Environmental Protection Agency, 266 F.3d 741 (7th Cir. 2001) under its analysis of the “equal footing doctrine.” The court erroneously cited the CWA as a *source* of tribal authority, stating, “[t]he Clean Water Act . . . explicitly gives authority over waters within the borders of the reservation to the tribe . . .” The court purports to defer to the EPA, however the EPA’s own interpretation is that CWA Section 518(e) does *not* grant tribes authority beyond its inherent authority over tribal waters. 56 Fed. Reg. 64,876. The CWA is not a source of tribal authority.

Consistent with the requirements of your program that all public comments be submitted to EPA through the appropriate governmental entity, I am also forwarding all written public comments received by the Department of Natural Resources.

Sincerely,

Scott Hassett
Secretary

cc. Governor James Doyle - Capitol