No Private Right of Action to Enforce Great Lakes Water Diversion Statute

In a case of first impression, the United States District Court for the Western District of Michigan has held that there is no private right of action to enforce the provision of the Water Resources Development Act of 1986 (WRDA) relating to the diversion or exportation of Great Lakes water outside of the Great Lakes basin.

Great Spring Waters of America and its parent company, Perrier Group of America (collectively, "Perrier") were recently granted a license by the Michigan Department of Environmental Quality (MDEQ) to pump 400 gallons of water per minute from Sanctuary Springs in Mecosta County for diversion to Perrier's water bottling plant. Sanctuary Springs also supplies water to Osprey Lake, which flows into the Muskegon River and Little Muskegon river, which are tributaries of Lake Michigan.

The Little Traverse Bay Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, and Little River Band of Ottawa Indians (collectively, the "Indian Tribes") filed suit to enjoin Perrier's license under the following WRDA provision:

> No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governors of each of the Great Lakes States.

Under the statute, the "Great Lakes States" are Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin. Apparently, Governor John Engler of Michigan had deemed it unnecessary to obtain the approval of the other Great Lakes States' governors before MDEQ licensed Perrier to pump water from Sanctuary Springs. The Indian Tribes alleged that Perrier's pumping and subsequent bottling and sale of the water would result in at least some of

the water being exported out of the Great Lakes basin, and thus, because Governor Engler had not obtained the requisite approvals, Perrier's license was issued in violation of the WRDA.

The Indian Tribes asserted that they had standing to sue under the statute because they were riparian landowners, and, furthermore, held fishing rights on Lake Michigan and its tributaries pursuant to the 1836 Treaty of Washington. Perrier argued that the suit should be dismissed because the Great Lakes provision of the WRDA does not provide for suits by private parties such as the Indian Tribes.

After examining the intent behind this "fairly opaque" provision of the WRDA, as evidenced through precursor statutes and WRDA's legislative history, the court turned to the specific question at hand: whether WRDA, which does not explicitly provide a private right of action, could be read to imply such a right. To answer this question, the court employed the four-part test set forth by the United States Supreme Court in *Cort v. Ash*. Under this test, a statute implies a private right of action if: (1) the party filing suit is "one of the class for whose especial benefit the statute was enacted;" (2) there is an indication of legislative intent to create a private right of action; (3) such right is consistent with the underlying purposes of the legislative scheme; and (4) the cause of action is not one that has traditionally arisen under state law, so that it would not be inappropriate to infer a cause of action based solely on federal law. The court noted that, of these factors, "Congressional intent is the touchstone."

In examining the first factor, whether the Indian Tribes are "members of a special class which was intended to be benefitted by" the WRDA, the court noted that "there is no indication in the statute that any special benefits were intended to be conveyed upon any limited class of riparians, users or property owners…. Rather, the Act in its wording and history describes a general and public right which inures to all persons who live by, use and enjoy" the Great Lakes.

Furthermore, "Congress did not draft this prohibition to convey any special rights or protections upon tribal members." Therefore, this provision of the WRDA was not created to specially benefit parties such as the Indian Tribes.

On the second factor, whether an indication of Congressional intent to imply a private right of action exists, the court held that:

> all of the indications are that no such cause of action was intended. The language of the statute and legislative history is couched in light of the history of and deference to the Great Lakes Governors. The Act intended that the Governors have authority to make decisions jointly to protect the resource and enforce the prohibition, and the Act assumes, perhaps not wisely, that the Governors will act in favor of the interests of their citizens, including property holders. It is also apparent that enforcement of the prohibitions by private citizens was not contemplated because: this might frustrate the ability of the Governors to resolve issues utilizing uniform conservation principles; the Act is so non-specific that it has failed to provide sufficient criteria for judicial enforcement; the failure to include "private right of action" language as to this section of the WRDA appears intentional in that said language is included as to another recent provision of the WRDA; and, Congress at the times of enactment understood that the Governors were embarking on a long-term project to negotiate terms pertinent to enforcement, including conservation standards and dispute resolution terms.

Thus, the court held that the statute intended to remain silent on the means of enforcement, so that the Great Lakes governors could collaborate to create mutually acceptable criteria and enforcement measures between themselves.

The court recognized some potential problems that could arise with a scheme where no enforcement mechanism was provided. "One problem, posed here, is what is to be done when the Governors elect, as they have apparently done in this case, to ignore the statutory proscription." While the court acknowledged this problem, the court declined to alter its conclusion to account for it: "[w]hile it must be admitted that this is a significant and potentially

terrible problem, it is also a problem that the Act appears to overlook for the present in the hopes that later legislation or dispute resolution mechanisms will resolve it…the solution to this problem is not to try to enforce a vague statute, especially where the sense of Congress is that precise conversation standards and dispute resolution mechanisms must await further political negotiation."

Another problem "is the absence of an explicit enforcement mechanism of the Governors to utilize to supervise a wayward Governor." The court found that this concern was significant, but could be overcome through pending negotiations between the governors, or even by lawsuits filed by the Great Lakes States in the Supreme Court. The court also noted the possibility that:

> the Governors might elect to enforce or not enforce the proscription of the Act in a manner which served their interests, but was contrary to the federal interests in the Great Lakes waters. The Court assumes without deciding that in such a case that officers of the federal government could bring suit to enforce the Act, but that federal enforcement might well be difficult especially in the absence of governing federal standards and in the absence of a Congressional delegation of authority to an officer of the executive branch.

The court next examined the third factor, whether a private cause of action would be consistent with the WRDA's statutory scheme, and held that it would not be consistent. As mentioned earlier, the statute intended to place authority over enforcement in the hands of the Great Lakes States Governors, and allowing suits to be filed by "disgruntled individual users and riparians would only complicate and frustrate" that scheme.

Finally, the court considered the fourth factor, whether the interest protected by the statute is a state or federal interest. A finding that federal interests are protected would favor implying a federal private right of action. But if the court instead found that state interests were primarily protected, the converse would apply. The Indian Tribes had argued that federal

interests were protected "based on the federal interests in regulating Indian affairs." The court rejected this argument, finding that such tribal interests were "fairly peripheral" to the statute, but agreed with the ultimate conclusion that federal interests were the focus of the statute: "[t]he waters of the Great lakes are navigable waters of the United States used to ferry goods between the States. The waters also occupy a huge and important source of fresh water for the United States, which is critical to interstate commerce." Thus, the court held, "interests in [the statute's] enforcement are primarily federal."

Only the fourth factor favored implying a private right of action. Thus, after considering all four factors together, the court held that the Great Lakes provision of the WRDA does not allow for a private right of action, and dismissed the Indian Tribes' claim.

Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of America, Inc., 203 F. Supp 853n (W.D. Mich. 2002).

H. Kirk Meadows

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