

## WAPA LEGAL UPDATE

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### High Court Leaves Wetlands Jurisdiction Unsettled

#### *Summary*

Earlier this year, I alerted you to a pending United States Supreme Court decision which hopefully would have resolved the issue of how far the Federal Government can regulate wetlands. Unfortunately, the June 19, 2006 decision of the United States Supreme Court was hardly a source of comfort to either side in the wetlands jurisdiction debate. Developers seeking more certainty as to what land is under the Corps of Engineers' jurisdiction are faced with two quite different theories of jurisdiction, with no clear notion how the lower courts will apply them. On the other hand, environmentalist dodged a bullet, but know that only one vote stands between the current expansive definition of jurisdiction and a much more constricted one favored by four members of the high court.

#### *Analysis*

A divided U.S. Supreme Court ruled in two cases involving developer's plans to build on land the U.S. Corps of Engineers and the EPA had ruled contained wetlands that they had to go back to the lower courts for further findings on the question of whether the wetlands are "waters of the United States" subject to the Corps' jurisdiction.

The EPA brought an enforcement action against a property owner for filling wetlands on a planned shopping center site in Bay County, Michigan without obtaining a section 404 dredge and fill permit. The wetlands fed into a drain connected to a creek that flowed into a navigable river. The Sixth US Circuit Court of Appeals upheld the District Court's ruling in favor of the government.

In a companion case before the high court about 16 acres of a 20 acre parcel in Macom County Michigan were wetlands. They adjoin a ditch that flows into a drain that flows into a creek that flows into Lake St. Clair. A 4 foot wide brim separates the wetlands from the ditch. The Corps refused to issue the property owner a permit to fill most of the wetlands in order to build a 112 unit condominium development. The lower courts upheld the Corps determination.

In each of the appeals, the ultimate question before the Court was whether the government agencies had improperly asserted jurisdiction over lands not covered by the Clean Water Act's requirement for a permit to fill in "waters of the United States."

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The Supreme Court's plurality opinion authored by Justice Scalia and joined by Justices Thomas, Alito and Chief Justice Roberts, concluded the jurisdictional term "waters of the United States" does not refer to water in general but to water as found in streams, rivers and lakes. Thus, these Justices concluded that the phrase only includes relatively permanent, standing or flowing bodies of water. They felt that it did not include normally dry channels through which water intermittently flowed. They rejected the notion that "a mere hydrological connection" between a wetland and waters of the United States could confer jurisdiction.

Casting the fifth vote necessary for a judgment, Justice Kennedy issued an opinion that sets out a different standard for the courts to apply in determining jurisdiction. He felt that a water or wetland must possess a "significant nexus" to waters that are navigable in fact. Justice Kennedy felt that the plurality opinion was unpersuasive in that the requirement of permanent standing water or continuous flow made little practical sense in relation to a statute concerned with downstream water quality. He argued that a mere trickle, if continuous, would be regulated while channels carrying huge volumes of water, but intermittently, would not.

In a dissenting opinion, Justice Stevens joined by Justices Souter, Ginsberg and Breyer argued that the wetlands in both cases were adjacent to tributaries of navigable waters. Such wetlands play important roles in maintaining the quality of the adjacent waters and waters downstream. Given these important water quality roles and the ambiguity inherent in the phrase "waters of the United States" the Corps reasonably interpreted its jurisdiction to cover such non-isolated wetlands. These Justices concluded that jurisdiction does not depend on a wetland by wetland inquiry. It is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality.

## **To What Extent Can the State Encourage Economic Development?**

### *Summary*

On July 7, 2006, in *Northwest Airlines, Inc. v. Wisconsin Department of Revenue and Midwest Airlines, Inc.*, the Wisconsin Supreme Court ruled that a statute providing tax breaks for airlines operating a hub within Wisconsin was not unconstitutional. The obvious result of the decision is that the Court has effectively allowed a seemingly economic protectionist tax exemption to stand due to the jobs and revenue that it could create and be retained within the State.

### *Analysis*

This case centers around Wisconsin Statutes §§ 70.11(42) and 76.02(1) which provide an absolute exemption from ad valorem taxation for any airline that operates a hub facility in Wisconsin. Northwest Airlines, Inc. (Northwest), who does not have a hub facility in Wisconsin, brought suit challenging the constitutional validity of the tax exemption claiming itself disadvantaged. Northwest claimed the hub exemption violated the Interstate Commerce Clause of the U.S. Constitution, the Equal Protection Clause of the U.S. Constitution and the Uniformity Clause of the Wisconsin Constitution.

The first issue that the Court addressed was whether the tax break violated the Commerce Clause. The Court held that when Congress enacted Section 40116 of the U.S. Code, that statute precluded Commerce Clause review of state taxation of airlines. Section 40116 prohibits a number of taxes and types of tax assessment and collection practices with respect to airlines. According to the Court, § 40116 also authorized the states to impose any type of tax and to use any tax assessment or collection practice not prohibited by subsections (b) or (d) of § 40116. Hence, the Court concluded that because Congress clearly intended to preclude Commerce Clause review of airline taxation when it enacted § 40116, and the hub exemption doesn't fall within any of the prohibited assessment or collection practices in subsections (b) or (d), the hub exemption is authorized by § 40116.

State tax classifications require only a rational basis to satisfy the Equal Protection Clause, meaning that, so long as the classification made does not concern a suspect class or implicate a fundamental right, then it must bear only a rational relationship to a legitimate government interest. The Court determined that the hub exemption implicated neither a suspect class nor a fundamental rights. The Court held that the legislature chose to classify airlines on the amount and type of business that they do in Wisconsin and the Court decided it must accept the classifications adopted by the legislature unless they are very wide of any reasonable mark.

The Court next went into a discussion of all of the legitimate governmental purposes advanced by the hub exemption. First, the Court noted that there would be more nonstop flights to and from the state which would encourage existing business to remain in-state and help attract new business; an increase of all flights to and from the state; in addition it would mean an increase in jobs in the state. The Court also pointed out that when Northwest reduced its Wisconsin presence, Milwaukee lost nearly 100 jobs and that the legislature could have reasonably believed that the hub exemption would guard against the loss of more jobs and prevent a further drop in the number of flights to and from Wisconsin. Finally, the Court noted that both Midwest Airlines and Air Wisconsin, two airlines benefiting from the hub tax exemption, were both looking to expand their operations around the time the exemption was enacted and certainly it was reasonable for the legislature to believe that the exemption would influence the two airlines to expand in Wisconsin.

The Wisconsin Uniformity Clause requires that there be one class of taxable property and that all property within that class must, as nearly as practicable, be taxed uniformly. The Uniformity Clause also grants the legislature the right to select some property for taxation and to totally omit or exempt other property. The only limitation upon the legislature's authority to exempt property is that the distinction between taxed and wholly exempt property must bear a reasonable relation to a legitimate purpose of government. The Court then used the same economic justifications that it used under the Equal Protection Clause to show that the classifications of the hub exemption are rationally related to the legitimate governmental purpose of ensuring the vitality of the Wisconsin economy.

Although Chief Justice Abrahamson and Justice Bradley dissented to this opinion, the opinion is a strong endorsement of economic encouragement through legislation within the state. The Court chose to allow this tax exemption, noting the obvious economic

benefits that the state would gain, as opposed to holding the exemption unconstitutional, despite the fact that the tax exemption is somewhat protectionist and discriminatory in nature

### **Strict Compliance With Notice of Claim Denial Process Required**

#### *Summary*

On May 3, 2006 the Court of Appeals concluded that a city's notice of disallowance served on a claimant's adult daughter rather than the claimant did not comply with the requirements of Wis. Stat. § 893.80 (1g). Thus, the Court of Appeals ruled that the six month limitation period to file a lawsuit against the city did not begin to run.

#### *Analysis*

The decision in *Pool v. City of Sheboygan* reinforced the fact that the courts strictly follow the requirements of § 893.80 which is the statute that requires that a claimant file a notice of claim with the municipality as a precondition to filing a lawsuit. Usually, cases on this subject address the strict procedural requirements that a claimant must fulfill. However, this case shows that "what is good for the goose is good for the gander," so municipalities have to follow this statute strictly too.

Pool owns property that abuts State Highway 28 in Sheboygan. The property contains a privacy fence running parallel to Highway 28. In 2002, the City of Sheboygan advised Pool that he must remove the fence because of a planned project to widen Highway 28. Once Pool did not remove the fence, the City unilaterally removed the fence. Pool then filed a notice of claim and claim alleging inverse condemnation without compensation. Within the 120 day period that the City legally had to respond to the claim, the City sent a notice by certified mail to Pool disallowing his claim and advising him of the fact that he had six months from the date of mailing to bring a lawsuit on the claim. The certified letter was served on Pool's adult daughter who signed the certified mail receipt of service.

When Pool filed a petition for compensation, the City moved to dismiss the petition because it was filed more than six months after the date of service of the notice of disallowance. The Court of Appeals reversed the trial court decision granting the City's motion to dismiss. The Court of Appeals concluded that there was nothing unclear or open to interpretation in the statutory language that the notice of disallowance must be served on the claimant. Thus, it found that the notice of disallowance served on Pool's daughter was insufficient to comply with the statute because she was not the claimant.

The lesson from this case is that strict compliance for notice of disallowance is necessary to preserve bona fide claims, especially those involving property rights given the narrow six month window the disallowance creates for the claimant to bring their claim against the government.