

Tribal Challenge to Road Construction: Federal Appellate Court Addresses National Historic Preservation Act and Clean Water Act Issues



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The United States Court of Appeals for the Eighth Circuit (“Court”) affirmed a lower court ruling addressing challenges to Clean Water Act nationwide permits granted to Meryln Drake by the United States Corps of Engineers (“Corps”). See *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. United States Corps of Engineers*, 888 F.3d 906 (8th Cir. 2018).

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation (“Tribe”) alleged that the Corps violated the National Historic Preservation Act (“NHPA”), Clean Water Act (“CWA”), and Administrative Procedures Act in authorizing use of the nationwide permits.

The CWA prohibits the discharge of any pollutant including dredged or fill material. Certain activities are exempted from the statutory permitting requirements, including the construction or maintenance of farm roads where such roads are constructed and maintained in accordance with best management practices. Statutory exemptions are covered by a recapture provision, where a new permit is required under the CWA if land is no longer used for the exempted purpose.

As an alternative to individual permits, the Corps created a system of general permits known as “nationwide permits.” They are intended to authorize activities which have minimal impacts with little to no delay.

A nationwide-permit is only available to a “single and complete project.” Further, such permits are subject to “NHPA” requirements, which take into account the historic aspects of property and effect the permit would have on the land. Nationwide Permit 14 authorizes linear transportation projects—such as roads—so long as the water crossing is nontidal and does not cause the loss of greater than one-half acre of waters of the United States.

Drake began building a road across his property for agricultural use starting in 1998. The construction process required dredging and filling portions of Enemy Sim Lake (“Lake”) and its surrounding creeks and inlets. In order to complete construction, the Corps granted Drake six permit and exemption determinations under the CWA.

In 2000, Drake received a nationwide permit to create a road to connect his house to an established road under Nationwide Permit 26. In 2003, Drake applied for two permits to further fill the lake for additional road projects.

First, Drake applied for a permit to “unify residents to a single road.” The Corps issued Drake a nationwide permit under Nationwide Permit 14. He then applied for a permit to build an access road across the inlet, wetland, and creek on the east side of the Lake for cattle grazing. The Corps issued Drake a farm-road exemption.

In 2008, Drake applied for a permit to build another access road. He initially represented to the Corps that this road was for agricultural purposes, but later disclosed that he would use the road for a future second residence. In 2009, the Corps again issued Drake a nationwide permit under Nationwide Permit 14.

88% of the Lake’s shoreline is owned by the Tribe. The lake is described as having significant cultural, historical, and religious significance to the Tribe. For example, in 1867, the Tribe’s treaty with the United States government was partially negotiated on the shores of the Lake, it is home to the Tribe’s historic burial grounds, its plants are used for ceremonial and medicinal purposes, and the Tribe members use it to fish.

The Tribe argued Drake’s projects might interfere with the ability of its members to fish on the Lake. In 2004 it expressed concern to the Corps that Drake would develop the land rather than use the road for agricultural purposes. Other public concerns escalated the issue, garnering the attention of Senator Tim Johnson. Eventually, the Corps agreed to review Drake’s nationwide permits. After review, however, the Corps concluded that no modification or revocation of the permits was necessary.

The Tribe continued to express concern about Drake’s land. These complaints culminated in a March 2, 2010 letter to the Corps. It argued that Drake obtained the permit and exemption determinations through misrepresentations about his projects and was abusing the farm-road exemption.

The Tribe argued that Drake’s roads fell within the CWA’s recapture provision. It requested that Drake be required to:

- remove the road,
- obtain a permit to continue construction of the road, and
- pay civil penalties for willfully violating the CWA.

The Corps responded in an August 30, 2010 letter. It concluded the agency decisions were supported by sufficient evidence that Drake was using his road for agricultural purposes. As a result, the roads could not be recaptured. Further, it concluded that the roadways qualified as a single and complete project.

The Tribe filed an action requesting that the lower court enjoin the Corps from further permitting. It also requested that Drake be required to remove the road. The lower court found for the Corps. The Tribe appealed.

The Eighth Circuit addressed five issues:

1. the finality of the 2010 letter from the Corps to the Tribe;
2. the justiciability of the recapture claim;
3. the statute of limitations challenging the permits;
4. the unlawful “stacking” of permits; and
5. the NHPA analysis conducted by the Corps.

The Court first determined that the letter the Corps sent on August 30, 2010, was not a final agency action for the purposes of the Tribe’s challenges. For an agency decision to be final, the action must mark the “consummation of the agency’s decision making process,” and “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” It concluded that the Corps’ letter at least failed under the second portion of the test. Specifically, it did not affect the legal

rights of Drake, the Tribe, or the Corps. Rather, the letter merely stated how the Corps applied the law at the time it issued the permit to Drake.

Second, the Court found that the recapture claim by the Tribe was not a valid challenge to the Corps' enforcement decision. The recapture provision operates automatically. A formerly exempt project is within the jurisdiction of the Corps as soon as it ceases to be exempt.

The Tribe argued that Drake no longer used the road for agricultural purposes, the road had been recaptured, and needed a new permit. The Court, however, found that the Corps' authority to investigate and impose sanctions on Drake was discretionary, and it was up to the Corps' volition whether or not to pursue CWA actions against Drake.

Third, the Court found that the Tribe was not entitled to an extension of the statute of limitations through tolling. Therefore, its challenge to the Corps' ruling was time barred. The statute of limitations for a civil action commenced against the United States is six years after the right of action first accrues.

The Court found that—based on substantial evidence of the interactions between the public, the Tribe, and Drake—the Tribe's right of legal action first accrued on January 25, 2005. The Tribe first brought suit in 2013, well after the six year statute of limitations.

Fourth, the Court decided that the Corps' 2009 permit was related to a "single and complete project" and therefore not an unlawfully stacked permit. The Tribe claimed that the Corps acted arbitrarily by determining that Drake's 2009 project qualified for a nationwide permit because it was not a "single and complete project." However, the Court found that an agency has the power to control its own interpretations, and the Corps decision should stand.

To underscore the point, the Court highlighted language found in Nationwide Permit 14. Such language states that "individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately." Reissuance of Nationwide Permits, 72 Fed. Reg. 11,197 (March 12, 2007). Thus, the Court found that the Corps' interpretation of its own regulation addressing the Nationwide Permit 14 (as applied at the Lake) was accurate.

Finally, the Court found that it did not have jurisdiction to review the NHPA regulations. Because the lower court did not make a final decision with respect to the NHPA claim, the Court could not exercise appellate review.

In summary the Court concluded:

- the 2010 letter was not a final agency action;
- the recapture claim was a nonjusticiable enforcement action;
- the Tribe was not entitled to an extension of the statute of limitations;
- the Corps did not violate its own regulations in issuing the 2009 nationwide permit; and
- the NHPA regulation could not be decided.

A copy of the [opinion](#) can be downloaded here.