

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RAY BABB,

Plaintiff,

v.

STATE OF WISCONSIN,

Defendant.

ORDER

00-C-0305-C

Plaintiff Ray Babb is seeking an injunction striking down any and all regulations adopted by the state of Wisconsin that deprive him of his constitutional rights to use his property as he wishes and preventing the state from developing, constructing or proposing regulations that violate his constitutional property rights. In addition, he wants the court to investigate the rules and regulations promulgated by the Wisconsin Department of Natural Resources and declare null and void any regulations that violate the United States Constitution. As examples of allegedly unconstitutional regulations, he lists one interpreting the navigability of streams as including any in which a canoe can be dragged at the high water mark, thus placing that land within the state's jurisdiction and taking it away from land owners; a regulation depriving land

owners of the right to harvest wild ginseng as they choose; proposed non-point pollution regulations; and the regulation prescribing a fine of up to \$5000 for the possession of an illegal deer, plus seizure of the vehicle used in the transportation of the deer plus its contents, including weapons. Defendant State of Wisconsin has moved to dismiss, citing the Eleventh Amendment to the United States Constitution.

Because plaintiff has named only the State of Wisconsin as a defendant, defendant's motion to dismiss must be granted because this court is barred by the Eleventh Amendment from entertaining his suit.

The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." The Supreme Court has drawn upon principles of sovereign immunity to construe the Amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.'" Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984) (quoting Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280 (1973)).

There are only two exceptions to the general rule that the Eleventh Amendment prohibits suits against the state by citizens of another state or by the state's own citizens for

monetary damages or equitable relief. See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2223 (1999); Pennhurst, 465 U.S. at 100. First, a state may make an explicit waiver of the protections of the amendment and consent to suit in federal court. See Clark v. Barnard, 108 U.S. 436, 447-448 (1883); see also College Savings Bank, 119 S. Ct. at 2228 (repudiating doctrine of constructive waiver). Second, Congress may use its enforcement powers under the Fourteenth Amendment to abrogate the state's Eleventh Amendment immunity through an unequivocal expression of its intent to do so and pursuant to a valid exercise of power. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

Neither of the two exceptions applies to plaintiff's suit. First, the state has not consented to be sued in this court. In fact, it has moved to dismiss plaintiff's suit on Eleventh Amendment grounds. Second, I am aware of no statute by which Congress could be said to have abrogated the state's immunity to suits challenging the legality of its laws, rules and regulations. Therefore, plaintiff's suit must be dismissed.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendant State of Wisconsin is GRANTED and plaintiff Ray Babb's suit for injunctive and declaratory relief against defendant

is DISMISSED as barred by the Eleventh Amendment to the United States Constitution. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 5th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge