

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0633

Cir. Ct. No. 02CV001571

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**RIVER ALLIANCE OF WISCONSIN, FRIENDS OF THE
JUMP RIVER, INC., DANIEL HAUPERT, CATHERINE
HAUPERT, DONALD RETZLAFF, MARJORIE RETZLAFF AND
RICHARD U. BAUM,**

PETITIONERS-APPELLANTS,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
ROBERT DE CHAMBEAU, Judge. *Reversed and cause remanded with
directions.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 DYKMAN, J. Appellants, including River Alliance of Wisconsin (River Alliance), appeal from an order granting the Department of Natural

Resources' (DNR) motion to dismiss. First, River Alliance asserts that it stated a claim challenging WIS. ADMIN. CODE § NR 102.13 as invalid per se because the rule exceeded DNR's authority provided by WIS. STAT. § 281.15(1) (2001-02).¹ Second, River Alliance contends that the trial court erred by failing to review the validity of Wisconsin's anti-degradation implementation procedures. Third, River Alliance claims the trial court erred by not reviewing the classification of North Fork of the Jump River (North Fork). We agree that River Alliance has stated a claim challenging § NR 102.13 pursuant WIS. STAT. § 227.40. We remand for the trial court to consider River Alliance's allegations that § NR 102.13 contravenes state and federal law. Our remand does not include, however, review of DNR's procedures and classification of North Fork because River Alliance has not exhausted its administrative remedies on this issue.

BACKGROUND

¶2 DNR issued a permit to allow Catawba-Kennan Joint Sewage Commission to discharge sewage into North Fork. River Alliance asserts that DNR did not properly consider and protect the existing uses of North Fork when it classified the river as a warm water sport fishery (WWSF), a subcategory of fish and aquatic life waters. Pursuant to WIS. STAT. §§ 227.40 and 227.52, River Alliance petitioned the trial court for judicial review and asked for declaratory judgment concerning three matters:

- (1) the DNR's letter dated April 18, 2002, denying Petitioners a hearing as to "any issues raised in the Petition regarding whether the Jump River is properly classified";
- (2) the DNR's issuance of Permit to the Sewage

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Commission, dated January 30, 2003; and (3) the State of Wisconsin's failure to formally classify the North Fork of the Jump River as an exceptional resource water ... or as a cold water fishery.

¶3 The trial court found that River Alliance had not exhausted its administrative remedies with respect to the North Fork permit because a DNR hearing regarding effluent limits was pending. Therefore, it did not address claims that DNR was not complying with the Clean Water Act and federal antidegradation policies, nor did it review the North Fork permit.

¶4 The trial court also found that DNR's classification of North Fork as a WWSF did not constitute a rule and dismissed River Alliance's declaratory judgment claims. It reasoned that "whether and how to classify [North Fork] is a question of fact and policy, and not a challenge to the validity of an existing rule subject to review under WIS. STAT. § 227.40." It also denied River Alliance's request that the court order DNR to adopt an administrative rule listing North Fork as an exceptional resource water. The trial court concluded it did not have subject matter jurisdiction to order DNR to make such a classification.

¶5 River Alliance appeals and argues that the trial court erred by requiring it to petition for rulemaking under WIS. STAT. § 227.12 because DNR's default classification of North Fork as a WWSF is a rule. It contends that the trial court erred in failing to review whether DNR's procedures comply with federal law or exceed state law. Finally, it asserts that the trial court erred by failing to review Wisconsin's antidegradation implementation procedures as applied to North Fork.

¶6 This appeal requires us to review whether the trial court erred by dismissing River Alliance's claims against DNR. We review de novo whether a

complaint properly pled a cause of action upon which relief may be granted. *Vogel v. Liberty Mut. Ins. Co.*, 214 Wis. 2d 443, 447, 571 N.W.2d 704 (Ct. App. 1997). We consider the facts pled true, and construe inferences from the pleadings in favor of the party against whom the motion is made. *Id.*

¶7 River Alliance’s complaint seeking declaratory judgment asserts that DNR has “never taken affirmative action to classify the North Fork of the Jump River,” and that DNR classified North Fork as a warm water sport fishery by default. DNR gave that classification to all waters that have not been specifically classified. The complaint also alleges that DNR has made the legal conclusion that “Stream classifications adopted under ch. 281 are not reviewable in a proceeding held under s. 283.63.” We interpret the complaint to allege that DNR’s refusal to classify North Fork except by default violates the federal Clean Water Act, and that state law requires DNR to classify North Fork other than by default.

¶8 We liberally construe pleadings, sustaining them if they give reasonable notice to the responding party as to the nature of the claim. *Anderson v. Cont’l Ins. Co.*, 85 Wis. 2d 675, 683-84, 271 N.W.2d 368 (1978). River Alliance’s allegations regarding North Fork are premised on the ground that DNR’s classification system, codified in WIS. ADMIN. CODE § NR 102.13, violates federal and state law. River Alliance is seeking declaratory judgment.

¶9 We begin by noting that an administrative agency has only those powers given to it by statutory authority. *Mallo v. DOR*, 2002 WI 70, ¶15, 253 Wis. 2d 391, 645 N.W.2d 853. An agency may not promulgate a rule which conflicts with state law. *Id.* “No governmental agency has any power to adopt an unconstitutional rule or procedure, even though it may have been specifically

authorized by statute so to do.” *Lawson v. Hous. Auth.*, 270 Wis. 269, 279, 70 N.W. 605 (1955). And given the supremacy clause contained in Article VI of the United States Constitution, we conclude that no Wisconsin administrative agency may adopt a rule which conflicts with federal law. See *Gorton v. Am. Cyanamid Co.*, 194 Wis. 2d 203, 533 N.W.2d 746 (1995) (discussing scope of federal preemption of state law).

¶10 Though not a model of clarity, River Alliance’s complaint alleges facts setting out a claim that WIS. STAT. § 281.15 requires DNR to classify the waters of the state, or to set individual standards for each water of the state, and that DNR has failed to do so. While River Alliance focuses narrowly on North Fork as the beneficiary of this legislative requirement, the necessary implication of its complaint is that DNR has violated § 281.15 by adopting a rule which lumps many waters of the state into a default classification. Its complaint, read liberally, also asserts that DNR’s rules violate federal statutes or rules, and that therefore, DNR’s rules are invalid. While River Alliance’s goal is to force DNR to classify North Fork in a more protective way, we review what River Alliance has pled, not what it hopes to achieve.

¶11 While an interpretation of federal law and WIS. STAT. § 281.15 is a question of law which we can independently decide, we do not do so for two reasons. First, in part because of River Alliance’s focus on North Fork as opposed to the statutes and rules at issue, the parties’ briefs and oral argument did not directly address the issues we have determined to flow from River Alliance’s complaint. Second, declaratory judgments can involve fact-finding, *see, e.g. Mitchell Bank v. Schanke*, 2004 WI 13, 268 Wis. 2d 571, ___ N.W.2d ___, even though the ultimate question is one of law. We are not a fact-finding court. *Wis. Bell, Inc. v. DOR*, 164 Wis. 2d 138, 144, 473 N.W.2d 587 (Ct. App. 1991).

¶12 We therefore reverse the trial court's order dismissing River Alliance's complaint. We remand to permit the trial court to address the issues we have identified, with or without an evidentiary hearing, and to issue an order declaring whether the administrative rules are valid.

By the Court.—Order reversed and cause remanded with direction.

Not recommended for publication in the official reports.

