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Lake Beulah Mgmt. Dist. v. Wis. Dep't of Natural Res., 787 N.W.2d 926 (Wis. Ct. App. 2010)

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material fact existed, and that the trial court erred in granting summary judgment.

Finally, the County and State argued that because the work plan did not originally contemplate the property damage nor was it a necessary incident to the government project the owners could not bring an inverse condemnation claim. The court determined that the information contained in the State hydrogeologist's memorandum effectively notified the County and State three years prior to the high water event that the River may, as a necessary incident to or a consequence of the Dike improvements, flood the owners' property. Accordingly, the court found that the record reflected a genuine issue of material fact as to whether the damage to the owners' property was a necessary incident to the County and State's work on the Dike.

Therefore, the court affirmed the decision of the appellate court and remanded the case to the trial court for further proceedings.

Karina B. Swenson

WISCONSIN

Lake Beulah Mgmt. Dist. v. Wis. Dep't of Natural Res., 787 N.W.2d 926 (Wis. Ct. App. 2010) (holding that because the Wisconsin Department of Natural Resources ("DNR") had authority to consider scientific evidence of adverse environmental impacts to the waters of the State from all wells, the DNR must consider an affidavit regarding the subject well's impacts to the waters of Lake Beulah).

In 2003, the Village of East Troy ("Village") applied for a well permit from the DNR to add a fourth well. The proposed site of the well was only 1,400 feet from Lake Beulah. As part of the permitting process, the Village prepared a report, estimating that the well would not have adverse effects on the lake. The DNR accepted the report and issued a permit, which was valid for two years. Soon after, the Lake Beulah Management District ("District") petitioned for a case before the DNR, arguing that the DNR did not comply with its duty to protect navigable waters. The District believed the DNR had a duty to consider independently the environmental effects before approving the permit. The DNR originally denied the petition but later granted a hearing. The Lake Beulah Protective and Improvement Association intervened and allied with the District (collectively, the "District"). The Village filed a motion for summary disposition, which the Administrative Law Judge ("ALJ") granted, stating that because the language of the statute expressly required the DNR to consider only certain impacts, the statute excluded considering others. The ALJ further reasoned that the District failed to present any scientific evidence demonstrating adverse impacts on the well.

After the District filed a petition for judicial review in the Wisconsin District Court ("district court") of the 2003 permit, the DNR changed its opinion, spontaneously deciding it had authority to

consider the public trust doctrine for high capacity well approvals. The public trust doctrine gives the state title to navigable water in trust for public purposes. The new authority to consider the public trust doctrine allowed the DNR to limit the approval of wells when potential negative impacts on public rights in navigable waters existed. Nonetheless, the DNR believed that it did not have a duty to consider the environmental impacts for the subject well because the DNR never received evidence that the well would have adverse impacts on Lake Beulah. In 2005, the district court dismissed the petition of the 2003 permit, and the District moved for reconsideration. The District filed an affidavit from a geologist, stating that the Village's consultant had reached erroneous findings from inadequate and improperly conducted tests. The geologist's affidavit concluded that the well would negatively impact the wetlands and surface waters of Lake Beulah. The district court denied the District's motion for reconsideration, and the District then appealed to the Wisconsin Court of Appeals ("court"). During the appeal, the Village applied to extend its 2003 permit. Consequently, the DNR granted the two-year extension and mailed a copy to the District with a thirty-day appeal deadline. About six months after the DNR granted the new permit and while the original appeal of the 2003 permit continued in the court, the District petitioned the district court for review of the 2005 permit.

In 2008, the district court denied the petition of the 2005 permit, and the District appealed to the court. The court first considered the District's contention that the 2005 permit extension was a nullity. The District argued that the DNR's approval came after the 2003 permit expired, and thus, the DNR could not grant a new permit because the Village did not apply for a new permit but an extension of the previous one. The court found that regardless of how the Village labeled its application, the DNR processed the application as a new permit because it received the correct fee and reviewed the application as a new permit. Accordingly, the court held the 2005 permit was a new permit and not an extension.

The court then considered whether the statute precluded DNR from considering the public trust doctrine in relation to the well. The court did not give any deference to the DNR's opinion because the issue involved the scope of the agency's power. The court found that the general statutes expressly delegated regulatory authority to the DNR to protect the waters of the state, and because the wells affect the waters, the DNR had authority over them as well. The specific statutes concerning wells classify wells into three categories based on size but were silent as to whether the DNR should consider potential environmental effects for certain wells. The court held that while the statutes mandated the DNR to complete environmental reviews for only certain wells, the language did not preclude the DNR from reviewing other middling wells as well.

Next, the court considered whether the DNR was required to conduct a full environmental review of the well the Village

constructed. The court held that although the DNR had the authority to consider the environmental impact of the well, it was not required to do so. The DNR's duty under the public trust doctrine arose only when there was evidence suggesting that the well could affect state waters. The court did not set any standard for the DNR to determine when the duty to further examine environmental impacts arises, but it did state that scientific evidence suggesting adverse impacts should be sufficient. The court ultimately deferred to the judgment of the DNR to decide what evidence would be sufficient to warrant further investigation into environmental impacts of the state's water. Accordingly, the court held that if there was a substantial indication that a well would significantly affect the waters of the state then the DNR should consider the information and possibly conduct its own studies.

Finally, the court addressed the proper way concerned citizens should present evidence of environmental impacts of a well to the DNR. The court agreed with the DNR that citizens have three options for submitting information. The first two options allow citizens to present new information either while the permit process was ongoing or after the DNR granted the permit, in which case a contested case hearing would take place to consider the information. The third option allows for petition of judicial review after the DNR issues the permit; however, this option does not allow for consideration of new information. The court also pointed out that the District did not submit its information under any of these options.

Nonetheless, because the DNR had the geologist's report prior to making its decisions to approve the Village's permits, the court ultimately concluded that the DNR did have a duty to consider the report as to whether the well would cause adverse environmental impacts to the waters of Lake Beulah. The court reversed and remanded to the district court with directions to remand to the DNR to consider the affidavit and any other information pertaining to the well.

Kelly Miller

WYOMING

Kerbs v. Walck, 229 P.3d 974 (Wyo. 2010) (holding that a landowner harmed a neighboring landowner by installing a non-approved diversion, that the same landowner unlawfully tampered with headgates, and that the damages awarded were not excessive).

Two ranchers, Mr. Eugene Walck ("Walck") and Mr. Scott Kerbs ("Kerbs") of Kerbs Ranch, own both pre-1904 and post-1904 water rights along Jack Creek. Two irrigation ditches, the Forney No. 2 Ditch ("Forney Ditch") and the D. McPhail Ditch ("McPhail Ditch"), convey water through headgates from Jack Creek. The Forney No. 2 Ditch conveys water to just the Kerbs Ranch, while the McPhail Ditch