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Valstad v. Cipriano, 828 N.E.2.d 854 (Ill. App. Ct. 2005)

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The court applied both section 42-1426(2) and section 42-1416 (repealed) to A & B's proposed enlargement, treating the source of the enlargement as groundwater. Both sections prohibit a proposed enlarged water right that injures junior appropriators. The court held that, under the *Freemont-Madison* decision, proposed enlargements constitute *per se* injuries to junior appropriators. Treating A & B's proposed enlargement as a *per se* injury to junior appropriators, the court ruled that section 42-1426(2) requires that an injurious enlargement must become subordinate to a junior right by advancing its priority date to a date one day later than the junior appropriator's priority date. The court also noted that, even though the district court declared section 42-1416 unconstitutional, A & B still would not receive the statute's rebuttable presumption because of its *per se* injury to junior appropriators. In applying both the current and repealed version of the Idaho statute, the court held all proposed enlargements must be subordinate to junior rights, since a *per se* injury to junior appropriators cannot by definition be mitigated.

The court held that the Groundwater Users' recommendation in support of IDWR's Amended Director's Report was a sufficient procedural action to preserve and establish the Groundwater Users' interests and rights in the case.

Accordingly, the court affirmed the district court's decision granting partial summary judgment in favor of the Groundwater Users, the State, and the Groundwater Districts.

Christopher Jensen

ILLINOIS

Valstad v. Cipriano, 828 N.E.2d 854 (Ill. App. Ct. 2005) (holding the state's imposition of fees on NPDES permit holders is justified and is not preempted by the federal Clean Water Act where a legally sufficient justification exists which is reasonably related to the legislative purpose and it advances the objective of the imposing Act).

The Illinois General Assembly enacted Public Act 93-32 ("Public Act"), effective in relevant part July 1, 2003. The Public Act added section 12.5 to the Illinois Environmental Protection Act ("Act") requiring the Illinois Environmental Protection Agency ("Illinois EPA") to collect annual fees from certain holders of National Pollutant Discharge Elimination System ("NPDES") permits. In June 2003, the Illinois EPA requested such fees from Harold Valstad, the owner and operator of Valstad Quarry, Inc., and 40 other quarry owners (collectively "Valstad"). Valstad paid the fees under protest. In August 2003, Valstad filed a revised complaint against the Illinois EPA director, Renee Cipriano ("Cipriano"), the Illinois EPA, and the Illinois State Treas-

urer alleging, in part, that section 12.5 of the Act violated 1) the uniformity clause, equal protection clause, and the due-process clause of the Illinois Constitution; 2) the Federal Clean Water Pollution Prevention and Control Act ("CWA") under the supremacy clause of the United States Constitution; and 3) regulations promulgated under the CWA. In September 2003, the Circuit Court of Sangamon County granted Cipriano's motion to dismiss. Valstad appealed the dismissal to the Appellate Court of Illinois, Fourth District.

Valstad argued that section 12.5 of the Act violated the uniformity clause of the Illinois Constitution because there is no real and substantial difference between private and governmental agencies or between point sources of pollutants and non-point sources of pollutants. To survive scrutiny under the uniformity clause, the fee classification must be based on a real and substantial difference between the people taxed and those not taxed and bear some reasonable relationship to the object of the legislation or to public policy. Additionally, the scope of inquiry under the uniformity clause is relatively narrow and the court is not required to have perfect rationality as to each and every fee payer. The court rejected Valstad's argument, finding a legally sufficient justification existed for the imposition of fees on aggregate mines holding NPDES permits, and that a real and substantial difference existed between governmental and private NPDES permit holders.

In support of the first claim, Valstad contended the Act violated the uniformity clause because no real and substantial difference existed between private aggregate mines, which are required to have NPDES permits and pay fees, and Illinois public school districts, which are required to have NPDES permits but are not required to pay fees. Rejecting this argument, the court noted that section 12.5 of the Act specifically excludes the state or any department or agency of the state, as well as any school district from NPDES permit fees. Furthermore, because the purpose of the Public Act is to increase state revenue for both the CWA fund and the general revenue fund, imposing a fee on school districts would not advance the objective of the Public Act. Accordingly, the court found a real and substantial difference existed between the fee-paying aggregate mines and non fee-paying school districts that was reasonably related to the legislative purpose of the Public Act.

Second, Valstad contended that no real and substantial difference existed between aggregate mines, which constitute point sources of pollutants, and entities which constitute non-point-sources of pollutants. In its defense, Cipriano explained that the CWA requires point sources of pollutants to obtain NPDES permits, but it does not require non-point sources of pollutants to hold such permits. As a result, the Illinois EPA bears expenses in administering the NPDES permits to point sources of pollutants whereas it bears no expense on behalf of non-point sources of pollutants. Furthermore, Cipriano argued if the

court interpreted the uniformity clause to mandate administration on non-point sources of pollutants it would defeat the purpose of the Public Act, to increase revenue. The court agreed with Cipriano, finding a real and substantial difference existed between point sources of pollutants and non-point sources of pollutants that was reasonably related to the legislative purpose of the Act.

Next, Valstad argued that section 12.5's imposition of fees was not reasonably related to the purpose of the Act because the $26 million generated by the imposed fees exceeded the $6.4 million costs of clean water activities. Rejecting this argument, the court noted the costs of clean water activities did not reflect the state's total expenditures for such activities, including overhead and expenditures. Additionally, the transfer of money from a special fund to a general revenue fund is generally within the legislature's authority, and Valstad received a benefit from the expenditures made out of the general revenue fund. Moreover, the uniformity clause does not require the taxed group to be the sole or even primary beneficiary of the tax.

Valstad further contended, based on the supremacy clause of the U. S. Constitution, that the CWA preempts the imposition of fees under section 12.5. First, Valstad argued section 301(o) of the CWA, which prescribes fees for applications for modification, expressly preempts the imposition of NPDES permit fees. Unpersuaded, the court held that the requirement of fees under one section of the CWA does not, by itself, expressly preclude states from imposing fees upon NPDES permit holders. Valstad's argument that the CWA is so comprehensive so as to exclude any state regulation also did not persuade the court. Instead, it noted Congress intended that the states retain much of the authority for administration and enforcement of the NPDES permit program. Under the same analysis, the court rejected Valstad's third argument and held that Congress' decision to affirmatively decline to restrict the availability of NPDES permits to those with thousands of dollars to spare does not preempt the states from imposing NPDES permit fees, reiterating that Congress intended that each state assume responsibility for its own NPDES program.

Finally, relying on section 123.62 of the Code of Federal Regulation ("section 123.62"), Valstad argued that the imposition of fees under section 12.5 of the Act is a violation of the regulations promulgated under the CWA in that it constitutes a revision of the Illinois NPDES permit program, which requires approval by the United States EPA administrator. Referring to the language of section 123.62, the court found that the imposition of permit fees does not rise to the level of "revision" as implied in that section. For initial approval of a state's NPDES program, a large amount of information is required; however, a state is not required to submit its NPDES permit-fee structure at that time. Accordingly, the court held it would not stand to reason that a

state would later be required to submit information regarding its permit fees.

Unpersuaded by Valstad's arguments, the court affirmed the motion to dismiss.

Kelly L. Snodgrass

INDIANA

Parkison v. McCue, 831 N.E.2d 118 (Ind. Ct. App. 2005) (affirming the trial court's grant of summary judgment on grounds that: (1) title to lands submerged under water reverted to the state; (2) easements over such lands were terminated; (3) accretion caused title of such land to revert to original riparian owner free of easements; and (4) constructing piers over beach easements severely limited the rights of riparian owners and rendered the easement appreciably less useful for other easement holders).

Lakefront lot owners filed an ejectment and trespass suit when back lot owners constructed a pier over an easement bordering Clear Lake. The lakefront lot owners argued that flooding extinguished the easement bordering lakefront properties and neighboring back lot owners must remove the pier built over that easement. In response, Andrew Parkison argued that the back lot owner's easement still existed and that the easement language unambiguously granted pier rights, or in the alternative, if the language was ambiguous, then evidence showed the grantor's intent to provide pier rights. On motions for summary judgment from both parties, the Steuben County Superior Court held flooding did not terminate the easement and the plain language of the easement prohibited construction of a pier. On appeal to the Indiana Court of Appeals, Parkison argued that the trial court erred in determining the scope of the easement because the language of the easement was ambiguous. On cross-appeal, the lakefront lot owners argued that the trial court erred in finding that flooding did not extinguish an easement.

The court began by noting that easements over lands with riparian rights do not necessarily entitle easement holders to use of those riparian rights. The court determined that it must interpret the language of the deed granting the easement to find which rights the grantor provided for the easement holders. The court addressed the lakefront property owners' argument to determine if an easement existed to interpret. The court viewed flooding as a temporary condition that subsides as water levels recede. However, because the lakefront lot owners provided evidence showing the easement in question had been under water since 2002, the court held that it was not a temporary condition of flooding. Parkison asserted that the easement over the land re-