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Wisconsin v. Fedler, 2002 WL 31193360 (Wis. Ct. App. Oct. 3, 2002)

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sewage until MMSD could transport it to the sewage treatment plants. Lesaffre contended that MMSD knew that the operation of the tunnel would contaminate Red Star's well because the tunnel walls were hewn through unlined bedrock. Lesaffre also alleged that fractures in the bedrock wall provided a channel through which sewage containing E. coli and other fecal coliform bacteria could migrate in and out of the tunnel, flow into the aquifer, and into the Red Star Well.

MMSD began operation of the tunnel in 1994 and by the spring of 1999, samples from the Red Star well consistently tested positive for total coliform bacteria, fecal coliform, and E. coli. Red Star consequently discontinued use of the well and increased its use of city water. Lesaffre alleged that MMSD failed to properly operate the tunnel so as to prevent the contamination of its well and that MMSD's action constituted a taking. The circuit court ruled that the facts alleged fell into a category of cases described as "constructive takings with physical invasion" which constituted a "regulatory taking."

The appellate court determined that the allegations presented in the complaint were closer to a physical taking than a regulatory taking. Applying the case law for physical takings, the court concluded that it was premature to dismiss the case on summary judgment because there were several issues of material fact in dispute. Specifically, whether the operation of the tunnels was the source of the contamination of the Red Star well, the frequency of the contamination, and whether MMSD had the knowledge to create the conditions that caused the contamination of the well. The court also ruled that the doctrine of immunity did not generally bar a claim for the creation of a private nuisance.

Regan Rozier

Wisconsin v. Fedler, 2002 WL 31193360 (Wis. Ct. App. Oct. 3, 2002) (holding that where a property owner dredges in wetlands or ponds without a permit, civil forfeitures and restoration of property to the condition before alteration may be required even where there is no direct connection to a navigable waterway).

In December 2000, Ronald G. Fedler ("Fedler") received two tickets from the Department of Natural Resources ("DNR") for enlargement of a waterway without a permit. Fedler plead not guilty to both citations. The Circuit Court of Iowa County found Fedler guilty and ordered him to pay civil forfeitures and either remove the lower pond or obtain a permit for its construction. Fedler appealed to the Wisconsin Court of Appeals, District Four where the court upheld the verdict. The court found that Fedler violated a Wisconsin statute and was required to restore the land to the condition previous to dredging.

Fedler's property contained two ponds that the previous owner created in 1963. The water from the ponds flowed out of the ponds down through a culvert and eventually met up with a Class-II trout

stream. Over time, the lower pond gradually filled in with sediment creating a secondary wetland. Felder applied for a permit to dredge the ponds. The DNR denied the permit based upon the fact that the dredging would lead to a raise in the temperature of the water above the legal limit, thereby endangering fish downstream.

Two years later, the DNR was informed that Felder created a new pond where he originally sought to obtain a permit to dredge. The DNR cited Fedler for two violations of state statute for the enlargement of a waterway without a permit. Fedler claimed that he had not created a new pond, but merely cleaned out the lower pond that was gradually filling with sediment.

Fedler claimed that the DNR did not have jurisdiction to issue citations under the statute. Additionally, Fedler argued that his actions were "grandfathered" under the statute, as the statute was enacted after the creation of the ponds in 1963. The court rejected Fedler's claims and found that the DNR had jurisdiction to require permits under the statute. The statute existed before Fedler owned the property and therefore applied to his actions.

Fedler further contended that he was not in violation of the statute in that he was not trying to connect to a "navigable stream." The court found that the statute merely required an "ultimate connection" of a private waterway to a navigable waterway and did not require a "direct connection."

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WYOMING

Polo Ranch Co. v. City of Cheyenne, 61 P.3d 1255 (Wyo. 2003)
(holding developer had no right to drill for water because agreement granted city the exclusive right to water and said agreement was not in violation of public policy).

Developer, Polo Ranch Company, John N. Morris, and Norma B. Morris ("PRC") filed a complaint against the City of Cheyenne Board of Public Utilities ("City") seeking recovery for hay crop losses caused when the City refused to provide irrigation water. The City refused to provide water based on a water use agreement ("Agreement") entered into by the City and the previous landowner of PRC's property. The agreement granted the City the exclusive right to water on stipulated lands. The District Court, Laramie County, entered a partial summary judgment in favor of the City and against PRC. PRC appealed to the Supreme Court of Wyoming. The court affirmed the district court's holding that *res judicata* barred defining the "exclusive" right the City possessed under the Agreement as unenforceable due to public policy, and that PRC had no right to drill for water because of the City's exclusive right under the Agreement.