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## Milam v. Wisconsin Dep't of Natural Resources, No. 98-1585, 1999 WL 391577 (Wis. Ct. App. 1999)

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Milam v. Wisconsin Dep't of Natural Resources, No. 98-1585, 1999 WL 391577  
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the lower courts decision and remanded with directions to the DOE to issue a new letter in response to the city's "consistency certification" which comported with state law and accurately and affirmatively stated DOE's concurrence or objection to the city's certification.

*John B. Ridgley*

## WISCONSIN

**Milam v. Wisconsin Dep't of Natural Resources, No. 98-1585, 1999 WL 391577 (Wis. Ct. App. 1999)** (holding that the Wisconsin Department of Natural Resources properly denied the Milams' request for the water quality certification necessary to fill a wetland on their property in order to construct residential housing).

James and Herminia Milam owned seventeen lots on which they wanted to construct a subdivision. Three of the lots contained a wetland totaling three-quarters of an acre. The Milams applied to the Wisconsin Department of Natural Resources ("DNR") for a water quality certification to fill the wetland. According to the Wisconsin Code, the DNR must consider practicable alternatives to the proposed property use, which will not adversely affect the wetland or create significant adverse impacts. The DNR's wetland/water management specialist denied the application because a practicable alternative to filling the wetland existed and filling would cause adverse impacts. The specialist proposed combining four lots into two larger lots and building homes on the upper portions of the two plots that did not encompass the wetland area. This created fifteen residential units, as opposed to the original seventeen. The Milams requested a contested case hearing before an administrative law judge ("ALJ").

The ALJ found the DNR properly denied the Milams' request for the water quality certification. The ALJ held the Milams had not demonstrated the absence of practicable alternatives and the filling of the wetland would result in detrimental impacts to its functional values. The circuit court affirmed the decision.

The issue before the appellate court was whether substantial evidence supported the ALJ's determination. The court of appeals reviewed only the decision of the ALJ, not that of the circuit court. The ALJ determined a practicable alternative to filling the wetland existed. The court stated that a practicable alternative included one which considered cost, available technology, and logistics in light of the overall project purposes. The ALJ determined that fifteen of the lots contained developable land for the purpose of residential development. Clearly, the alternative allowed the construction of houses on the residential lots with only two less than the Milams' original plan. The court also found substantial evidence supporting the ALJ's environmental impact determination because the specialist

testified to an adverse result and the Milams did not contest it. Since the Milams' did not demonstrate the absence of either a practicable alternative or adverse environmental impact from their proposal to fill the wetland, the ALJ and the circuit court came to the correct determination.

*Kristen L. Cassisa*

## WYOMING

**Rennard v. Vollmar, 977 P.2d 1277 (Wyo. 1999)** (holding that the one who holds the water right also owns the ditch in which the water flowed to the irrigated land).

The water right conveyed to the Rennards ran through a ditch on the Vollmars' property before reaching the Rennards' irrigated land. The Vollmars' property did not consist of any irrigated land. The two adjoining properties once existed as one, and subsequent transactions divided them into individual parcels.

The district court granted summary judgment in favor of the Vollmars on the issue of a prescriptive easement. It held that the Rennards failed to prove the necessary elements of law for a claim under implied easements, and that the rule from *Frank v. Hicks* did not apply.

The issue on appeal was the applicability of the *Frank* rule. The rule states that "a right to the use of water for the irrigation of land, together with the ditch making such right available, becomes . . . so attached to the land irrigated as to pass by a conveyance of the land without mentioning the water right . . ." The Supreme Court of Wyoming reversed the district court's order and remanded with directions that judgment on this issue be entered for the Rennards.

The Rennards asserted that the court adopted the *Frank* rule in 1893. Thus, the ditch conveying the water right attached to the irrigated land. The Vollmars argued that the owners conveying the land to the Rennards did not intend to create a ditch easement across the Vollmars' non-irrigated parcel, and that the prior use of the ditch had always been permissive. They contended that no implied or prescriptive easement existed.

The court held that *Frank* stated the applicable rule. It went on to analyze the rule as applied in *Frank* and the instant case. Thus, "whoever grants a thing grants, by implication, that which is necessary to the beneficial use and enjoyment of the thing granted." Since the water right would be useless without the ditch conveying the water, the parties intended that the water right and the ditch for the water right were to become part and parcel of the irrigated land when they divided the once unified parcel.

*Melody Divine*