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Turkow v. Wisconsin Dep't of Natural Resources, 576 N.W. 2d 288 (Wis. Ct. App. 1998)

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or any person suing in the name of the state for the purpose of vindicating the public trust to assert a cause of action recognized by the existing law of Wisconsin." The court then examined the history and text of the Wisconsin statute providing for actions by citizens for abatement of public nuisances (plaintiffs claimed the proposed Minergy development was a public nuisance). The court found no basis in the history or text to prevent the plaintiffs' standing. The court held the plaintiffs' claims could therefore go forward.

The concurring opinion agreed that the plaintiffs' failure to file a notice of claim with the City did not bar their claims. However, the concurring opinion criticized the *per curiam* opinion stating the "holding and rationale . . . do not apply to the facts of the case" The court's unpredictable applications of the notice of claim requirement, "leaves attorneys and courts guessing about when a notice of claim must be filed and calls into question the status of cases now pending or already decided by the courts."

Christine Wise-Ludban

Turkow v. Wisconsin Dep't of Natural Resources, 576 N.W. 2d 288 (Wis. Ct. App. 1998) (holding that the agency has authority over navigability determinations and that the proper avenue for a challenge to agency action is through § 227 of the Wisconsin Statutes, not through a declaratory judgment motion).

In 1942, the construction of Big Lake Road created an artificial outlet ("the stream") of Big Lake. In 1957, the Public Service Commission ("PSC") found that the stream was not navigable. After the PSC finding, Lawrence Turkow purchased the property that contained the stream. A walkway and a metal fence blocked the stream at the time he purchased the property. Mr. Turkow subsequently erected another walkway that also obstructed the stream. In 1989, the Wisconsin Department of Natural Resources ("DNR") received complaints from citizens regarding the walkways and the fence. These obstructions prevented anyone from traveling down the stream. The DNR investigated and found that the stream was navigable. After additional complaints from citizens, the DNR wrote to Turkow advising him as to their finding of navigability. It ordered him to remove the obstructions within forty-five days or face citation. In response to the DNR's action, Mr. Turkow filed a complaint against the agency and both parties moved for summary judgment.

The trial court granted summary judgment to the plaintiff based on his declaratory judgment action. The trial court found that the DNR lacked jurisdiction due to the PSC's finding of non-navigability. The trial court precluded the DNR's authority and equitably estopped the agency from finding that the stream was navigable. The DNR

appealed this decision. The main issues in the case were whether the DNR had authority to determine that the stream was navigable and whether a challenge to agency action not pursuant to § 227 of the Wisconsin Statutes was valid.

The Wisconsin Court of Appeals held that the trial court improperly concluded that the DNR was estopped from reconsidering the navigability of the stream. The Court of Appeals also reversed the declaratory judgment action stating that it was barred by principles of sovereign immunity and specific remedies for agency action found in § 227. The appellate court concluded that the trial court erred in not granting the DNR's motion to dismiss based on the improper method of remedy sought by the plaintiffs.

The Court of Appeals reasoned that § 31.02 of the Wisconsin Statutes entrusted the DNR with the regulation of navigable streams. This section also gave the DNR the authority to make navigability determinations. The court found that equitable estoppel did not apply because the DNR had authority for its navigability determination. The court established that the PSC's finding was irrelevant under the circumstances. The court also reasoned that a declaratory judgment was inappropriate because it bypassed the exclusive means of administrative review set forth in the Wisconsin Statutes. A plaintiff cannot circumvent the review provided therein. The appellate court also confirmed that the principle of state sovereign immunity extended to state agencies. Thus, an action against the agency entailed only those remedies found in § 227. This section provides for both administrative and judicial review of agency action. Mr. Turkow did not pursue any action pursuant to § 227. Based on this reasoning, the trial court improperly denied the DNR's motion to dismiss. The DNR had the authority and jurisdiction for the navigability decision it made regarding the stream. A proper challenge to agency action must go through the proper channels and since Mr. Turkow ignored this principle, his action lacked standing.

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