SUPREME COURT OF WISCONSIN

Appeal No. 2018AP000059

Clean Wisconsin, Inc. and
Pleasant Lake Management District,

Petitioners–Respondents,

v.

Wisconsin Department of Natural
Resources,

Respondent–Appellant,

Wisconsin Manufacturers & Commerce,
Dairy Business Association,
Midwest Food Processors Association,
Wisconsin Potato & Vegetable Growers Association,
Wisconsin Cheese Makers Association,
Wisconsin Farm Bureau Federation,
Wisconsin Paper Council and
Wisconsin Corn Growers Association

Intervenors–Co-Appellants

INTERVENORS–CO-APPELLANTS' RESPONSE TO WISCONSIN DEPARTMENT OF NATURAL RESOURCES' MOTION TO MODIFY BRIEFING SCHEDULE

INTRODUCTION

On appeal from a decision of an administrative agency, this Court reviews the decision of the agency, not the circuit court. *Myers v. DNR*, 2019 WI 5, ¶ 17, 385 Wis. 2d 176, 922 N.W.2d 47. The decision before the Court is the Department of Natural Resources' ("DNR") determination that 2011

Wis. Act 21 ("Act 21") requires that, when issuing high capacity well permits, DNR impose only those conditions explicitly required or explicitly permitted under Wis. Stat. §§ 281.34 and 281.35. The circuit court found no such limits and vacated all eight permit approvals at issue. It concluded that Wisconsin's public trust doctrine and this Court's decision in *Lake Beulah*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, require DNR to evaluate the negative impacts on navigable waters by considering factors not explicitly required in Wis. Stat. §§ 281.34 and 281.35 (2017–18).

In its motion for a revised briefing schedule, DNR states its intent to take positions that conflict with its "previous positions regarding the public trust doctrine; the import of this Court's decision in *Lake Beulah*; and the effect of 2011 Wis. Act 21 on [DNR's] authority regarding high capacity well permitting." In all "meaningful respects," DNR will urge the Court to vacate its own permits.

DISCUSSION

A. The Court Should Not Allow DNR To Advance a Legal Position That Effectively Rescinds Prior Permit Approvals in This Case.

Intervenors–Co-Appellants object to DNR's motion to modify the briefing schedule because it necessarily entails opposing their own permit approvals. This attempt to rescind its permit approvals contravenes the statutory and administrative regime governing rescission, permittees' due process rights, and fundamental principles of justice. By asking this Court to

affirm the judgment of the lower court, DNR effectively seeks to rescind its approvals of the eight high capacity well permits at issue in this case. While *courts* may certainly invalidate the high capacity well permits at issue, DNR is limited to doing so in the ways prescribed by statute or rule—none of which DNR alleges are present here. For reasons discussed below, DNR cannot advance this new and inconsistent legal position going forward. Instead, they should stand aside for the remainder of this case.[1]

1. Statutes and Administrative Rules Create a Comprehensive Framework Governing DNR Rescission of Approved High Capacity Well Permits.

Wisconsin Stat. § 281.34(7) sets out the requirements for when DNR may rescind high capacity well permits it has already approved. Intervenors–Co-Appellants recognize Petitioners–Respondents' right to petition the courts to invalidate a DNR-approved high capacity well permit, but DNR has no right to join that effort simply because its interests have changed. Wis. Stat. § 281.34(7) provides:

> The approval of a high capacity well issued under this section . . . *remains in effect unless* [DNR] modifies or rescinds the approval *because the high capacity well or the use of the high capacity well is* ***not in conformance with standards or conditions applicable to the approval of the high capacity well.*** (Emphasis added)

[1] To be clear, Intervenors–Co-Appellants do not request that the attorney general and DNR be forced to brief a position they do not maintain. In that regard, if they are to participate in briefing this case, they should do so as they requested, on Respondents' schedule. Whether the attorney general has a duty to defend the validity of state laws such as Act 21 is a complicated question the Court need not answer in the context of this litigation.

Wisconsin Administrative Code Chapter NR 812 sets out the standards and conditions governing high capacity wells. Consistent with Wis. Stat. § 281.34(7), "failure to comply with any condition of an approval or the construction, reconstruction or operation of any well or water system in violation of any statute, rule or [DNR] order shall void the approval." Wis. Admin. Code NR § 812.09(4) (May 2019). Since DNR does not contend any statutory or regulatory "standards or conditions" allowing for rescinding approved permits are met, it has no grounds to seek to rescind the permits at issue. *See* Wis. Stat. § 281.34(7) (2017–18).

In 2017 Wis. Act 10, the Legislature further restricted the conditions under which DNR may rescind prior approval of a high capacity well permit. Under the newly created Wis. Stat. § 281.34(2g), the owner of a high capacity well may repair, maintain, and reconstruct an existing well, and may construct a new replacement high capacity well without obtaining additional approval from DNR. In addition, the owner can transfer the approval of his or her high capacity well permit concurrent with transferring the land on which the well is located.

These statutes and administrative rules set out a comprehensive regulatory regime governing DNR rescission and modification for high capacity well permits. Clearly, these limited opportunities do not encompass DNR's changed interests in espousing a particular legal interpretation at this point before the Court. If DNR wishes to rescind the eight permits, they must

do so via the prescribed procedures and standards, not by simply declining to present a meaningful defense of its decision to approve those permits before the Court.

2. Allowing DNR to Rescind Approved High Capacity Well Permits Outside the Statutory Strictures Would Deprive the Permittees of Due Process.

As noted, the Wisconsin Legislature set forth procedures governing DNR's rescission of permits it has already approved. Rescinding permits outside these confines deprives permittees of those statutory protections governing their approved permits. Because these permits are necessary for the livelihood of those eight agribusinesses, constitutional due process protections apply to procedures affecting those permits. *Bell v. Burson*, 402 U.S. 535, 539 (1971). Therefore, permittees are entitled, at a minimum, to DNR's compliance with the procedures laid out in the statutes governing approved permit rescissions and modifications.

Although "the range of interests protected by procedural due process is not infinite," *Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972), property interests "may take many forms." *Id.* at 577. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* Property interests "are created and defined by existing rules or mutually explicit understandings that stem from an independent source such as state laws, ordinances, or an implied contract that secure certain benefits, and support

claims of entitlement to those benefits." *Taplick v. City of Madison Personnel Bd.*, 97 Wis. 2d 162, 170, 293 N.W.2d 173 (Wis. 1980).

Once an individual obtains a "state-created property right, the due process clause of the Fourteenth Amendment circumscribes, but does not eliminate, the government's ability to deprive him of that interest." *Gen. Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 1000 (7th Cir. 2008). As this Court has noted, "[w]hen the government grants an economically valuable right to an individual… it often reserves the power to modify or eliminate those rights through a change in the law reflecting a change in public policy. When the government subsequently acts pursuant to that reserved power, no deprivation of property occurs, because the government does not thereby take away anything it had unconditionally given." *LeClair v. Nat. Res. Bd.*, 168 Wis. 2d 227, 238, 482 N.W.2d 278 (Wis. Ct. App. 1992) (quoting A. Peterson, *The Takings Clause: In Search of Underlying Principles—Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 Cal. L. Rev. 55, 62–63 (1990)).

Here, DNR seeks to rescind its approval over permits that lie at the heart of permittees' livelihood without following any statutorily authorized procedures. Permittees obtained a property interest in these permits when DNR approved them. Therefore, due process protections prevent the government from depriving permittees of those permits except through compliance with the procedural requirements prescribed by law.

3. The Court Should Invoke Judicial Estoppel to Prevent DNR From Adopting Inconsistent Positions in This Proceeding.

Judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (Wis. 1996). The doctrine is one of equity to be used at a court's discretion because it "is intended to protect the judiciary as an institution from the perversion of judicial machinery." *Id.* at 346. The doctrine is appropriate where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum designed for suitors seeking justice." *Id.* at 351 (quoting *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990). "[C]lassic judicial estoppel" prevents parties from "advocat[ing] a certain position in the trial court… and a contrary position on appeal." *State v. English-Lancaster*, 2002 WI App 74, ¶ 22, 252 Wis. 2d 388, 642 N.W.2d 627. However, the doctrine is one of equity and "not easily reduced to a pat formula." *State v. Johnson*, 2001 WI App 105, ¶ 10, 244 Wis. 2d 164, 628 N.W.2d 431. The more certain a court is that the positions are inconsistent, the less reluctant it should be in applying judicial estoppel because it is "an equitable determination that should be used only when the positions taken are *clearly* inconsistent." *Harrison v. Labor Indus. Review Comm'n*, 187 Wis. 2d 491, 497–98, 523 N.W.2d 138.

As stated in its motion, DNR no longer seeks to defend the eight high capacity well permits that it previously approved, which are necessary for

the livelihood of the agribusinesses holding those permits. In addition to lacking statutory grounds necessary to rescind those permits, DNR advocates a new position before this Court that is wholly inconsistent and irreconcilable with its position maintained before the lower court that the permits were lawfully approved. Therefore, this is a classic case for judicial estoppel because allowing DNR to switch positions at this stage would be "contrary to the fundamental principles of justice." *Petty*, 201 Wis. 2d at 345 (quoting *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (Wis. 1989)). Those eight agribusinesses that were granted permit approvals had a reasonable expectation that DNR would defend their permits. Fairness requires that DNR not be allowed to advance a wholly inconsistent position on those permit approvals to obtain an unfair procedural advantage over the permittees. *See Johnson*, 2001 WI App 105, ¶ 21.

B. Granting the Legislature's Petition to Intervene and Instructing DNR Not to Take Inconsistent Legal Positions Would Return Status Quo.

When this litigation was initiated by Petitioners–Respondents, DNR defended the high capacity well permits. Intervenors–Co-Appellants focused their arguments of the application of Act 21's explicit authority requirement with respect to the public trust doctrine and DNR's high capacity well permit program as a whole. Should the Court direct DNR not to advance positions inconsistent with those taken in the lower court, Petitioners–Respondents

would not be disadvantaged as they would be in precisely the same position they were in before the circuit court.

The Legislature's request to intervene as a matter of right is consistent with 2017 Wis. Act 369 and the clear intent that the Legislature be given an opportunity to defend its enactments. The need for such intervention is nowhere more evident than when the attorney general and DNR refuse to defend legislative enactments such as Act 21. Moreover, such intervention would provide an equitable result for those agribusinesses that reasonably expected the state to defend their state-issued permits.

CONCLUSION

For the reasons discussed, Intervenors–Co-Appellants ask the Court to judicially estop or otherwise direct DNR not to advance inconsistent legal positions and to recognize the Legislature's absolute right to intervene.

Dated this 13th day of May 2019

Respectfully summitted,

/s/

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