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STATE OF WISCONSIN
SUPREME COURT
No. 2008AP921

E-L ENTERPRISES, INC.,

Plaintiff-Respondent,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Appellant-Petitioner.

On Petition for Review of a Decision of the Court of Appeals, District I
Appeal From the Circuit Court for Milwaukee County,
Circuit Court Case No. 04-CV-005505,
The Honorable Richard J. Sankovitz, Presiding

BRIEF OF RESPONDENT E-L ENTERPRISES, INC.

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INTRODUCTION

The Milwaukee Metropolitan Sewerage District (the "District") pumped large amounts of groundwater from property adjacent to E-L's land. The pumping removed E-L's groundwater, diminishing the value of its remaining property. Though the District was fully aware that a few simple, relatively inexpensive measures would have prevented this result, it chose not to take them. It took years for E-L's groundwater levels to even partially recover from the depletion.

The issue is whether the District's removal of E-L's groundwater is a partial taking without just compensation entitling E-L to invoke Wisconsin's inverse condemnation statute, §32.10, and also a violation of the Wisconsin Constitution and the 5th Amendment of the U. S. Constitution. At trial, the jury found that all of the elements of a taking were present in this case: the District deliberately and permanently took E-L's groundwater for a public purpose. Furthermore, the trial record shows that the District was aware before, during and after the sewer's construction that it was removing E-L's groundwater and that the removal would reduce the value of E-L's remaining property.

Established legal precedent supports a finding that the District has partially taken E-L's property. More than 30 years ago, this Court recognized that a landowner's right to groundwater is a property right that can be taken. The cause of action is based on well-established precedent holding that groundwater is an important stick in the bundle of a private landowner's property rights. The District took this stick without compensating E-L for its loss.

Established legal precedent also holds that a government entity need not be physically present on a landowner's property in order for a taking to occur. In this case, the District physically removed the groundwater from E-L's property by pumping large quantities of groundwater from adjacent property.

Moreover, the Court has held that an "occupation" under Wisconsin's inverse condemnation statute includes the permanent *deprivation* of a property owner's property, not just a limited physical squatting on private property.

Precedent set by this Court and by the U.S. Supreme Court requires the District to provide just compensation for taking E-L's groundwater. The District has offered no persuasive legal or factual basis for this Court to overrule its own precedent or render a decision that conflicts with U.S. Supreme Court precedent.

The Court should affirm the lower court decisions.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

E-L frames the issues presented as follows:

Issue 1. Should the Court overrule longstanding precedent holding that an owner of real property has a property right in the groundwater in its real property?

The circuit court and court of appeals answered no, and followed established precedent that a property right in groundwater exists.

Issue 2. Is a government's deliberate, intentional and permanent taking of groundwater from a private person's real property, knowing that the taking will lower the value of the remaining real property, for a use that benefits the public, a

governmental taking in violation of Article I, §13, of the State Constitution and the 5th Amendment of the U.S. Constitution?

The circuit court held that such an action was a taking in violation of the Wisconsin Constitution. Its decision did not reach the 5th Amendment issue, because E-L's cause of action under the 5th Amendment does not accrue until E-L exhausts its state law remedies under Wisconsin's inverse condemnation statute. However, both the circuit court and the court of appeals decisions discussed the 5th Amendment by way of analogy, suggesting that the District's conduct violated federal as well as state law.

Issue 3. Was the District's intentional and permanent taking of groundwater from E-L's real property an "occupation" of E-L's property within the meaning of *Wis. Stat.* §32.10?

Initially, the circuit court narrowly construed §32.10. E-L asked the court to reconsider, citing this Court's precedent, particularly *Howell Plaza, Inc. v. State Highway Commission,* 66 Wis.2d 720, 730, 226 N.W.2d 185 (1975)(*Howell Plaza I*). In concluding that there had been an "occupation," the circuit court followed *Howell Plaza's* ruling that "there need not be an actual taking in the sense that there be a physical occupation or possession," but only a deprivation of "all, or practically all, of the beneficial use" of a part of its property.

The court of appeals affirmed.

STATEMENT OF THE CASE

E-L, a real estate holding company, was formed by Joseph Loftus for the purpose of acquiring and holding title to a building located on 12th Street in Milwaukee. The purchase was the result of years of hard work by Mr. Loftus under difficult circumstances. Orphaned as a boy, he attended boarding school and then worked his way through college at Marquette University. R.168:4-5. After graduating with a degree in electrical engineering, Mr. Loftus worked and taught university level night school. R.168:5. Eventually, he was able to buy Terminal-Electric Co., an electrical contracting firm located on 4th Street in Milwaukee. He started out with three electricians. R.168:6.

The City of Milwaukee condemned the 4th Street building when it constructed the Bradley Center in the 1980's. The condemnation forced Mr. Loftus to find a new location for Terminal-Electric's business. In 1986, he relocated his business to a building on N. 12th Street that E-L had recently acquired. R.168:6-8. The building, constructed in 1929, was supported by wood piles. R.185:80, 91-3; R.184:47-9, 54; R.169:Ex.58. Wood piles are extremely long-lasting if they are sufficiently saturated with water to prevent rot from destroying them. In this case, the wood piles had supported the building for more than half a century. R.183:82-6; R.169:Ex.28.

In the 1980's, the District constructed deep tunnels to reduce the dumping of sewage into rivers and lakes. The deep tunnels hold sewage until it can be treated. Feeding the sewage to the deep tunnels is a series of near surface sewers,

including the CT-7 (Cross-Town Collector Sewer No.7) located in a roadway easement adjacent to E-L's property. R.183:5-6; R.169:Ex.15:810.

Prior to constructing the CT-7, District consultants inventoried nearby structures. The information gathered included the structures' type of foundation and year of construction. R.183:23-6, 59-60; R.169:Ex.15. Photos taken by the District in September 1987 in preparation for construction showed no problems with the foundation of E-L's building. R.169:Ex.28:1; R.183:82-6; R.169:Ex.28.

Extensive studies conducted by the District prior to construction of the CT-7 revealed the presence of groundwater and emphasized the need to keep the sewer trench dry during construction in order to protect workers and to ensure proper installation of the sewer pipe. R.184:32. However, keeping the trench dry would cause problems that are well known to licensed structural or geotechnical engineers. R.184:30; R.183:71-2. Specifically, the act of de-watering the soil (removing the groundwater) would (1) reduce the soil's ability to support buildings and foundations, and (2) remove water needed to preserve wood piles supporting adjacent buildings. R.169:Ex.16:1509; R.169:Ex.6:2043; R.183:71-2; R.184:30. Notes handwritten on one study discussing the de-watering problem state: "downplay, done to be thorough but should be played down." R.169:Ex.16:1509.

Construction specifications for the CT-7 contained corrective measures to address the de-watering problems, such as using watertight walls around the sewer trench or replacing groundwater outside the trench using "re-charge wells."

R.184:32-3; R.169:Ex.6: 2043. The specifications left the choice of method to the contractor after consultation with the District. R.169:Ex.6:2042; R.184:91-105.

The District hired Bowles-Tomassini ("BCI/TCI") to construct the CT-7, but had its own civil engineer and supervisor on the job every day, observing the construction. R.183:82-93; R.1:5; R.4:6. Construction commenced in September 1987. R.166:11. Large amounts of groundwater were removed during construction. R.184:92-3. Engineers monitored soil and groundwater levels near E-L's building during this time. R.183:61-4; R.183:61-3; R.185:21-4. Although the District's engineers were well aware that the groundwater was being significantly lowered near E-L's building, no one notified E-L. R.184:27-30. It took more than two years before the groundwater came close to recovering. R.184:153; R.169:Ex.235-8.

E-L's land was continuously and permanently de-watered from the time the sewer was constructed. The de-watering occurred for three reasons. First, massive pumping during construction drained the groundwater from E-L's land. R.184:90-107. The District could have avoided the de-watering by replacing the groundwater using a re-charging well at a cost of less than $10,000. R.184:98-9. Second, the CT-7 sewer pipe leaked. R.184:99-105. Water that entered the leaky sewer pipe was continually taken away from E-L's property. The sewer pipe drained groundwater from E-L's property (where the land was wetter) to the west of it (where the land was dry). Third, the use of gravel for the base of the CT-7 acted as a "French drain." The water ran through the gravel away from E-L's

property, draining the groundwater near E-L's building to the dryer land to the west of it. The District could have easily prevented this problem by using an inexpensive concrete slurry. R.184:96-9; R.185:15-17.

In May 1998, Mr. Loftus noticed that cracks in the foundation of his building appeared to be getting worse. He hired a contractor to look at them. R.168:30. Eventually, during repairs to the building in October 2003 (following litigation to gain access to the easement adjacent to the building for repair purposes), E-L determined that one likely cause of its foundation problems was the District's construction of the CT-7. R.169:Ex.41; R.168:32-4; R.183:163-6; R.184:45. E-L invited the District to gather evidence during the repair work. R.169:Ex.9; R.183:108; R.184:44-5.

E-L gave the District notice of its claim on December 3, 2003. The District did not respond, and E-L filed suit on June 23, 2004. The District filed a counterclaim alleging that E-L's inverse condemnation claim was frivolous, and seeking fees and costs from E-L and its attorney. R.1:19: R.2:6,27; R.169:Ex.36. Shortly before trial, E-L settled its negligence and nuisance claims against BCI/TCI's insurer. R.1:9,13-14; R.114. The Court dismissed E-L's negligence and nuisance claims against the District. E-L's taking claim remained. R.102; R.183:170.

The case was tried to a jury. The jury made factual findings that the District has not disputed, as follows:

- Before the District's contractors began pumping water from the CT-7 trench, the piles under E-L's building were sufficiently saturated with water to support E-L's building. A-164.
- The District removed the groundwater that E-L needed to keep the wood piles under the south end of E-L's building saturated enough to support the building. A-164.
- The District's removal of the groundwater from E-L's property was unreasonable. A-164.
- The District ***deliberately, not accidentally,*** took E-L's groundwater. [Emphasis added.] A-165, 160.
- The District took the groundwater for a use that benefited the public. A-165, 160.
- The District took E-L's groundwater ***permanently.*** [Emphasis added.] A-165, 160.
- The just compensation for the District's taking of E-L's groundwater was $309,388. That just compensation was determined by "the difference between the fair market value of the property before the taking and the fair market value of the property after the taking." A-166, 162.
- E-L timely brought its claim. A-165, 161-2.

The District appealed the judgment to the court of appeals. It affirmed. A-16. Its petition to this Court followed.

ARGUMENT

1. E-L Has A Property Interest In Groundwater.

A. Precedent Holds That A Landowner Has a Property Interest In Groundwater on its Land.

The District frames its first issue as whether E-L's damages were consequential damages, and its second issue as whether a taking under the Wisconsin Constitution occurs when a government takes private property for public use by breaching its tort duty to use groundwater reasonably. Brief at 4. By framing the issues in tort language, the District skirts the takings questions and implies that the only legal recourse available to E-L lies in tort. E-L's tort, negligence and nuisance claims were settled or dismissed at trial. They are not at issue here. The District's repeated attempts to recast E-L's takings claim in tort terms obscures the real issue: whether a taking occurred without just compensation.

To determine whether a taking occurred, the first question that must be addressed is whether property owners have a property right in groundwater. The District claims that E-L has only a "fleeting" privilege to use the groundwater on its land, and that this privilege does not amount to a property right. Brief at 29. Its position completely contradicts well-established precedent, including this Court's landmark decision in *State v. Michels Pipeline Construction, Inc.*, 63 Wis.

2d 278, 217 N.W.2d 339 (1974), which unequivocally held that "a person has a property right in underground water." *Id*. at 296.

B. Wisconsin Courts Have Always Recognized A Landowner's Property Interest in Groundwater.

Wisconsin courts have long recognized that a landowner's right to use groundwater is a property right attached to ownership of the soil. *Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903). As stated by the *Huber* court:

> the right of a landowner to sink wells and gather and use percolating waters as he will, even though the flow in his neighbor's well be diminished, ***is a property right,*** which cannot be taken away from him or impaired by legislation, unless by way of the exercise of the right of ***eminent domain*** or by the police power

Huber at 366 [Emphasis added.]; *see also e.g., Roath v. Driscoll*, 20 Conn. 533, *6 (Conn. 1850) ("[e]ach owner has an equal and complete right to the use of his land, and to the water which is ***in it")***[Emphasis in original].

The *Huber* court also noted that it was immaterial if the property right in groundwater arose from absolute ownership of the water itself, or from a mere right to use and divert the water while it percolates through the soil: "[i]n either event, ***it is a property right,*** arising out of his ownership of the land, and is protected by the common law as such." *Huber* at 363 [Emphasis added.]

The issue in *Huber* and cases leading up to *Huber* was not whether a landowner had property rights in groundwater, but whether those rights should be subject to a reasonable use restriction. For over 100 years, Wisconsin courts had followed the common law principal that a landowner could pump percolating

groundwater from his land with immunity, regardless of whether the pumping was reasonable or resulted in the depletion of his neighbor's groundwater.

This principal, also referred to as the "English rule," was based on the premise that the "mysterious and unpredictable" nature of groundwater made it impossible to craft fair regulations governing competing rights to use the water. *Michels Pipeline* at 290-91. The *Huber* court concluded that, because the laws at issue restricted a property owner's use of groundwater, they were takings without just compensation. *Huber* at 370. The common law right to use groundwater with impunity remained the law in Wisconsin until this Court's decision in *Michels Pipeline*.

C. *Michels Pipeline* Established Liability For The Unreasonable Use of Groundwater.

The facts in *Michels Pipeline* were similar to the facts in this case. In *Michels Pipeline*, the Metropolitan Sewerage Commission of Milwaukee County (the "Commission") knowingly de-watered soil of adjacent properties in the course of installing a sewer. The State brought an action in equity against the Commission, alleging that the de-watering caused dried wells, poor water quality and cracking of basement walls, driveways and foundations due to soil subsidence. The State requested that the sewers be constructed in a way that would reduce the harm to adjacent property owners. Relying on the common law principals set forth in *Huber*, the trial court dismissed the case on the basis that Wisconsin law did not recognize a cause of action for injury to the water table. On appeal, this

Court reconsidered the issue of whether the right to use groundwater was subject to a reasonable use limitation similar to that applied in surface water disputes.

The *Michels Pipeline* decision surveyed and updated groundwater use law. Science, this Court observed, had advanced the understanding of groundwater enough to make the fair adjudication of groundwater disputes possible. There was no longer justification for treating property rights in groundwater as absolute when rights in surface water were subject to a reasonable use doctrine. *Michels Pipeline* at 292. Accordingly, the Court overruled *Huber* and adopted the new rule that a party is not liable for taking his neighbor's groundwater if the taking is reasonable, but he is liable if the taking is unreasonable.

The District erroneously claims that *Michels Pipeline* requires groundwater claims to be resolved exclusively by application of tort law. Brief at 30-31. In fact, the Court's decision did not specify a particular theory of liability. It simply adopted § 858A of the proposed section of the Restatement Second of Torts at the time titled ***"Non-liability*** for use of ground water – exceptions." *Michels Pipeline* at 302-03 [Emphasis added].

In considering whether the new "reasonableness rule" would conflict with other laws impacting groundwater, the Court noted that the fact of an act's legal authorization did not exempt it from compliance with other relevant legal principals, including takings principals:

> . . . To contend that a public utility, in the pursuit of its praiseworthy and legitimate enterprise, can, in effect, deprive others of the full use of their property without compensation, poses a theory unknown to the law of Wisconsin, and in

> our opinion would constitute the taking of property without due process of law.

Huber at 348, citing *Jost v. Dairyland Power Cooperation*, 45 Wis.2d 164, 177, 172 N.W.2d 647 (1969).

The *Michels Pipeline* decision did not debate or refute the principal that a landowner has property rights in groundwater. Its decision, imposing a limitation on a landowner's previously unfettered right to groundwater use, assumed the existence of a reasonable right in groundwater for all landowners. Part of the Court's rationale for rejecting the English rule was that "[t]here is a basic inconsistency in saying that ***a person has a property right*** in underground water that cannot be taken without compensation, for when he exercises that right to the detriment of his neighbor, he is actually taking his neighbor's property without compensation". *Michels Pipeline* at 296 [Emphasis added.] In other words, all property owners have a reasonable right to groundwater that cannot be taken without compensation.

The two relevant holdings from *Michels Pipeline* are (i) the reaffirmation that the right or privilege to use groundwater is a property right, and (ii) the notion that a party who unreasonably takes another's groundwater can be held liable for doing so.

D. The Ohio Supreme Court Has Held That A Landowner Has Property Rights in Groundwater That Can Be Taken By Government Interference or Physical Invasion.

In 2005, the Supreme Court of Ohio directly considered groundwater takings claims. *McNamara v. Rittman*, 107 Ohio St.3d 243, 838 N.E.2d 640

(2005), arose out of two cases where government activity caused water shortages and poor water quality. In one case, a city drilled wells, causing water shortages and poor water quality on nearby properties. In the second case (which is similar to the present case), groundwater was pumped to keep a sewer trench dry, resulting in de-watering of wells on adjacent property. The original two actions for damages were dismissed on the basis of sovereign immunity. The plaintiffs then filed takings claims. The district courts ruled in favor of the defendants on the grounds that Ohio did not recognize a property interest in groundwater. The question of whether a landowner has such an interest was certified by the appellate court to the Ohio Supreme Court.

In support of their claim that no taking had occurred, the government entities argued that the landowners had no title to or ownership of the groundwater itself. The *McNamara* court disagreed, describing groundwater rights as "one of the fundamental attributes of property ownership and an essential stick in the bundle of rights that is part of title to property." *McNamara* at ¶ 22.

E. A Landowner's Right to Groundwater Co-Exists with State Rights in Groundwater.

Completely ignoring *Michels Pipeline* and other modern decisions, the District argues that a landowner's right to use groundwater on his property is not a property right that can be taken by government action. Brief at 28. Its main argument is that the groundwater is owned by the State, implying that the State's rights preclude any landowner rights in groundwater. Brief at 30. Without

discussion, it string cites three cases that do not support its position: *United Cooperative v. Frontier FS Cooperative*, 2007 WI App 197, 304 Wis.2d 750, 738 N.W.2d 578, *Robert E. Lee & Assocs., Inc. v. Peters*, 206 Wis. 2d 509, 522, 557 N.W.2d 457 (Ct. App. 1996) and *Patz v. St. Paul Fire and Marine Ins. Co.*, 817 F. Supp. 781 (E.D. Wis. 1993)(the seminal case the District cites).

These cases all interpret whether an owned-property exclusion in an insurance policy allows an insurer to avoid liability for groundwater contamination on property owned by the insured. The cases' holdings, that contamination of groundwater generally is damage to public property, are based on the fact that lakes, streams, rivers and "groundwater" are waters of the State and therefore public property according to *Wis. Stat.* §281.01(18).

E-L does not claim sole "ownership" of the groundwater on its land. It recognizes that the State has an interest in State waters and in protecting the public's groundwater supply. The decisions cited by the District note that groundwater contamination originating from an insured's property often spreads to adjacent properties. *United Cooperative* at ¶35. The State's interest in its waters facilitates its efforts to safeguard the public from problems that impact the public at large, such as environmental contamination of the groundwater supply. However, the State's interest does not preclude a landowner from simultaneously

having a property or ownership right (akin to a riparian right) in groundwater.[1] *Michels Pipeline* made clear that, subject to the reasonable use requirement, a property owner has a right in groundwater even though he may not be able to claim absolute ownership of it.

As noted in *McNamara*, the rights of a landowner in groundwater are analogous to an owner whose land abuts a lake. The landowner does not own a particular bucket of lake water off the shore. Rather, it has riparian rights resulting from its land ownership. *See Stoesser v. Shore Drives Partnership*, 172 Wis. 2d 660, 665-6, 494 N.W.2d 204 (1993). These rights exist alongside the State's right in water. If the government takes riparian rights, a cause of action for taking exists. *W.H. Pugh Co. v. State*, 157 Wis. 2d 620, 460 N.W.2d 787(Ct. App. 1990); *Zinn v. State*, 112 Wis. 2d 417, 426, 334 N.W.2d 67 (1983).

The same is true here. A landowner has a property right in groundwater under his land, but not necessarily in a specific bucket of groundwater. When the existence of that groundwater in land ceases because of the unreasonable use of it by a neighbor, the neighbor has taken a property right of the land owner without a privilege to do so. E-L's interest in groundwater is similar to a riparian right in that the State and E-L both have sticks in the bundle of property rights that comprise ownership of groundwater. In sum, the insurance cases do not support the argument that a landowner has no property interest in groundwater.

[1] The District has dropped the argument set forth in its Petition for Review that there is a conflict in the law between these cases and E-L's position that a landowner has a property right in groundwater. Therefore, E-L will not address that issue.

The District also argues that the "constant movement and flux" of groundwater prohibits it from being the property of any landowner. Brief at 28. This is the old argument underpinning the English rule, which has not been followed in Wisconsin for decades. In support of its argument, the District cites *Cherry v. Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982).

In *Cherry*, the plaintiffs claimed that the 1980 Arizona Groundwater Code was a regulatory taking of their ownership of the groundwater without just compensation. Emphasizing the "weighty public concern over the depletion of groundwater" and possible public water shortages in Arizona, the court concluded that the legislature's restrictions on private use of groundwater were a valid exercise of its police powers. The State of Arizona was justified in claiming near-total control of the consumption of groundwater "in the interest of the public welfare." Because Wisconsin has no comparable statute at issue, *Cherry* is not instructive. The *Michels Pipeline* decision controls in Wisconsin. Moreover, despite its ruling, the *Cherry* court recognized that a landowner has a qualified right, arising out of its ownership of the land, to use groundwater on its land. *Cherry* at 1277.

In sum, the District attempts to label the property right in groundwater as solely "public" instead of "private" to argue that a property owner has no rights in groundwater. That claim is contrary to *Michels Pipeline*, its predecessor case, *Huber*, and jurisprudence reaching back to English common law. Wisconsin recognizes a property right in groundwater that exists in the land. The District's

efforts to label a property right in groundwater as a limited, "fleeting" right to use the water obscures Wisconsin precedent and is a matter of semantics. The distinction between ownership of groundwater or a right to use the groundwater is a distinction without a meaning. The District's argument fails to comport with Wisconsin law.

F. The Court Properly Instructed the Jury At Trial.

At trial, the judge followed the holding of *Michels Pipeline* to instruct the jury on the parameters of E-L's property rights in underground water. The instructions properly stated that a landowner's property right in groundwater is a right enjoyed or shared by all landowners, subject to the reasonable use restriction adopted in *Michels Pipeline*. The District claims that the jury instructions were wrong. In support of this claim, it again argues that groundwater is owned by the State, and that landowners have no property right in groundwater, but only a right to use the groundwater that is on their land. Brief at 30. As discussed at length above, this argument ignores established precedent, including this Court's decision in *Michels Pipeline*. *Michels Pipeline* held that landowners have a property right in groundwater, subject to a reasonable use restriction. The jury instructions correctly stated the law.

The District attempts to support its position by citing the concurring opinion in *McNamara*. Brief at 31, Footnote 3. Its failure to address the majority opinion is misleading. This District also erroneously suggests that the *McNamara* decision was based on a specific provision in the Ohio Constitution. *Id.* It was not.

Both *McNamara* and *Michels Pipeline* held that a landowner has a property interest in groundwater, and both cases support the jury instruction given at trial.

2. The District Took E-L's Property Interest In Groundwater.

A. The District's Taking of E-L's Groundwater is a "Taking" of Private Property Within Established Wisconsin Precedent.

The District tries to re-cast its taking as a tort that simply caused incidental damage to E-L's property. In order for the Court to accept the District's argument, it would have to overrule several of its own decisions or distinguish their application to this case.

(1) The Effect of the Government's Action Determines Whether There is a Taking.

The Court in *Zinn* correctly noted that a taking is determined by the effect of a government action, not the government's intent:

> It is well established that 'the constitution measures a taking of property not by what a state says, or by what it intends, but by what it *does*.' *San Diego,* 450 U.S. at 652-53, [citations omitted]. It is the *effect* of the state's action that triggers the Just Compensation Clause, not the intent of the government in taking the action which led to the deprivation of private property rights. If government action has the effect of taking private property for public use, just compensation must be made. Decisions of this court make it clear that the intent of the government has never been the test, rather we look to whether the impact on the property owner was to deprive him or her of substantially all beneficial use of the property or render the land useless for all reasonable purposes.

Zinn at 430 [Emphasis in original.]

The typical condemnation case arises out of a "deliberate, planned decision by government to acquire private property." However, as Judge Sankovitz, the circuit court judge, correctly pointed out: "there are instances in which courts have permitted claims against the government for just compensation even though

neither condemnation nor damages were intended by the government and even though damages might not otherwise be recoverable." R.141:1. The real issue, or "wrinkle" (as Judge Sankovitz called it), is whether "foreseeable but unintended property damage accompanying a taking of private property should be considered a taking." R.141:3.

(2) Wisconsin Precedent Establishes a Taking Claim if the Taking Was Foreseeable.

This Court's precedent allows the recovery of property losses accompanying a taking of private property where there are foreseeable but unintended consequences. In *Dahlman v. City of Milwaukee*, 131 Wis. 427, 110 N.W. 479 (1907); *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 221 N.W. 381 (1928), the government lowered the street grade adjoining Dahlman's property. The work removed a lateral support for Dahlman's property. The government only intended to lower the grade of the street. It did not intend to take the property that was supported by the grade. But, although ***unintended,*** the government's actions resulted in a taking of Dahlman's land. That unintended result was foreseeable. Like the government action in *Dahlman*, the District took E-L's groundwater. The unintended but foreseeable consequence of that taking was the drying out and rotting of E-L's piles and resulting loss in value of E-L's building.

The District makes a weak attempt to distinguish *Dahlman* on the grounds that the taking of E-L's groundwater did not cause removal of lateral support for

E-L's building, and that *Dahlman* dealt with soil, not groundwater. These distinctions are irrelevant. The point is that the consequences of the governmental action in *Dahlman* were readily foreseeable. The evidence in this case is even stronger. The District intentionally took E-L's groundwater knowing full well that the foreseeable consequence would be the rotting of E-L's wood piles and loss in value of E-L's building. The distinction between soil support in *Dahlman* and groundwater support for E-L is a distinction without meaning.

(3) Only Regulatory Takings Require a Showing That A Landowner Has Been Deprived Of Beneficial Use of His Property.

In support of its argument that E-L must show a deprivation of all economic beneficial use of the real property, the District cites a regulatory takings case, *R.W. Docks & Slips v. Wisconsin*, 2001 WI 73, 628 N.W.2d. 781 (Wis. 2001). The standard in regulatory takings cases is different from that in physical taking or occupation cases. In regulatory takings cases, "there is no compensable categorical taking unless the regulatory action in question deprives a property owner of all economically beneficial use of his property." *R.W. Docks* at 3. E-L asserts that the District's taking was a physical, not regulatory, taking, so there is no need for it to prove such deprivation. The District physically took E-L's groundwater and deprived E-L of the use of that groundwater, resulting in the diminished value of E-L's property. *R.W. Docks* is inapplicable.

(4) The District's Attempt to Distinguish *Price* Falls Short.

The District attempts to distinguish *Price*. Brief at 38. In *Price*, the government constructed a dam. The river level behind the dam rose, inundating the soil on Price's farm and destroying its agricultural use. The dam caused water to invade Price's land to Price's damage.

In a similar case, *Wikel v. State Dept. of Transportation*, 2001 WI App 214, 635 N.W. 2d 213, the court allowed a damages claim to proceed as part of an inverse condemnation claim based upon physical occupation of the plaintiff's property. The plaintiff in *Wikel* claimed the state had flooded her property and rendered it "uninhabitable and unsalable." *Wikel* at 629-30.

The District draws the distinction that compensation is allowed if water is forced onto property, resulting in a physical presence, but is not allowed if water is taken from property. This makes no sense. The critical factor in the case is that the construction activities were intentional and the resulting harm was foreseeable. It does not matter that the harm was caused by an invasion of water rather than a depletion of water.

(5) *Wisconsin Power & Light* Is Consistent With *Dahlman* and *Price*.

In *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 87 N.W. 2d 279 (1958)("WPL"), the Court held that the accidental downing of a transmission tower was too accidental to constitute a taking. However, the court suggested that accidental damage, so long as it was not "purely accidental," might

be compensable. *WPL* at 7. *WPL* did not change the holdings of *Dahlman*. Instead, this Court found that the facts in *WPL* were sufficiently different from the facts in *Dahlman* or *Price and* applied a different analysis. The *WPL* opinion noted that a fact for consideredation is whether the government had any "reason to anticipate that damage would result from its acts." *Id.* at 7.

(6) The Application Of Established Law To The Facts Supports a Finding That The District Took E-L's Property.

The court of appeals in this case, relying on *WPL* and applying the jury's findings that all elements of a government taking had occurred, found that the District's taking of E-L's groundwater supported E-L's inverse condemnation claim. A-5-9.

The District claims that it did not "extract" E-L's groundwater – it simply removed groundwater from its own land. Brief at 32. This is disingenuous. It is clear from the record that the District's pumping extracted E-Ls groundwater. The water did not naturally migrate off of the land. The evidence plainly shows that the District intentionally took the groundwater, knowing that the natural and probable outcome of its taking would be a permanent taking of E-L's groundwater, which in turn would adversely affect the value of E-L's property. While the District may have had no direct intent to decrease the value of E-L's building, the evidence shows that such devaluation was the direct, probable and foreseeable result of the District's massive removal of groundwater during construction of the sewer.

The jury's findings were in accord with the opinion of E-L's structural engineer expert witness that the District permanently took the groundwater by (1) de-watering it during construction, (2) constructing a French drain and (3) constructing a leaky sewer. R.184:90-107. The findings were also in accord with the witness' opinion that any geotechnical engineer had to have known that the District's action would result in E-L's land being permanently de-watered. R.184:106-7.

Not only should the District's engineers have known of the de-watering, they actually knew of the massive draw downs because they were monitoring the groundwater throughout construction of the sewer. R.184:24-30. In spite of this knowledge, and knowing that E-L's building was built on wood piles that would rot if dried out, they did nothing. No one alerted E-L to the situation. R.184:107; 184:29-30.

Indeed, the District's contractor, BCI/TCI, pumped water out 24/7. The District's engineers and supervisor oversaw the pumping and recorded it. R.184:23-29, 92-3; R.169:Ex.19. The District benefitted from a dry trench in which to lay the pipe and protect the workers' safety. R.186:68.

The District could have chosen to avoid the taking by directing that a water-tight wall be erected between the sewer and E-L's building. R.184:98. It could have directed that a light concrete slurry be used to prevent the French drain affect. R.184:96-8. It could have directed replacement of the groundwater with

re-charging wells. R.184:98-9. It could have conducted the proper seepage test to determine the leakiness of the sewer. R.184:99-106.

The District chose not to take relatively minor additional costs to avoid taking E-L's groundwater. It made this choice knowing full well that taking E-L's groundwater would cause the piles to dry out and rot. A-165 (Question No. 4). The District's choice left E-L bearing the full cost of replacing the piles. The District benefitted at E-L's expense. After hearing the District's evidence to the contrary, the jury agreed with E-L. A-164 (Question No. 3). The government should not be permitted to take deliberate action, knowing the consequences of the action, and then argue that it did not specifically intend the consequences. Allowing it to do so would shift the burden of financing public works from the general population to individual property owners, which is exactly what the 5th Amendment and Article I, §13 were enacted to prevent. *Dalrymple v. City of Milwaukee*, 53 Wis. 178, 10 N.W. 141 (1881)(holding that eminent domain law is based upon a policy that no one person should disproportionately pay for public works).

B. The District's Taking Violates the Fifth Amendment.

(1) A Physical Taking, No Matter How Minor, Is a *Per Se* Taking.

The Fifth Amendment of the U.S. Constitution guarantees individuals the right to receive just compensation for property taken by the government for public use or benefit. The U. S. Supreme Court has consistently ruled that any

"permanent physical occupation of real property" is a *per se* taking. *Loretto v. Teleprompter Manhattan CATV. Corp.*, 458 U.S. 419, 427 (1982); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); s*ee, also N. Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879)(a physical invasion amounting to an appropriation is required for a *per se* taking to be found); *Sanguinetti v. United States*, 264 U.S. 146, 148 (1924). "The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests." *Loretto*, 458 U.S. at 435.

The U.S. Supreme Court has further concluded that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto* at 432. If the government physically invades and occupies property, thereby infringing upon the owner's fundamental "right to exclude," the government must pay compensation for appropriating a property right. *Kaiser Aetna* at 179-80.

Federal law has established that any physical permanent occupation by the government, no matter how minor or trivial, constitutes a taking for which compensation is due. *Loretto* at 430. In *Loretto*, the defendant cable company installed a cable on Loretto's building in order to provide cable services to the tenants. *Id.* at 422. The Supreme Court held that "permanent occupations . . . are

takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id*.

Likewise, in *Kaiser Aetna,* the Court concluded "even if the Government physically invades only an easement in property, it must nonetheless pay compensation." *Kaiser Aetna* at 180. The Supreme Court regards the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id*. at 176. The Court has consistently held that the government must properly compensate land owners for physical invasions and occupations of property.

The previous cases exemplify how the Supreme Court views a physical invasion as "a government intrusion of an unusually serious character." *Loretto* at 433. Due to the egregious character of a physical invasion, the U.S. Supreme Court has "uniformly found a taking to the extent of the occupation" whenever a physical occupation exists. *Id.* at 434.

(2) The District's Physical Taking of E-L's Groundwater From the Adjacent Property Is a *Per Se* Taking.

In this case, the District argues "that non-invasive government conduct does not result in [a] takings." Brief at 54. Though it was not pumping the water directly from E-L's property, the District's actions physically drained E-L's groundwater. This "non-invasive" act resulted in a direct physical invasion and permanent occupation of the Plaintiff's groundwater. Because this removal is a physical invasion that permanently occupies E-L's property, the District's actions

constitute a *per se* taking of property that requires compensation to be paid under federal law.

The Ohio Supreme Court's *McNamara* decision emphasized that a direct physical invasion of a landowner's property is not required to establish a taking, only government interference with a property right is required. *McNamara* at ¶29. (citing the U.S. Supreme Court's decision in *Dugan v. Rank*, 372 U.S. 609 (1963))(government interference with water rights results in a taking); see *also Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962)(landowner right in airspace above its property is taken where airport-related noise interferes with landowner's right).

These Supreme Court cases support the conclusion that the District's taking of E-L's groundwater violates the 5th Amendment's mandate that private property not be taken for public use without just compensation. The *Loretto* court held that any physical permanent occupation by the government, no matter how minor or trivial, constitutes a taking for which compensation is due. *Loretto* at 430. *McNamara* and cases cited therein held that direct physical invasion is not required for a taking. Federal precedent does not support the District's contention that no taking occurred because it removed the groundwater in E-L's land by pumping on adjacent property.

(3) The District's Violation of the Fifth Amendment Is Also A Violation of the Wisconsin Constitution and Section 32.10 of the Wisconsin Statutes.

The Wisconsin Constitution mirrors the 5th Amendment. Article I, §13, provides that "[t]he property of no person shall be taken for public use without just compensation thereof."

E-L sought compensation under the Wisconsin Constitution and *Wis. Stats.* §32.10 for the taking of its groundwater. Section 32.10 states the following:

> If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, [after the owner has taken certain procedural steps]. . . . The court shall make a finding of whether the defendant is occupying the property of the plaintiff without having the right to do so . . . .

The terms "occupied" and "occupying" are equivalent to "took" and "taking." *See Howell Plaza I* at 723. The synonymous language makes the state remedies under §32.10 and the Wisconsin Constitution parallel to the federal remedy under the 5th Amendment.

If the terms were not synonymous and the remedies not parallel, then E-L would have invoked federal law under 42 U.S.C. §1983 for a violation of its 5th Amendment right applicable to the State by the 14th Amendment. *See Melnick v. City of Menasha,* 200 Wis.2d 737, 743-44, 547 N.W.2d 778 (Ct. App. 1996).

However, since E-L had remedies for the District's taking under Wisconsin law, the parallel federal remedy under 42 U.S.C. §1983 is not available. *See, e.g., SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion Co.,* 235 F.3d 1036 (7th Cir. 2000)(holding that a takings claim does not accrue under

the 5th Amendment, which is applicable to the states by the 14th Amendment, until available state remedies have been tried and proven futile). E-L never "abandoned" its 5th Amendment rights as the District asserts. Brief at 48. Rather, its rights are not yet ripe.

The District's deliberate and permanent taking of E-L's groundwater for a use that benefits the public by pumping groundwater four feet from E-L's property line is a Constitutional taking under both the 5th Amendment of the U.S. Constitution and Article I, §13 of the Wisconsin Constitution. However, E-L's Federal remedies are not available to it. E-L must first be denied compensation for the taking. Presently, E-L's rights only arise under the Wisconsin Constitution and §32.10.

C. A Government Is Required To Pay Just Compensation For a Groundwater Taking, Regardless of The Impact On The Public Fisc.

The District threatens that this Court's recognition of its groundwater removal as a taking "will subject any government entity that designs, constructs or operates a sewer, well, tunnel, or similar project to takings claims of "unlimited duration and scope". Brief at 54. The District anticipates project cost increases and a rise in takings claims which cannot be barred on the basis of sovereign immunity. While a decision in favor of E-L may lead to similar takings claims where the government acted deliberately, knowing the consequences of its action, additional cost to the District does not outweigh a fundamental Constitutional right.

Moreover, the District controls the planning, construction and implementation of its projects. It can anticipate many, if not most, problems. It can take cost-effective measures to prevent groundwater takings. In this case, it anticipated the de-watering but chose to push the burden of the project to E-L. It did not tell E-L about the de-watering. R.184:27-30. This callous indifference to private property rights is troubling. In the end, the public fisc would have been better served by the institution of relatively inexpensive corrective measures.

If the Court, upon review of the record, the briefs and oral arguments, affirms that a taking occurred when the District de-watered E-L's property, then just compensation is due E-L and any other landowner whose rights are similarly taken. This is true regardless of the fact that a decision in favor of E-L might result in increased project costs and/or a rise in groundwater takings claims, as threatened by the District.

D. Property Rights Are Constitutionally Protected.

The District asserts that state laws, including those requiring Wisconsin Department of Revenue ("DNR") review and approval of its construction plans, adequately protect private landowners' rights in groundwater. It does not specify how. The sole purpose of Federal and State takings clauses is to ensure that the government compensates private landowners when it takes their property for a public use. Implicit in the adoption of the takings clauses was the recognition that governments, in their legitimate advancement of the public interest, often infringe on the property rights of private property owners. The takings provisions ensure

that private property owners are not at the State's mercy in these cases; their property rights are constitutionally protected.

E. Government Entities Are Able To Anticipate Takings Payments In Determining Project Costs.

According to the District, the Court's affirmation of E-L's groundwater taking claim will open the floodgates. It argues that "properties potentially affected by groundwater level changes might later be the subject of costly takings litigation, the limits to what those projects may one day cost will be unknowable." Brief at 55-6.

As discussed above, the District could have avoided costly litigation in this case (and possibly others) by taking certain simple, inexpensive measures to address de-watering. Moreover, government entities have always been required to factor takings payments into the cost of projects where private property is taken. The argument that project costs will be too difficult to anticipate, creating uncertainty, was rejected by the Supreme Court in *Dugan*, where the Court found no uncertainty in valuing riparian rights. *Dugan* at 623.

3. Section 32.10 Applies to the District's Taking of E-L's Groundwater.

A. The Lower Courts Properly Applied §32.10.

The District argues that its taking of E-L's groundwater was not within *Wis. Stats.* §32.10 because the District did not physically enter onto E-L's property, but rather took the groundwater by pumping it out from the adjacent property.

The District cites *Zinn v. State,* 112 Wis. 2d 417, 334 N.W.2d 67 (1983) in support of its argument that §32.10 applies only to what it calls "traditional invasion takings." Brief at 62.

In *Zinn,* the DNR ruled that the legal high water mark of Zinn's lake was higher than the actual water level. The effect of the ruling was to make the lake itself, "on paper", considerably bigger, and the legal boundary of Zinn's property smaller. The ruling affected a taking of the Zinn property because the regulatory ruling rendered the property unavailable for private use and enjoyment, and because the State asserted title under the public trust doctrine to the actual property involved. *Id.* at 421. Soon thereafter, the DNR reversed its ruling. *Id.* at 422. Zinn then sued for just compensation for the temporary taking directly under Article 1, §13 of the Wisconsin Constitution. *Id.*

This Court allowed the claim and analyzed the applicability of §32.10 to Zinn's taking claim. This Court stated:

> *Sec. 32.10, Stats.*, allows a landowner, who believes that his or her property has been taken by the government without instituting formal condemnation proceedings, to commence an action to recover just compensation for the taking. This remedy is based on Art. I, sec. 13 of the Wisconsin Constitution, *Howell Plaza*, 66 Wis.2d at 723, 226 N.W.2d 185 (1975), and is the legislative direction as to how the mandate of the just compensation clause is to be fulfilled.

Zinn at 432-33.

The Court found that §32.10 did not apply because it is designed to address circumstances where there is a permanent taking of property; that is, where, "the

government has occupied private property, plans to continue such occupation and the landowner is merely requesting just payment for this land." *Zinn* at 433-4.

The District argues that *Zinn* precludes the use of §32.10 (in circumstances such as those here) because it ruled that there was no "occupation" that resulted from DNR's order. From this, the District argues that because *Zinn* found no "occupation" due to DNR's actions, neither is there an "occupation" due to the District's actual taking of E-L's groundwater.

This analysis misreads and misapplies *Zinn* and §32.10. *Zinn* does not address the scope of occupation. Rather, its ruling that §32.10 was inapplicable was based on the ***temporary*** nature of the government's occupation, not that there was not an occupation (or taking).

Further, the plain language of §32.10 shows it is designed to cover takings of property or interests in property:

> If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. The petition shall describe the land, state the person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted. ***A copy of the petition shall be served upon the person who has occupied petitioner's land, or interest in land.*** The petition shall be filed in the office of the clerk of the circuit court and thereupon the matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the occupying person as defendant.

Wis. Stats. §32.10 [Emphasis added.]

As described below, §32.10 and indeed the entirety of Chapter 32 applies to interests in land:

> (2) "Property" includes estates in lands, fixtures and personal property directly connected with lands.

The precedent that addresses §32.10 supports the findings of the trial court and court of appeals that the District's taking of E-L's groundwater was an occupation within the meaning of §32.10.

Reel Enterprises v. City of La Crosse, 146 Wis. 2d 662, 431 N.W.2d 743 (Ct. App. 1988), addressed the standard for finding that a government regulation amounts to a "regulatory taking" of private property. The court explained the rule in the context of a claim by plaintiffs that their property had been "***occupied*** and taken." *Id.* at 670-71[Emphasis added.] The claim was based on the loss of value due to a restrictive flood plain ordinance limiting use and development of portions of plaintiff's property. *Id.* at 669. The court's analysis is pertinent:

> However, a taking may result from official activities not involving outright seizure or physical invasion. Restrictive regulation, whether by the state, a county or municipality, may constitute a "regulatory taking" . . . .

Id. at 671-2.

With that as a basis, the court discussed the framework of takings law:

> In the absence of its physical occupancy or possession, private property can be taken for public use only by state, county or municipal action which imposes a legally enforceable restriction on the use of the property. If a legally enforceable restriction is imposed on that use, then a taking occurs only if the restriction deprives the owner of all, or practically all, of the use. ***If a regulatory taking has occurred, an action lies for inverse condemnation under sec. 32.10, Stats.***, or for compensation under Wis. Const. art. I, sec. 13, whether the taking is ***permanent or temporary.***

Id. at 674-5 [Emphasis added.]

Under this language, the court recognized that regulatory takings can occur, and indeed almost always occur, in the context of an inverse condemnation by the

public authority. In addition, by holding that such a non-physical invasion type taking is properly pursued under §32.10, the court necessarily acknowledged that the term "occupy" within §32.10 must be read to encompass a broader range of "takings" than those that result only from permanent physical occupation of the actual real property involved.

Reel Enterprises imposed a relatively higher standard on private property owners in making claims for so-called regulatory takings, and ultimately determined that no taking had been alleged. *Id.* at 672. *Reel Enterprises* has been overruled in part by the Supreme Court's decision in *Eberle v. Dane County Board of Adjustment*, 227 Wis. 2d 609, ¶37 (1999). While this may seem problematic, the rulings in *Eberle* actually affirm and support the underlying holding of *Reel Enterprises* with respect to the applicability of §32.10 to regulatory, and more generally, all permanent takings, whether based on express "occupation," "invasion" or an actual taking or appropriation of property. Significantly, *Eberle* did ***not*** alter the *Reel Enterprises* holding that §32.10 applies to "non-occupation" regulatory takings. *Eberle* reversed *Reel Enterprises'* more restrictive standard for when a regulatory taking has occurred, and in so doing is an expansion of private property rights in the context of inverse condemnation claims.

Eberle also confirmed that permanent takings, whether occurring through actual occupation, invasion, and actual taking or appropriation or through a regulatory non-occupation government action, are controlled by §32.10. *Id.* at 635, n.27.

The nature of the taking in *Eberle* was temporary, and the court's holding therefore only directly addresses and upholds the claim for a ***temporary*** regulatory taking directly under Article I, §13, of the Wisconsin Constitution. However, in its analysis the court explained that if a regulatory taking is ***permanent***, it is properly pursued under §32.10. *Id.* at ¶47.

The Court also noted:

> It should be noted that in concluding that the plaintiffs' regulatory taking claim was not ripe in *Hoepker*. . . we reasoned, in part, that "the legislature has established a procedure for inverse condemnation through which an individual may seek compensation for a regulatory taking. *See Wis. Stats.* 32.10. The [plaintiffs] have not utilized this procedure." . . . In light of references in the opinion to a "temporary regulatory taking," this language may appear to suggest that §32.10 provides a remedy for a temporary taking.
>
> In *Hoepker*, however, it was not clear whether the plaintiffs' unripe regulatory taking claim would involve a temporary or permanent taking; under the applicable ordinance, the plaintiffs potentially could have been required to reserve land permanently or for only a five-year period. …. ***The discussion in Hoepker regarding §32.10 was intended to address solely the potential permanent regulatory taking claim, which was the primary focus of the parties' arguments***. Accordingly, *Hoepker* should not be construed as supporting in any way the position that temporary takings can be remedied through §32.10.

Eberle, 227 Wis. 2d at 639, n.30 [Emphasis added.]

Both *Reel Enterprises* and *Eberle* were decided after this Court's decision in *Zinn*, which established that temporary takings may be pursued directly under Article I, §13 of the State Constitution. *Zinn* at 435-37. As described above, *Zinn* expanded takings law to allow for claims of temporary takings directly under the Wisconsin Constitution. *Id.* at 435. In so doing, the court concluded that ***temporary*** takings are not covered by §32.10. *Id.* But as the more recent

decisions make clear, *Zinn* cannot be read to cabin off §32.10's coverage to only "actual occupation" takings. The ***temporary*** nature of the taking in *Zinn* is what precluded action under §32.10 (and required direct action under the Wisconsin Constitution), not the lack of an occupation of the property. *Id.* at 433-5.

Eberle is also consistent with earlier decisions of this Court holding that actual physical occupation is not a required for private property owners to invoke the protections of §32.10. In *Howell Plaza I*, the State Highway Commission had plans for a highway but had not yet physically occupied the necessary private property when the plaintiff filed his claim under §32.10. *Id.* at 724. The Commission defended on the basis that because there was no physical "occupation" there could be no claim under §32.10. The Court rejected this understanding:

> We conclude that ***there need not be an actual physical occupation or possession by the condemning authority.*** We hold that, to state a cause of action in the absence of actual possession or occupation, an allegation for inverse condemnation under §32.10, Stats., will be sufficient only if the facts alleged show that the property owner has been deprived of all or practically all of the beneficial use of his property or any part thereof.

Id. at 730. [Internal citations omitted; emphasis added.]

Although the *Howell Plaza I* court did not find that a regulatory taking had occurred under the facts of that case, the court acknowledged that such claims, while not involving actual physical occupancy, are properly addressed by actions under §32.10. *Id.*

The District ignores post-*Zinn* decisions in *Reel* and *Eberle* and instead cites a subsequent decision *Howell Plaza, Inc. v. State Highway Commission*, 92

Wis. 2d 74, 88, 284 N.W.2d 887(1979)(*Howell Plaza II*) as support for its position that §32.10 only applies to regulatory takings. Brief at 23. However, its quote from the case ignores the applicable broader context. In *Howell Plaza II*, the court surveyed the law in the area. In using the description "physical invasion," quoted by the District, the court further explained the parameters of occupation. It approvingly quoted *City of Buffalo v. J. W. Clement Co., Inc.*, 321 N.Y. S.2d 345, 357 (1971):

> . . . it is clear that a *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a *legal interference* with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property.

Howell Plaza at 88 [Emphasis in original.]

Here, the District took E-L's groundwater and interfered with E-L's use of it and its property. The District takes the quoted language out of context. In context, *Howell Plaza II* includes a broader definition of "occupy" than the District claims and reaffirms *Howell Plaza I's* ruling that "an actual physical occupation by the condemning authority, is not the only test of a 'taking'". *Howell Plaza II*, 92 Wis. 2d at 87, quoting *Howell Plaza I.*

Other decisions of this Court also instruct that §32.10 is applicable to takings of property interests, whether directly or as a result of passage of an ordinance or statute (i.e. a regulatory taking). In *Maxey v. Redevelopment Authority of City of Racine*, 94 Wis.2d 375, 288 N.W.2d 794 (1980), a lessee of a theater space within a building that the city redevelopment authority wanted to

condemn by eminent domain brought an action under §32.10. *Id.* at 386. The court determined that the action under §32.10 was valid and not barred by the City's action for inverse condemnation. However, the Court explained that the leasehold interest for which Maxey was seeking compensation was property for purposes of the State Constitution's takings clause, as well as for purposes of §32,10:

> The trial court correctly held that Maxey qualified as an owner of property as that term is used in sec. 32.10, Stats. It is also a jurisdictional prerequisite to the bringing of an inverse condemnation that the property prior to the commencement of the action "has been occupied by a body possessing the power of condemnation."

Id. at 388.

Further, the Court's discussion shows that it was considering the property right inherent within the lease allowing Maxey to operate the theater and the denial of a license to do so that was the subject matter of the inverse condemnation:

> In the instant case the trial court found that the City of Racine and the Redevelopment Authority were to be considered as alter egos in respect to the condemnation of the Baker Block Building. This ruling is not questioned on this appeal. It is therefore apparent that the City's refusal to relicense the theater because of the projected urban renewal project constituted a legal restraint by the condemning authority on Maxey's use of the property. Under the rationale of Howell Plaza I and Howell Plaza II, there was a taking on August 20, 1974.

Id. at 388.

The lower courts in this matter followed established precedent in construing the word, "occupy," and more generally concluding that §32.10 applies to implied or in effect takings whether they be regulatory or otherwise. Their conclusions are not error. This Court should affirm these rulings.

B. Judge Sankovitz Appropriately Ruled That E-L Was Entitled to Litigation Expenses Under §32.28(3)(c).

Whether E-L is entitled to its litigation expenses pursuant to §32.28(3)(c) for proving that the District took its property hinges on whether E-L has a claim under §32.10. For reasons discussed above, E-L has such a claim and Judge Sankovitz properly allowed it after the trial.

Having proven its case under §32.10, Judge Sankovitz properly awarded litigation expenses pursuant to §32.28(3)(c).

The District does not contest the reasonableness of those expenses. Additionally, if E-L is successful on this appeal, this Court should award E-L its costs on appeal pursuant to § 32.28(3)(c). *See Radford v. J.J.B. Enterprises, Ltd.*, 163 Wis. 2d 534, 551, 472 N.W.2d 790 (Ct. App. 1991)(interpreting fee shifting provision under *Wis. Stat.* §100.18 to apply to litigation costs incurred on appeal).

CONCLUSION

Wisconsin precedent dating back more than a hundred years holds that a property owner has an interest in its groundwater. The District asks this Court to reverse this long-recognized property right. The State and Federal Constitutions, this Court and the U.S. Supreme Court consistently hold that a physical taking of property, here E-L's groundwater, violates both Constitutions. The District asks this Court to ignore this precedent. This Court's precedent holds that "occupation" under §32.10 is broadly construed to include government regulatory

actions that are not physical occupation, but constructive occupation. The District asks this Court to ignore this Court's established interpretation of "occupation."

This Court should follow well-established law and refuse the District's request to reverse established precedent. This Court should affirm the decisions of the trial court and the court of appeals.

Respectfully submitted this 17th day of July, 2009.

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Section 809.19(7)(d) Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,457 words.

/s/ Susan A. Cerbins
Susan A. Cerbins

Section 809.19(12) Certification

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

/s/ Susan A. Cerbins
Susan A. Cerbins