STATE OF WISCONSIN
SUPREME COURT
No. 2008AP921

E-L ENTERPRISES, INC.,

Plaintiff-Respondent,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I
Appeal From the Circuit Court for Milwaukee County,
Honorable Richard J. Sankovitz, Presiding
Milwaukee County Circuit Court Case No. 04-CV-00505

REPLY BRIEF OF PETITIONER MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

FOLEY & LARDNER LLP
G. Michael Halfenger (WBN 1024062)
William J. Katt, Jr. (WBN 1066365)
777 E. Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT
Michael J. McCabe (WBN 1011060)
James H. Petersen (WBN 1014389)
260 W. Seeboth Street
Milwaukee, Wisconsin 53204
(414) 225-2102

Attorneys for Petitioner Milwaukee Metropolitan Sewerage District

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INTRODUCTION

EL accuses the District of "re-cast[ing] E-L's takings claim in tort [to] obscure[] the real issue: whether a taking occurred without just compensation." EL-Br. 9. But EL's brief makes clear the tort nature of its claim, arguing that the District "should . . . have known" of dewatering (*id.* at 24), should have "foreseen" the harm (*id.* at 20–22), and could have avoided the harm through "simple, relatively inexpensive measures" (*id.* at 1, *see also id.* at 24–25, 30). In reality, EL's tort claim was re-cast as a "taking" to avoid statutory immunity, as EL's counsel's website candidly explains, "[t]o avoid government immunity issues, the firm successfully argued that MMSD had taken E-L's groundwater property rights without due process of law." Kerkman & Dunn, Summary of Significant Cases, *at* http://www.kerklaw.com/significant.html (last visited July 29, 2009).[1]

But the tort nature of EL's claim makes inescapable the well-established principle of Wisconsin law that consequential damages

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[1] A printout of the webpage is attached to this brief's addendum.

committed by a governmental entity—the very relief EL seeks here—are not recoverable as a "taking." *See* MMSD-Br. 17–24. Lacking an answer to these authorities, EL simply ignores them.

Instead, EL asks this Court to constitutionalize its tort claim by adopting one of two proposed characterizations—either (1) that the District's removal of groundwater on its own land amounts to a physical taking of "EL's groundwater," or (2) that the District's removal of groundwater was a physical occupation of EL's "right to use" groundwater. Neither characterization finds support in Wisconsin law.

Wisconsin law does not bestow exclusive rights in particular amounts of groundwater, as EL correctly concedes. And the District cannot be said to have occupied a "right to use" groundwater—if there is such a right, it is shared by all overlying landowners, including the District. What is more, any interference with EL's right to use groundwater could not amount to a taking because EL was not deprived of all economically beneficial or productive uses of its property.

ARGUMENT

I. Fundamental Takings Principles Foreclose EL's Claim.

Takings occur only when a governmental entity either (1) physically invades or otherwise permanently interferes with a person's exclusive ownership rights, or (2) deprives the person of "all economically beneficial or productive use of land."[2] *See R.W. Docks & Slips v. State*, 2001 WI 73, ¶15, 244 Wis. 2d 497, 628 N.W.2d 781. Contrary to EL's contention, these categories apply to both government conduct and regulations that interfere with private property rights. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that statute requiring access to building by private cable company was physical taking).

Which category applies depends on the nature of the government interference. Interference with an exclusive right to occupy or possess property defines the narrow category

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[2] EL has not made, and could not make, a takings claim based on the ad hoc factual inquiry described in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See* MMSD-Br. 42–43. EL also concedes that it raises no Fifth Amendment takings claim in this action.

of physical, per se takings, because interference with "rights to possess, use and dispose of [property]," as *Loretto* explains, "is . . . the most serious form of invasion of an owner's property interests. *Id.* at 435. When the government invades private property or otherwise interferes with this exclusive right of possession, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id*.

Other government conduct, including both regulations limiting how property may be used and "government action outside the owner's property that causes consequential damages within," *Loretto*, 458 U.S. at 428, are not per se takings. To establish a taking of this type, the property owner must demonstrate that the government's conduct deprives the owner of "all economically beneficial or productive use of land." *See, e.g.*, *R.W. Docks*, 244 Wis. 2d at 507, ¶15; *Wis. Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 87 N.W.2d 279 (1958) (discussing incidental destruction of property); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537–38 (2005) (dis-

cussing regulatory takings principles); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) (government reduction of river highwater level not a taking).

The requirement that one show deprivation of all economically beneficial or productive use of the land is based on the recognition that only non-invasive "actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain" can constitute a taking. *Lingle*, 544 U.S. at 539. Conversely, non-invasive action that causes only incidental impairment of the property's value is *not* a taking. *See Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 89, 284 N.W.2d 887 (1979).

In deciding whether non-invasive government conduct deprives an owner of all economically beneficial or productive use of her property, "this Court focuses . . . on the nature and extent of the interference with rights in the parcel *as a whole*." *See R.W. Docks*, 244 Wis. 2d at 513, ¶25 (quoting *Penn Cent.*, 438 U.S. at 130–31 (emphasis added)).

II. The District Did Not Invade or Occupy EL's Property.

A. The District Removed Groundwater on Its Own Property.

EL casts its takings claim solely as a physical taking, yet concedes that the District never entered its land. EL-Br. 21. It bases its claim on the District removing groundwater from beneath the District's property—not EL's. *See, e.g.*, *id.* at 30. This properly ends EL's physical taking claim: EL does not allege the necessary interference with an exclusive right of possession or occupation of its property. *Cf. W.H. Pugh Coal Co. v. State*, 157 Wis. 2d 620, 629, 460 N.W.2d 787 (Ct. App. 1990).

EL attempts to construct a "physical" taking by arguing that the District caused a "permanent taking of *E-L's* groundwater." EL-Br. 30 (emphasis added); *see also id.* at 21. But that misconstrues Wisconsin law. Groundwater can, and does, reside under and move freely beneath many parcels, each of which may have a different owner. All landowners have a "right" to use groundwater, subject to state regulation, and that right is

constrained only by the nuisance-law principle that the use cannot be both unreasonable and injurious to neighboring users. *See State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 302–03, 217 N.W.2d 339 (1974).

That the District's removal of groundwater was unreasonable does not mean that the District used *EL's* groundwater—neither EL nor the District own the groundwater in the ground. It means only that the District's removal might have been a nuisance. *Id.*

And EL does not complain of losing all access to groundwater. It instead claims the District decreased the amount of groundwater, thereby causing damage to its building. *Id.*

While this negative economic effect might state a nuisance claim, as described in *Michels*, it does not state a claim for a per se taking by physical invasion or occupation. The District's groundwater removal did not interfere with EL's possession of its building or any other exclusive property right. Absent interference with an exclusive property right, there can be no physical taking. *See R.W. Docks*, 244 Wis. 2d at 508, ¶18.

B. A "Right to Use" Groundwater Cannot Support EL's Takings Claim.

EL alternatively argues that its taking claim is based on a "right to use" groundwater. This right to *use* groundwater cannot be an exclusive right—all neighboring landowners enjoy the same right, and, as EL acknowledges, the state also "has an interest" (EL-Br. 15) in the groundwater. Thus, a "right to use" groundwater is at most one among several non-exclusive sticks of property rights. And government regulation or interference with the exercise of that claimed right is not, therefore, a per se taking. *R.W. Docks*, 244 Wis. 2d at 508, ¶18; *Loretto*, 458 U.S. at 435.

Michels limits property owners' right to use groundwater by imposing a nuisance tort duty. *See Michels*, 63 Wis. 2d at 297. This tort duty—which EL seeks to transform into a "right" in support of its takings claim—is not actionable as a taking. *See Hoene v. City of Milwaukee*, 17 Wis. 2d 209, 116 N.W.2d 112 (1962) (damage from government conduct constituting nuisance not a taking).

In addition, *Michels* cannot be read to create an affirmative property right in a par-

ticular level of groundwater. To the contrary, it expressly rejected the "rule of correlative rights" under which "the rights of all landowners over a common basin . . . are coequal or correlative, and one cannot extract more than his share . . . where others' rights are injured thereby." 63 Wis. 2d at 299. By instead imposing a nuisance duty, the Court "preserve[d] the basic expression of a rule of nonliability—a privilege if you will—to use groundwater beneath the land." *Id.*

Subject to *Michels*' nuisance duty, all overlying landowners have a right to use groundwater, which EL casts as "akin to a riparian right." EL-Br. 16. Regardless, because the right to use groundwater is not exclusive, it is not "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto*, 458 U.S. at 433. Consequently, government interference with this right could only amount to a taking if the interference deprived an owner of "all economically beneficial or productive use[] of land." *R.W. Docks*, 244 Wis. 2d at 507, ¶15. EL, which continued

to rent its building, cannot make that showing.

EL places misplaced reliance on *McNamara v. City of Rittman*, 838 N.E.2d 640 (Ohio 2005), to support its per se takings claim. While *McNamara*'s facts are similar, the certified question presented to the Ohio Supreme Court was materially narrower: "Does an Ohio homeowner have a property interest in so much of the groundwater located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?" *Id.* at 643. The court expressly did not go beyond this question to decide whether there was a taking: "Whether there were takings in these two cases is not for us to decide."[3] *Id*.

Based on an earlier Ohio decision adopting the "reasonable use" provision of RESTATEMENT (SECOND) OF TORTS §858 (1979), *McNamara* held that reasonable use

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[3] Whether the conduct at issue in *McNamara* constituted a taking under the U.S. Constitution (which differs materially from the Ohio Constitution, (*see* MMSD-Br. 43 n.4)), was never resolved, because the Sixth Circuit ultimately ruled that the claim was time-barred. *See McNamara v. City of Rittman*, 473 F.3d 633, 638–39 (6th Cir. 2007).

of groundwater was a right enjoyed by landowners. 838 N.E.2d at 644–45. But the RESTATEMENT section on which *McNamara* relies includes a correlative rights component that was absent from the draft RESTATEMENT language adopted by this Court in *Michels*. *Contrast id.* at 644 (noting Ohio's adoption of correlative rights principle that "the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water"), with *Michels*, 63 Wis. 2d at 299 (rejecting "rule of correlative rights").

Wisconsin, unlike Ohio, does not bestow on each landowner the right to a particular "share" of a "total store of groundwater." Rather than imposing liability for dispossessing a neighbor of her particular groundwater "share," Wisconsin simply makes one who injures others by using an excessive amount of groundwater liable in nuisance for the injury. *Michels*, 63 Wis. 2d at 299.

Furthermore, *McNamara* states that, under Ohio law, "the right to *withdraw ground water* . . . is one of the fundamental attributes of property ownership and an es-

sential stick in the bundle of rights that is part of title to property." 838 N.E.2d at 635 (emphasis added). But, under Wisconsin (and federal) law, the effect on one "stick in the bundle" of property rights—rather than the effect on the property as a whole—is not what matters for takings purposes. *R.W. Docks*, 244 Wis. 2d at 513, ¶25.

What EL argues for here—subdividing the property into component rights and asking whether government conduct affected the right to use one segment—has been rejected by this Court and by the U.S. Supreme Court as a proper method for determining whether a taking occurred: "'[A] claimant's parcel of property [cannot] first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable.'" *R.W. Docks*, 244 Wis. 2d at 514, ¶26 (quoting *Concrete Pipe & Prods of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 642–44 (1993)). Because the District's conduct interfered (at most) with only a por-

tion of EL's property, EL cannot recover in takings.[4]

III. Foreseeability of Injury Does Not Preserve EL's Takings Claim.

EL also argues that a physical taking occurred here because the District's pumping of groundwater had the "unintended but foreseeable consequence" of "drying out and rotting . . . EL's piles . . . resulting [in a] loss in value of EL's building." *Id.* This misunderstands takings law, as EL's statement that "a taking is determined by the effect of a government action, not the government's intent" (EL-Br. 19) demonstrates.

Although foreseeability may be relevant to whether property has been taken *for public use*, *see Wisconsin Power*, 3 Wis. 2d at 7, foreseeability is *irrelevant* to whether government conduct constitutes a taking. What matters is the *effect* of government conduct:

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[4] That government interference with a single, non-exclusive property right does not equate to a taking defeats EL's reliance on *Dugan v. Rank*, 372 U.S. 609 (1963), which pre-dates that principle's adoption. *Griggs v. Allegheny County*, 369 U.S. 84 (1962), which EL also cites, is inapposite. There, the government's operation of an airport resulted in a taking because it rendered the plaintiff's property wholly uninhabitable. *Id.* at 87.

> [i]t 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*. 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.

Zinn v. State, 112 Wis. 2d 417, 430, 334 N.W.2d 67 (1983) (citations omitted).

Nor is EL's foreseeability argument well supported by the authorities on which it relies. In *Dahlman v. City of Milwaukee*, 131 Wis. 427, 438, 111 N.W. 675 (1907), the taking consisted of conduct that had the *effect* of seizing an actual physical portion of land. EL's conclusory statement that "[t]he distinction between soil support in *Dahlman* and groundwater support for E-L is a distinction without meaning" (EL-Br. 21) ignores the fact that owners enjoy exclusive possession rights in land, but not in groundwater. *See supra* Part I.

Similarly, in *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 221 N.W. 381 (1928), the plaintiff was permanently de-

prived of his exclusive right of possession when a corporation with condemnation authority flooded his property. *Id.* at 26–27; *see also Wikel v. State Dep't of Transp.*, 2001 WI App 214, ¶¶13–14, 247 Wis. 2d 626, 635 N.W.2d 213 (government-caused flooding damage allegedly rendered home uninhabitable). In *Zinn*, the takings claim was explicitly based on the fact that the state had taken actual title to part of plaintiff's property. 112 Wis. 2d at 422. And, in *Pugh*, the county occupied the property to the plaintiff's exclusion. 157 Wis. 2d at 627.

Nothing similar occurred here. EL remained in complete possession of its property and made beneficial use of it. While the jury found that the District's groundwater removal damaged EL's property, that economic interference with EL's property is not, as a matter of law, a physical taking. *See supra* Part I. EL's attempt to direct the Court's focus to the District's "intent" and "foreseeable consequences" only underscores that its claim is really one for nuisance.

IV. EL's Tort Allegations Are Not Actionable as Inverse Condemnation.

Section 32.10 "protect[s] property owners against the slothful actions of a condemnor which, having constructively taken an owner's property, is in no hurry to compensate the owner." *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 393, 288 N.W.2d 794 (1980). It requires the court "to make a finding of whether the defendant is *occupying* property of the plaintiff without having the right to do so." Wis. Stat. §32.10 (emphasis added).

No §32.10 claim is available. The District never occupied EL's property, and EL does not—and cannot—argue that a traditional exercise of eminent domain supports its takings claim. *See Zinn*, 112 Wis. 2d at 433.

The authorities on which EL relies support the District. In *Wikel*, a §32.10 claim was allowed to proceed on plaintiff's allegation that the government's actions rendered her home "uninhabitable and unsaleable." *Wikel*, 247 Wis. 2d at 635, ¶17. And the claim in *Maxey* depended on the fact that the gov-

ernment's denial of a theater license "deprived Maxey of a substantial portion of the beneficial use of his leasehold interest." *Maxey*, 94 Wis. 2d at 390. EL's inability to show a similar actual or constructive occupation dooms its §32.10 claim. *See Howell Plaza*, 92 Wis. 2d 74.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand for entry of judgment in favor of the District.

Dated this 31st day of July, 2009

G. Michael Halfenger
(WBN1024062)
William J. Katt, Jr.
(WBN1066365)
FOLEY & LARDNER, LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
(414) 271-2400

Michael J. McCabe
(WBN1011060)
James H. Petersen
(WBN1014389)
MILWAUKEE METROPOLI-
TAN
SEWERAGE DISTRICT
260 W. Seeboth Street
Milwaukee, WI 53204
(414) 225-2102

Attorneys for Petitioner
Milwaukee Metropolitan
Sewerage District

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,916 words.

Dated this 31st day of July, 2009.

_____

G. Michael Halfenger
WBN 1024062

CERTIFICATE OF MAILING

I certify that this Reply Brief of Petitioner Milwaukee Metropolitan Sewerage District was deposited in the United States mail for delivery to the Clerk of the Supreme Court of Wisconsin by first-class or priority mail, or other class of mail that is at least as expeditious, on July 31, 2009. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 31st day of July, 2009.

_____

G. Michael Halfenger
WBN 1024062
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
414-271-2400
414-297-4900 Facsimile

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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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.

Dated this 31st day of July, 2009.

G. Michael Halfenger
WBN 1024062
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
414-271-2400
414-297-4900 Facsimile

ADDENDUM