SUPREME COURT
STATE OF WISCONSIN
Appeal No. 2008AP921

E-L ENTERPRISES, INC.,

Plaintiff-Respondent,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Appellant- Petitioner.

LEAGUE OF WISCONSIN MUNICIPALITIES AMICUS BRIEF

On review of a decision of the Court of Appeals, District I
Appeal from the Circuit Court of Milwaukee County,
Circuit Court Case No. 01-CV-001403
The Honorable Richard J. Sankovitz, Presiding.

LEAGUE OF WISCONSIN MUNICIPALITIES
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INTRODUCTION

E-L-Enterprises, Inc. (E-L) suffered damage to a building and claims the Metropolitan Sewerage District (District) caused the damage when the District's contractor pumped groundwater from District property, which adjoined E-L's. E-L asserts ownership of the groundwater that flowed from underneath its land to the District's and claims the District seized this groundwater without just compensation contrary to article I, section 13 of the Wisconsin Constitution. The District denies these claims.

For the first time, the Court will consider whether groundwater that has not been extracted, uncaptured groundwater, is owned by an overlying landowner. The vast majority of Wisconsin cities and villages use groundwater as the source of water for their citizens and businesses. Consequently, cities and villages across the state have regulatory systems in place that control access to groundwater in their jurisdictions to protect and conserve this vital natural resource. The potential impacts on municipal access to and control of groundwater from private ownership of the resource are

substantial and this case is important to the League's 579 member municipalities.

ARGUMENT

I. THE FITH AMENDMENT TAKINGS CLAUSE IS INAPPLICABLE.

Article I, section 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." The United States Constitution provides a similar restraint on government power, stating "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The record shows that E-L's takings claims are not based on the Fifth Amendment and neither lower court applied it. Therefore, the United States Constitution's provisions regarding takings of property are not directly applicable. Nontheless, Fifth Amendment takings principles inform application of article I, section 13. *See e.g.*, *Zealy v. City of Waukesha,* 201 Wis.2d 365, 372, 548 N.W.2d 528 (1996). Those principles are applicable to the extent they enlighten analysis of article I section 13 in this case.

II. UNCAPTURED GROUNDWATER IS NOT PRIVATE PROPERTY SUBJECT TO ARTICLE I, SECTION 13.

A. Groundwater Rights Are Usufructuary Not Possessory.

The first step in takings analysis is to determine whether a protected property right exists. *Noranda Exploration, Inc. v. Ostrom*, 113 Wis 2d 612, 624-25, 335 N.W.2d 596 (1983). Whether a property right exists in Wisconsin is entirely a question of Wisconsin law. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001, 104 S.Ct 2862 (1984) ("'[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' ") (citations omitted).

But, the property right inquiry requires more than finding "a property right" because the government is not required to pay just compensation for every kind of injury to a private property interest. *See Omnia Commercial Company v. U. S.*, 261 U.S. 502, 508-510 (1923). Thus, identifying "the nature and extent of the private property interest at stake" is a critical step in takings analysis. *See*

R.W. Docks and Slips v. State, 244 Wis. 2d 497, ¶ 18, 628 N.W.2d 781 (2001).

E-L argues that it and the state hold a simultaneous "property or ownership right (akin to a riparian right) in groundwater." Resp. Br. 16. E-L claims the District caused a "permanent taking of *E-L's groundwater*." Resp. Br. 30 (emphasis added).

The trial court agreed that E-L *owned* the *groundwater*. It repeatedly characterized the groundwater to the jury as "E-L's groundwater," indicating ownership, and instructed the jury that "[g]roundwater is considered property of the person who owns the land under which it flows." A-160.

To be clear, this case is about ownership of *uncaptured* groundwater. The groundwater E-L claims ownership of and the trial court deemed E-L owned, freely flowed from E-L's land to the District's as the District pumped groundwater from its land. Groundwater that flows in this manner is plainly uncaptured.

Defending its claim, E-L contends "[t]he distinction between ownership of groundwater or a right to use the groundwater is a distinction without a meaning." Resp. Br. 18. This is incorrect.

Water rights are considered "usufructuary" in nature. A usufruct or *usus fructus* right is defined as: "The temporary right of using a thing, without having the ultimate property, or full dominion, of the substance." *Black's Law Dictionary*, 1385 (5th ed. 1979).

The California Supreme Court described the concept 156 years ago: "The right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use . . . The right is not in the *corpus* of the water, and only continues with its possession." *Eddy v. Simpson*, 3 Cal 249, 252 (1853) (emphasis in original). The usufructuary nature of water rights is part of Wisconsin riparian law. *Munninghoff v. Wisconsin Conservation Com'n*, 255 Wis. 252, 259, 38 N.W.2d 712 (1949) ("The owner of submerged soil of a running stream *does not own the running water*. . .")(emphasis added).

Groundwater rights are also usufructuary, that is, they are rights to use, not own, uncaptured groundwater. *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 82, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982)(holding "there is no right of ownership of groundwater in Arizona prior to its capture and

withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water."); *Village of Tequesta v. Jupiter Inlet Co.*, 371 So.2d 663, 668 (Fla. 1979) ("The right to use water does not carry with it ownership of the water lying underneath the land."), *cert. denied* 444 U.S. 965 (1979); *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962) ("the right of the plaintiff to groundwater underlying his land is to the usufruct of the water and not to the water itself."); and *Katz v. Walkinshaw*, 141 Cal. 116 (Ca. 1903); *see McNamara v. Rittman*, 107 Ohio St.3d 243, ¶28 , 838 N.E.2d 640 (2005) and *Chance v. BP Chems., Inc.*, 670 N.E.2d 985 (Ohio 1996) (property owners do not enjoy ownership of waters of state below their properties); *see also Pratt v. State Dept. of Natural Resources*, 309 N.W2d 767, 772 (Minn. 1981). The usufructuary nature of groundwater rights makes the distinction between groundwater ownership and groundwater use not just meaningful, but critical in a takings case. The usufructuary nature of groundwater rights completely disallows any claim or instruction that ownership of uncaptured groundwater is a property right.

B. Wisconsin Common Law Does Not Recognize An Ownership Right In UnCaptured Groundwater.

There are only a handful of groundwater cases in Wisconsin. However, review of key decisions shows they agree with the general principle that groundwater rights are usufructuary. They identify a qualified right to use uncaptured groundwater, not own it.

In *Huber v. Merkel*, 117 Wis. 355, 357, 94 N.W. 354 (1903) *overruled by State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 288-89, 217 N.W.2d 339 (1974), the Court held:

> 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.

Id. at 366 (emphasis added). This holding specified an absolute right to gather and use un-captured groundwater, not ownership of it.

Michels understood *Huber* to reflect the "English Rule of absolute possession." *Michels*, 63 Wis. 2d at 293. Despite the absolute possession or ownership terminology, the English Rule does not encompass ownership of the groundwater. The Kansas Supreme Court explained this point:

> Much of the language in the cases pertaining to absolute ownership is obiter dicta and completely unnecessary to the respective decisions. . . . Thus, the use of the term "ownership" as applied to percolating water has never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself. . . . There is a right of use as it passes, but there is no ownership in the absolute sense.

Williams v. City of Wichita, 190 Kan. At 330.

In *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 340, 77 N.W.2d 699 (1956), the Court explained *Huber* as establishing "a right *to sink wells thereon and to use the water from them*. . ." (emphasis added). Likewise, in *Michels*, the Court described the right as "an absolute right to the *use* of groundwater." *Michels*, 63 Wis. 2d at 290 (emphasis added).

These statements are consistent with the general rule that groundwater rights are usufructuary in nature. They describe a right to capture and convey no impression that an overlying landowner owns uncaptured groundwater.

This makes sense since *Huber* explained that the basic right to gather and use uncaptured groundwater arose "out of ownership of the *land*." *Huber*, 117 Wis. at 363 (emphasis added). Thus, *Huber* did not link the basic right to an underlying right of uncaptured groundwater ownership.

Finding *Huber* flawed, *Michels* overruled it and adopted Section 858A of the then-proposed Restatement (Second) of Torts. *Michels Pipeline*, 63 Wis. 2d at 301. *Michels* explained Section 858A as "*preserving* the basic expression of *a rule* of nonliability-a privilege if you will-*to use* ground water beneath the land." *Id*. at 303 (emphasis added). This statement is misleading if *Michels* believed Section 858A modified the right to use un-captured groundwater to include groundwater ownership, since *Huber* explicitly linked the right to land ownership.

The *Michels* analysis exhibits substantial insight and there is no basis to claim the Court misunderstood the consequences of adopting Section 858A. Therefore, although *Huber* did not survive, the usufructuary nature of groundwater rights in Wisconsin did.

Michels noted there is an "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." *Id*. at 296. Properly construed, the

right it referenced is the right to use uncaptured groundwater, not a right of ownership.

C. Private Ownership of Uncaptured Groundwater Is An Unsound Concept.

1. Threatens Groundwater Protection.

Groundwater is a vital natural resource in Wisconsin. In 2007, there were 11,493 public water systems, from small gas stations to large cities, which ranked Wisconsin second nationally in the number of such systems, behind Michigan. *Safe Water on Tap*, Wis. Dept. of Nat. Resources (2007), available online at http:www.dnr.state.wi.us/org/water/dwg/report.pdf. The vast majority of those systems relied on groundwater to supply drinking water and served about 2.1 million people. *Id.*

Although substantial, Wisconsin's groundwater supply exhibits significant problems in some areas. One problem is a substantial decline in groundwater level in the Fox Valley, Dane County and southeastern Wisconsin, including the Milwaukee metropolitan area. *Groundwater Coordinating Council Report to the Legislature* (2008), available online at http://dnr.state.wi.us.org/ dwg/gcc/rtl/2008report.pdf.

The legislature responded with 2003 Act 310, which provides for groundwater withdrawal regulation of high capacity and some other wells. The legislation further establishes Groundwater Management Areas in northeast and southeast Wisconsin where plans will be developed and implemented to manage groundwater resources in a sustainable manner.

Municipal regulation of groundwater access is also common in Wisconsin. The regulations include wellhead protection ordinances that prevent contamination of the well recharge area by restricting private wells and other activities. (Example ordinances prepared by the Wis. Dept. of Natural Resources can viewed at http://dnr.wi.gov/org/water/dwg/gw/whp/at/WHP_ORDA.pdf.) The wellhead protection area must encompass, at a minimum, that portion of the recharge area equivalent to a 5 year time of travel to the well. Sec. NR 811.16(5)(a), Wis. Adm. Code.

Grafting a right of private ownership to uncaptured groundwater threatens these and other public efforts to protect the quantity and quality of Wisconsin's groundwater. While such a property right may not eliminate protection, the financial risk of

regulation will be higher, either preventing regulation or shifting massive compensation costs to the public.

2. Deharmonizes Wisconsin Water Law.

In *Michels*, the court noted "the interdependence of all water systems" and decried the "arbitrary distinction between the rules to be applied to water on the basis of where it happens to be found." *Michels*, 63 Wis. 2d at 292. *Michels* further observed that "[t]here is little justification for property rights in ground water to be considered absolute while rights in surface streams are subject to a doctrine of reasonable use." *Id.* These statements show *Michels* intended to harmonize Wisconsin riparian and groundwater law.[1]

The *Michels* rationales for harmonizing groundwater and surface water law remain. Twenty-first century scientists do not report that groundwater and surface water are no longer part of the same hydrologic system. And, the rule that Wisconsin riparians do not own the uncaptured water touching their land is still good law. *Munninghoff v. Wisconsin Conservation Com'n*, 255 Wis. at 259. There is no need to deharmonize groundwater law and surface water

[1] The proposition is further supported by *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), which harmonized Wisconsin diffused surface water law with riparian and groundwater law.

law in Wisconsin by ruling uncaptured groundwater is privately owned.

It is also widely accepted that overlying landowners do not own the groundwater that flows underneath their land. A leading treatise on property law accordingly reports:

> Thus, as a general rule today, groundwater is considered to be owned by the public at large, rather than by the individual landowner, and is therefore subject to significant public supervision and control.

6 *Thompson on Real Property* §50.11(a) at 759 (2s ed. 1994). Thus, adopting the unconventional theory that un-captured groundwater is owned by the overlying landowner will not only undo the legal consistency achieved in *Michels* but place Wisconsin outside legal norm, much like *Huber* did.

III. THE GROUNDWATER "INTEGRITY" THEORY IS FLAWED.

The court of appeals did not address E-L's uncaptured groundwater ownership idea, implicitly agreeing with its irregularity. Instead, it operated with a new groundwater property right theory, a right to groundwater "integrity" or subjacent support. A-8. The concept rests on significant errors that warrant rejection.

A. Soil Is Property, UnCaptured Groundwater Is Not.

The court of appeals cited *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 101 N.W. 706 (1904) and *Dahlman v. City of Milwaukee*, 131 Wis. 427, 111 N.W. 675 (1907) in support of its theory. A-6.These cases involved unintentional removal of soil from private property by a municipality. The soil provided lateral support for a building in each case and, in both cases, the Court held that removal of the soil constituted a compensable taking under article I section 13. *Damkoehler*, 124 Wis. at 145-151 and *Dahlman*, 131 Wis. at 436-440.

The court of appeals saw "no logical basis to distinguish between the removal of soil providing lateral support and the diversion of groundwater performing essentially the same function." A-8. But, there is.

There is no question that soil on private land is private property. It is the essence of real property. It is the most tangible component of land. Accordingly, government action that causes soil to be dislodged from private property and fall onto public property (the street), is a quintessential seizure of private property.

The legal nature of groundwater is much different. As shown, uncaptured groundwater is not privately owned. Rather, a landowner holds a limited right to withdraw groundwater and use it.

Government removal of soil and government removal of uncaptured groundwater do not affect the same kind of property. Soil is private property, un-captured groundwater is not. In a takings case, this makes all the difference. The first act requires compensation, the second does not. This logical distinction is a critical one the court of appeals overlooked.

B. *Michels* Does Not Support Theory.

The court of appeals identified Section 858A(a) of the Restatement (Second) of Torts, which *Michels* adopted, as the basis of the groundwater integrity right it used. A-8. However, *Michels* does not support the theory.

Section 858A(a) of the Restatement (Second) of Torts (1979) recognizes a nuisance claim when "[t]he withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure." But, this claim only arises where the original withdrawal causes "interference with the use of water by another."

Section 858A of the Restatement (Second) of Torts (1979). Thus, the claimant must be a groundwater user.

It might be said that a landowner "uses" groundwater even if they do not pump it out of the ground, as for subjacent support. But, this is not how *Michels* characterized Section 858A's impact. *Michels* described the problem addressed by Section 858A as "who shall bear the costs of *deepening* prior wells, *installing* pumps, paying increased *pumping* costs, etc., necessitated by a lowering of the water table by a large user." *Id.* at 303 (emphasis added). This description indicates *Michels* considered Section 858A to provide protection for active, not passive use of groundwater.

This conclusion is supported by the summary of "unreasonable harm" provided by *Michels*. It stated:

> The comment on the meaning of 'unreasonable harm' as used in the Restatement rule explains that as in other situations, reasonableness will vary with the circumstances. Later users with superior economic resources should not be allowed to impose costs upon smaller water users that are beyond their economic capacity. The comment also address itself to the fear of the respondents that a change in the rule concerning use of percolating water will allow the first user to *dictate the depth of wells* and the water table to all later users. The comment explains that it is usually reasonable to give equal treatment to persons similarly situated and to place similar burdens on each.

Id. The highlighted portion indicates the court considered a "user" to have a well, not just own a building that sits on top of wood piles.[2] Thus, Section 858A only applies when both parties are exercising their right to extract groundwater.

CONCLUSION

The League respectfully requests that this Court reverse the court of appeals and hold that uncaptured groundwater is not private property.

Dated: August 17, 2009.

LEAGUE OF WISCONSIN MUNICIPALITIES

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[2] In this case, the facts suggest that wood piles (long poles driven into soil), *not* groundwater, actually provided the subjacent support for E-L's building. *See* for brief discussion of timber piles, *Cities of the Future*, Novotny, Vladimir and Brown, Paul R. eds., page 133 (IWA Publishing, 2007).

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), Stats. for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is _____ words.

Dated: August 17, 2009.

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Daniel M. Olson (SBN 01021412)

SECTION 809.19(12) CERTIFICATION

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

I further certify:

That this 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 parties.

Dated: August 17, 2009.

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Daniel M. Olson (SBN 01021412)