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. IN RESPONSE TO LEAGUE OF WISCONSIN MUNICIPALITIES AMICUS BRIEF

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TABLE OF CONTENTS

Page

Table of Authorities

Wisconsin Cases

Page

Statutes and Legislative History

INTRODUCTION

The Wisconsin League of Municipalities (the "League") supports the position of the Milwaukee Metropolitan Sewerage District (the "District") that E-L should not be compensated for the District's unreasonably, deliberately and permanently depleting E-L's groundwater, knowing that the depletion would lower the value of E-L's remaining property and knowing the depletion could be avoided by the use of inexpensive corrective measures. Though there is no support for its position in established Wisconsin groundwater law, the League bases its argument, as did the District, on the notion that the government has sole ownership of groundwater.

It has never been the law in Wisconsin that the State has sole ownership of the groundwater. In fact, the League's contention that private landowners have no property interest in the groundwater on their land completely contradicts well-established Wisconsin law, including this Court's *Michels Pipeline* decision explicitly recognizing that "private property owners have a property right in the groundwater on their land". *State v. Michels Pipeline Construction Co.,* 63 Wis. 2d 278, 296, 217 N.W. 2d 339 (1974).

There is no question that municipalities are rightfully entitled to exercise police powers over State groundwater for the public's benefit. The government has exercised this power to regulate groundwater by enacting drinking water and well standards, among other legislation. These government rights, however, coexist with private owners' property interest in the groundwater in their land. If

their property interest is taken by the government in the course of construction of a public works project, the owners are constitutionally entitled to just compensation from the government. Otherwise, individual property owners disproportionately bear the cost of a project that benefits many. In this case, the District took E-L's property-its groundwater-for the public purpose of sewer construction. E-L is constitutionally entitled to compensation for the taking.

A decision in E-L's favor will both support existing law and caution MMSD and others entitled to act on behalf of the government to consider and avoid, or if avoidance is not economically feasible, to compensate property owners for obvious or likely takings resulting from public works projects. The requirement that just compensation be paid for taking private property interests is one of the fundamental protections provided by the U.S. Constitution, even if it causes additional planning or expense on the government's part.

STATEMENT OF THE LEAGUE'S ARGUMENTS

The League presents the following three main arguments:

Argument One. The Fifth Amendment takings clause is inapplicable.

E-L refuted this argument in Section 2(B), Pages 25-30, of its MMSD Response Brief and its response will not be repeated here. However, to summarize its position, E-L does have a cause of action under the Fifth Amendment, but the action does not accrue until E-L exhausts its state law remedies under Wisconsin's inverse condemnation statute, *Wis. Stat*. §32.10.

Moreover, the lower courts discussed the Fifth Amendment by way of analogy, suggesting that MMSD's conduct violated federal as well as state law.

Argument Two. Uncaptured groundwater is not private property subject to Article I, Section 13 of the Wisconsin Constitution.

Well-established legal precedent, including decisions of this Court, holds that a property right in groundwater exists. They are not simply "usufructuary;" they are a stick in the bundle of rights that constitute real property ownership. The League sets forth partisan arguments that this Court's recognition of private ownership rights in groundwater is "unsound" and "de-harmonizing". As stated in E-L's brief in response to the District's brief: "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." (*MMSD Response Brief* at 31).

Argument Three. The groundwater "integrity" theory is flawed.

A right in groundwater is one component of land ownership – one stick in the bundle of property ownership rights. Without groundwater, soil subsides and piles rot, as happened to E-L's piles. Wisconsin law recognizes that groundwater is a property right that can be taken by the government.

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 League claims that E-L has only a "usufructuary" right to use the groundwater on its land, and more importantly, that this privilege does not amount to a property right. (*Amicus Brief* at 29). Its argument completely contradicts well-established precedent going back to the 1903 *Huber* decision holding that the right to sink wells and gather water is a property right, as well as this Court's landmark decision in *Michels Pipeline* which unequivocally held that "a person has a property right in underground water." *Huber v. Merkel,* 117 Wis. 355, 357, 94 N.W. 354 (1903); *Michels Pipeline* at 296.

The League asserts that a landowner's absolute right to use groundwater in its land cannot be a property right. Wisconsin law refutes this view. The *Huber* court expressly noted that it was immaterial if a person's 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 357. [Emphasis added.]. The distinction between ownership of groundwater or a right to use the groundwater is a distinction without a meaning.

Huber was a takings case. The decision overturned statutes that limited a person's common law right to use groundwater with impunity. It overturned those statutes on the grounds that they were a taking of private owners' right to pump unlimited amounts of water. *Huber* at 359. This holding is an explicit recognition that groundwater is an issue of private property ownership. The later *Michels Pipeline* case overturned *Huber*, not because it found that private owners have no property rights in groundwater, but because of *Huber's* application of the old common law groundwater use doctrine,. *Michels Pipeline* at 298.

B. *Cases Cited by the League Are Off-Point.*

In support of its argument that water rights are simply "usufructuary" in nature, the League string cites cases arising in contexts notably different from those in the present case. The Arizona and Florida cases arose in states where extensive groundwater management legislation has been adopted to address groundwater shortages. *See Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324, 1328-29 (1982)(Arizona Act provides "it is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state."); and *Village of Tequesta v. Jupiter Inlet Corporation*, 371 So.2d 663, 670 (1979) ("State of Florida operates under an administrative

system of water management pursuant to the terms of the Florida Water Resources Act). There is no comparable legislation in Wisconsin that the Court needs to address.

The Kansas and California cases either rejected common law property rights in favor of statutory regulation (Kansas) or adopted different doctrines such as the correlative rights doctrine (California). *See Williams v. City of Wichita*, 190 Kan. 317, 334, 342 P2d.578 (1962)(Court upholds constitutionality of 1945 Water Appropriation Act in face of strong dissent in favor of prior rule that groundwater is part of the real property in which it is situated"); and *Katz v. Salkinshaw*, 64 L.R.A. 236, 141 Cal. 116 (1903)(Court rejected common law with respect to groundwater rights and adopted correlative rights doctrine that each overlying landowner is entitled to use groundwater with a priority equal to all other overlying users). Again, there is no comparable law in Wisconsin that the Court needs to address.

The only Wisconsin case cited by the League, *Munninghoff v. Wisconsin Conservation Com'n*, 255 Wis. 252, 259, 38 N.W.2d 712 (1949), is a riparian rights case. In *Munninghoff*, a property owner requested a license to install muskrat traps on land he owned beneath navigable waters. The state commission denied the permit on the grounds that it could not license an exclusive use in navigable waters. This Court overturned the commission's ruling, holding that the public's rights in navigable waters did not prohibit Munninghoff from affixing muskrat traps land he owned beneath navigable waters.

The Court, in discussing the respective ownership rights of the bed of a navigable waterway (a running stream), and of the water of the navigable waterway itself, stated that "[t]he owner of the submerged soil of a running stream does not own the running water…" *Id*. at 259. This statement is inapplicable to groundwater ownership, because Wisconsin law governing navigable waterways such as streams and lakes (also referred to as "surface waters") differs from Wisconsin law governing groundwater.

Rights in the State's navigable waters are governed by the public trust doctrine, which provides that Wisconsin's navigable waterways are held in trust for the public. See Paul G. Kent and Tamara A. Dudiak, *Wisconsin Water Law – A Guide to Water Rights and Regulation*, UW Board of Regents at 12 (2nd ed. 2001). The state's rights in navigable waterways co-exist and are to some extent limited by riparian owners' rights. *Id*. at 12, and citing *Munninghoff*, at 13.

Munninghoff is not instructive in the present case because the public trust doctrine does not apply to non-navigable waterways such as groundwater. *Id* at 12. Instead, the State gets its authority to regulate groundwater by virtue of its statutory police powers over "waters of the state". See Wis. State §281.11. As with *Munninghoff*, the *Eddy v. Simpson*, 3 Cal. 249, 252-253 (1853) and *Pratt v. Department of Natural Resources*, 309 N.W.2d 767 (1981) cases cited by the League, are inapplicable California and Minnesota riparian cases involving ownership rights in surface waters.

McNamara, cited by the League, discussed riparian rights but is actually a groundwater case directly on point. *McNamara* expressly held that "landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can constitute an unconstitutional taking." *McNamara v. Rittman*, 107 Ohio St.3d 243, 245, 838 N.E.2d 640 (2005) (Another case cited by the League, *Chance v. BP Chems., Inc.*,670 N.E. 2d 958 (Ohio 1996), predated *McNamara* and its language regarding the lack of ownership rights in groundwater is in direct conflict with it).

C. *The League Misconstrues Huber and Michels Pipeline*.

The League again attempts to label the property rights in groundwater discussed in *Huber* and *Michaels Pipeline* as "usufructuary" rights. (*League Brief* at 5). It quotes the *Huber* court's statement that "[t]he right of a landowner to sink wells and gather and use percolating waters as he will…is a property right" subject to eminent domain. *Id* at 7. The League then asserts that this holding does not provide that landowner's have a property right in groundwater. This is nonsensical. *Huber* clearly states that a property right exists, whether it be an ownership right or a right to use the groundwater. Further, the *Huber* statement that the right to use groundwater "arose out of ownership of the land" supports E-L's position that a private owner's property interest in groundwater is a stick in the bundle of rights associated with land ownership. *McNamara* at 247.

The *Michels Pipeline* decision did not debate or refute the principal that a landowner has property rights in groundwater. To the contrary, 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. For example, the Court noted that "there 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." *Michels Pipeline* at 292. The Court further stated 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. Wisconsin law makes clear that the right to groundwater is a property right.

2. The League's Distinction Between "Captured" and "Uncaptured" Groundwater is Unhelpful in this Case.

The League's brief differentiates between "captured" water and "uncaptured" water, arguing that established Wisconsin law regarding property rights in groundwater applies only to captured water, not to uncaptured water in the land. It maintains that E-L's groundwater "freely flowed from E-L's land to the District's," clearly placing it in the free flowing or "uncaptured" category. (*League Brief* at 4). E-L does not dispute that its groundwater is "uncaptured" as the League uses the term. However, Wisconsin decisions holding that landowners have a property right in groundwater do not distinguish between captured and

uncaptured or free flowing water. Landowners have a property right in groundwater in their land even if it is "uncaptured" water.

Moreover, the League's claim that E-L's water "freely flowed" to the District's property is patently false. While the water may have "freely flowed," it did so in response to the District's pumping of massive amounts of groundwater and establishing a "French Drain". (*E-L Brief* at 6). E-L's groundwater depletion was clearly the result of the District's actions and not the result of the natural flow of water.

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

The League asserts that private ownership of groundwater is an "unsound concept" and "threatens groundwater protection." *(League Brief* at 10). However, it fails to provide any arguments in support of these statements. It simply notes the undisputed facts that groundwater is a vital natural resource and that various areas in the State have problems with the groundwater supply that are being addressed through State and municipal regulation.

E-L does not claim sole and absolute private ownership of groundwater. The property interest of private owners co-exists with the State interest, akin to the relationship of the State and private owners in the riparian rights context. There is a balancing of the rights of one against the rights of the other. Moreover, a private property interest in groundwater does not threaten the State's exercise of its police powers. Wisconsin residents have been sinking wells on their property for over a

hundred years. This has not prevented the State from regulating groundwater through its ample police powers. In fact, the current situation in Wisconsin is a regulatory framework coexisting with private owners' rights in the groundwater in their land. A change in the law declaring absolute State ownership of groundwater would through this area of the law into confusion.

The League threatens that "the financial risk of regulation will be higher, either preventing regulation or shifting massive compensation costs to the public." (*League Brief* at 11-12). This argument was also raised by the District. (*League Brief* at 53-54). E-L's response is the same:

> 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. ..

(*E-L MMSD Response* at 30-31).

The League also argues that private ownership "de-harmonizes" existing law. (*League Brief* at 12). This assertion is based on the incorrect assumptions that (i) E-L is arguing it has sole ownership of the groundwater in its land, and (ii) E-L is asking for a change in the law. Neither assumption is true. E-L is simply asking the Court to follow established Wisconsin precedent holding that property owners have a property interest in the groundwater in their land.

With the reasonable use doctrine adopted in *Michels Pipeline*, groundwater law was harmonized with surface water law. A landowner's reasonable right to use the groundwater in its land is as much a property right as a riparian owner's reasonable right to use water. *McNamara* at 247. There is no disharmony – both are property rights that cannot be taken by the government without just compensation.

4. Groundwater is One Stick in the Bundle of Rights Comprising Real Property Ownership.

In its MMSD Reply Brief, E-L analogized subjacent support provided by the groundwater in its soil to sublateral support provided by soil in the *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 101 N.W. 706 (1904) and *Dahlman v. City of Milwaukee*, 131 Wis. 427, 110 N.W. 479 (1907) cases. The consequences of the governmental actions in *Damkoehler* and *Dahlman* (building collapse as a result of taking soil) were readily foreseeable (though unintended), as was the District's depletion of E-L's groundwater that resulted in the rotting and drying of its piles and the loss in value of its building.

E-L's MMSD Response Brief simply analogized the taking of soil to the taking of groundwater. It did not posit a new "groundwater integrity theory," as asserted by the League. E-L also disagrees with the League's narrow interpretation of the holding of *Michels Pipeline*. E-L simply relies on the established law in *Huber* and *Michels Pipeline* that a property owner has a property right in the groundwater in its property.

CONCLUSION

For these reasons, this Court should follow well-established law and refuse the District's and League's requests to reverse the lower court decisions.

Respectfully submitted this 14th day of September, 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 2,988 words.

/s/ Jerome R. Kerkman
Jerome R. Kerkman

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/ Jerome R. Kerkman
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