08AP0921

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

BRIEF AND APPENDIX OF PETITIONER MILWAUKEE METROPOLITAN SEWERAGE DISTRICT (Corrected)

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INTRODUCTION

E-L Enterprises, Inc., sued the Milwaukee Metropolitan Sewerage District and an insurer of one of the District's contractors. EL pleaded a tort: during sewer construction 15 years earlier on property neighboring EL's, the contractor allegedly removed too much groundwater. Removal of the groundwater, EL claimed, dried out the building's wood foundational piles, necessitating repairs.

EL's tort claims against the insurer survived summary judgment, and those parties settled. The circuit court properly dismissed EL's nuisance and negligence claims against the District as barred by governmental immunity. None of this is at issue.

At issue is a judgment that art. I, §13 of the Wisconsin Constitution renders the District liable for building repairs—that is, by causing incidental damage to EL's building, the District allegedly "took" EL's property for public use without providing just compensation.

Decades of precedent, however, hold that consequential property damage from government activities—EL's claim in a nut-

shell—does not give rise to a takings claim. Rather, takings claims lie only when the government physically invades private property or otherwise deprives the owner of all beneficial use of the property. Neither tort claims involving conflicting uses of property nor government acts that render private property less valuable have ever been actionable as "takings." The principles underlying these rules are fundamental and must be preserved lest every incidental or accidental effect of government conduct become the subject of constitutional litigation, displacing the Legislature's policy choices on when to afford relief to persons affected by public works projects.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Two types of government conduct can constitute a taking of property compensable under art. I, §13 of the Wisconsin Constitution—(1) physically invading or occupying the property, and (2) depriving the owner of substantially all of the property's value. *See, e.g.*, *Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 81–82, 284 N.W.2d 887 (1979) ("*Howell Plaza II*"). The consequential effects

of government action do not otherwise give rise to a takings claim for just compensation.[1]

EL claimed that the District's extraction of groundwater during sewer construction on an easement next to EL's property reduced the groundwater level under EL's property, which caused some of the building's wood foundational piles to decay (submersion preserves them) and ultimately fail, resulting in building settlement that required repair. The lower courts held that the District was constitutionally required to compensate EL for the cost of repairs to the property under art. I, § 13. A-165–66.[2]

The following issues are presented:

Issue 1. Whether the damages to EL's building were consequential damages for which there is no recovery under art. I, §13 of the Wisconsin Constitution?

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1 The scope of conduct actionable as a Wis. Stat. §32.10 inverse condemnation claim is narrower than that actionable as a takings claim under art. I, §13. *Zinn v. State*, 112 Wis. 2d 417, 438, 334 N.W.2d 67 (1993). As a result, events giving rise to a claim under art. I, § 13 do not necessarily support a claim under Wis. Stat. §32.10. *See infra* Part V.

2 References to A-___ refer to Petitioner's appendix.

The circuit court held that a private landowner could maintain a takings claim for damage caused by the use of groundwater on the government's own land.

The court of appeals affirmed.

Issue 2. Under Wisconsin law, a landowner has a right to capture groundwater on his own land, subject to a tort duty not to do so in a way that unreasonably harms his neighbors. *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 302–03a, 217 N.W.2d 339 (1974). Does the government take private property for public use under art. I, §13, if it breaches this tort duty by withdrawing groundwater in an amount that causes unreasonable harm to a neighboring private property?

The circuit court held that EL could recover as a "taking" damages caused by the District's extraction of groundwater.

The court of appeals affirmed.

Issue 3. Whether the United States Constitution's provisions regarding takings of property are applicable?

Neither the circuit court nor the court of appeals addressed this issue, because EL did

not preserve a federal takings claim. The issue is raised pursuant to this Court's May 12, 2009 order granting review.

Issue 4. Was the District's use of groundwater an "occupation" of EL's property, entitling EL to recover litigation expenses and attorney fees on an inverse condemnation claim under Wis. Stat. §32.10?

The circuit court first ruled that EL could recover for inverse condemnation under §32.10. Before trial, the court reconsidered and held that EL could not recover under §32.10 because EL failed to allege an occupation of property, as required by the statute. After trial, the court changed course again, ruling that, because EL had recovered on its art. I, §13 takings claim, it had satisfied §32.10's requirements.

The court of appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In granting review, the Court necessarily determined that the issues presented are of general importance and worthy of both argument and publication.

STATEMENT OF THE CASE

The Milwaukee Metropolitan Sewerage District is a municipal entity that provides wastewater treatment for 28 communities in a service area that covers over 400 square miles. Its wastewater system is composed of collection and interceptor sewers that convey wastewater to the District's treatment facilities and to its Deep Tunnel storage system. R. 4:1–3. The District continually expands and upgrades its infrastructure to ensure that it has sufficient physical capacity to meet the communities' wastewater treatment needs.

Since the implementation of the Water Pollution Abatement Program three decades ago, the District has constructed over $3 billion of sewers and storage tunnels designed to ensure compliance with federal and state clean water laws. *See generally City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 491 N.W.2d 484 (1992). Those capital expenditures are principally funded by property taxes collected in the communities that the District serves.

A. Statement of facts relating to EL's "takings" claim for construction damages.

This case arises from the District's construction in 1987–1988 of the Crosstown 7 sewer (R.1:2), a "near-surface collector sewer" constructed for the District by Bowles Contracting Inc./Tomasini Construction Inc. Joint Venture ("BCI/TCI"). R.4:1–3. The sewer collects sewer overflow, diverts it away from the Menomonee River, and conveys it to a drop shaft leading to storage in the Deep Tunnel. R.4:1–3.

To construct this sewer, BCI/TCI dug a trench from the surface, installed 36-inch and 48-inch sewer sections in the trench, and then restored the surface. R.169:Ex.4. As is typical of these types of projects, the construction contract left construction "means and methods"—that is, the order of work, labor force, and types of equipment—to the contractor's discretion. R.169:Ex.5.

The trench had to be dry when the pipe was laid and concrete poured (R.169:Ex.6:2), and the District's contract with BCI/TCI required the contractor to meet specific worksite dryness standards, while limiting any ef-

fect on groundwater levels. R.169:Ex.6:1–4. The contractor's removal of groundwater during construction led to this case.

One portion of the sewer was constructed next to EL's building on North 12th Street in Milwaukee, between the Menomonee River and West St. Paul Avenue. R.1:2. The building, built in 1928 (R.184:122–23; R.185:80), was constructed on wood piles—long, wooden poles driven into the ground. R.184:47–49, 54. Concrete pile caps were poured on top of the piles, and the caps provided foundational support for the rest of the building. R.184:47–49, 54.

BCI/TCI constructed the sewer in the District's construction easement under a private alley next to the south wall of EL's building. R.169:Exs.2, 4:1552; R184.52–60. Neither BCI/TCI, the construction trench, nor the District ever touched EL's property. R.169:Exs.2, 4:1552.

When BCI/TCI approached EL's building, groundwater entered the construction trench and interrupted construction. R.183:91, 102; R.184:91. The construction contract assigned groundwater management

and control to BCI/TCI. R.169:Ex.6:1–4. Beginning October 26, 1987, BCI/TCI pumped water from the trench for 17 days in order to dry it sufficiently to allow construction to resume under safe conditions. R.169:Ex.10; R.183:99.

The contract also required BCI/TCI to avoid damage to neighboring buildings and to repair any damage caused by the removal of water from the construction site. R.169:Ex.6:3. Under the contract, BCI/TCI was responsible for any resulting damage to surrounding properties. R.169:6:3. After construction, BCI/TCI's insurer filled cracks EL identified in its building, installed new paneling, and repaired cracks in the adjacent parking lot. R.167:34–40.

Groundwater measurements at the time of construction in 1987 and when the sewer was completed in 1988 showed a groundwater level reduction near EL's building. R.169:Ex.253-9. The levels recovered over the course of the next two years. R.169:Ex.235-8; R.184:153.

Ten years after BCI/TCI completed the sewer's construction in 1988 (R.169:Ex.8:191),

EL's owner began monitoring the building's settlement rate. R.169:Ex.39:EL979; R.183:41–42. In 2001, EL hired an engineer to examine the building's foundational piles. R.168:30–32; R.184:39–40.

EL did not notify the District of any building damage until September 2003 (R.1:5), the same year EL began repairing the building (R.184:75). EL's engineer determined that the tops of 14 wood piles under the building's south wall (and the first piles north of each corner) had rotted and were no longer able to support the building. R.184:52–60. To repair the problem, damaged portions of these piles were sawed off and replaced with concrete. R.184:52–60. After the foundation was repaired, EL also had to repair damage to the southeast corner of the building. R.184:75–83.

The repairs ultimately cost $309,388, including EL's attorney fees incurred litigating with a neighbor, who owned the adjacent alley and refused access to make the repairs. A-166. EL continued to lease the building throughout the entire period. A-166.

B. Procedural status and lower court disposition.

In June 2004, EL filed this lawsuit against the District and CNA Insurance Companies, the insurer for the now-defunct BCI/TCI. R.1. EL principally pleaded tort claims—negligence, continuing nuisance, and inverse condemnation claims against the District and negligence and nuisance claims against CNA. R.1. It also pleaded a claim for "inverse condemnation" against the District. R.1.

CNA settled EL's negligence and nuisance claims against BCI/TCI in a confidential agreement. R.114.

The circuit court dismissed EL's negligence and nuisance claims against the District under Wis. Stat. §893.80(4)'s governmental immunity provision. R.102. The circuit court also initially dismissed EL's inverse condemnation claim, but allowed EL to present its takings claim under art. I, §13 to a jury. A-064–66, 075.

Over the District's objection (R.186:9–10), the circuit court instructed the jury that "[d]rawing water out of the ground on one

piece of land can result in drawing groundwater away from neighboring land," and "[g]roundwater is considered property of the person who owns the land under which it flows." A-160.

The jury found that the District's removal of groundwater was unreasonable and that the District had accomplished a taking. A-164–65. While making clear that the District's contractors removed water from "the construction trench *near* EL's property" (A-164), the special verdict asked the jury whether "the District remove[d] the groundwater EL needed to keep the wood piles under the south end of its building saturated enough to support the building" (A-164). The jury answered "yes." A-164. The jury awarded EL $309,388, the amount of the foundation repairs, plus other incidental repair costs. A-166.

After trial the circuit court reconsidered its earlier ruling dismissing EL's §32.10 inverse condemnation claim. A-099–101. The court concluded that §32.10 entitled EL to recover its litigation expenses and attorney fees under §32.28(3)(c). A-099–101; 154–55.

The District appealed. The court of appeals affirmed. 2009 WI App 15, 763 N.W.2d 231.

ARGUMENT

I. Consequential Damage to Private Property Is Not a "Taking" Compensable Under Article I, §13.

Article I, §13 of Wisconsin Constitution provides, "The property of no person shall be taken for public use without just compensation therefor." This Court has limited takings claims to two types: (1) *physical invasions*—the government's physical occupation or appropriation of property, and (2) *"regulatory takings"*—non-invasive government conduct that deprives a property owner of all or substantially all economically beneficial use of the property. *See R.W. Docks & Slips v. State*, 2001 WI 73, ¶14, 244 Wis. 2d 497, 628 N.W.2d 781; *Zinn v. State*, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983).

Within each of these two categories, whether the law recognizes a compensable taking depends on the nature of the property right, the extent to which the government's conduct affects that right, and for how long it does so. *See R.W. Docks*, 2001 WI 73, ¶¶19–26. The paradigmatic taking "is a direct government appropriation or physical invasion." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). A permanent physical invasion requires compensation "however minimal the economic cost it entails, [because it] eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Id.* at 539; *see also Wis. Builders Ass'n v. Wis. Dep't of Transp.*, 2005 WI App 160, ¶36, 285 Wis. 2d 472, 702 N.W.2d 433 (quoting *Lingle*, 544 U.S. at 536).

In contrast, non-invasive government conduct, whether through activity or regulation, can amount to a taking only if the conduct renders the entire property valueless or so greatly interferes with the beneficial use of the property as to be "[the] functional[] equivalent to the classic taking." *Lingle*, 544

U.S. at 539; *see also R.W. Docks*, 2001 WI 73, ¶17; *Zinn*, 112 Wis. 2d at 424; *Wis. Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 7, 87 N.W.2d 279 (1958).

These two lines—(1) between invasive and non-invasive government conduct; and (2) between the effects of non-invasive government conduct that incidentally impair only a portion of the property and those effects that deprive an owner of substantially all beneficial use of the property—are of paramount importance to ensuring that not all negative externalities of government conduct become constitutional torts. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 373, 548 N.W.2d 528 (1996). Because sovereign immunity "has only limited applicability to actions against the state which allege a constitutional taking of private property without just compensation," *Zinn*, 112 Wis. 2d at 435, faithful adherence to these lines is necessary to preserve the Constitution's delegation to the Legislature of the power to "direct by law in what manner and in what courts suits may be brought against the state." Wis. Const. art. IV, §27. A takings remedy unbounded by

the type of government conduct or the magnitude of its effects would quickly displace the Legislature's constitutional authority to decide when to compensate individuals for the tortious (or regulatory) effects of government conduct. Article I, §13's history and precedent preserve legislative decisionmaking except when the government physically invades private property or deprives the owner of substantially all beneficial use of it.

EL did not claim, nor was there evidence or a finding, that the District entered or occupied EL's building or grounds. EL claimed—and the jury found—that the District's removal of groundwater on its neighboring property lowered the groundwater level under EL's building, which exposed the building's wood foundational piles to air, caused them to decay, and eventually resulted in their failure to support the building's south wall adequately. EL's evidence, taken in its most favorable light, proved consequential damages, rather than a taking. These consequential damages could result from the similar activity of any neighbor and

are wholly unrelated to the District's governmental character.

A. For more than a century this Court has refused to treat claims that the government tortiously damaged private property as constitutional "takings."

"Governmental action which merely causes damage to private property is not the basis for compensation." *Zinn*, 112 Wis. 2d at 424; *see also Colclough v. Milwaukee*, 92 Wis. 182, 65 N.W. 1039 (1896). Indeed, as far back as 1862, this Court held that damages to private docks caused by the City's creation of a channel between the Milwaukee River and Lake Michigan did not give rise to a taking. *See Alexander v. Milwaukee*, 16 Wis. 264, 273 (1862); *see also Dore v. Milwaukee*, 42 Wis. 108, 116 (1877).

And, over a century ago, this Court said that "[p]erhaps no rule of law is more completely settled than is the rule that if consequential damages result to property owners from [governmental conduct] . . . it is not a taking of private property for public use, within the meaning of sec. 13, art. 1, of the constitution." *Smith v. City of Eau Claire*, 78

Wis. 457, 459, 47 N.W. 830 (1891). Nor has this clear, fundamental rule been undercut in the intervening years. *See City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶¶16–17, 302 Wis. 2d 599, 734 N.W.2d 428 (consequential damages are not recoverable under the just compensation clause); *Howell Plaza II*, 92 Wis. 2d at 80 ("[i]ncidental damage to property resulting from governmental activities . . . [are] not considered a taking of property for which compensation must be made." (quoting *State ex rel. Carter v. Harper*, 182 Wis. 148, 153, 196 N.W. 451 (1923))); *More-Way N. Corp. v. State Highway Comm'n*, 44 Wis. 2d 165, 170 N.W.2d 749 (1969) (road grade change removing parking stalls was consequential damage not recoverable as taking); *Wis. Power*, 3 Wis. 2d at 6 ("consequential damage to property resulting from governmental action is not a taking thereof").

1. EL claimed and proved consequential damages, not takings.

EL's complaint about what the District did to it is that, by removing groundwater from a construction trench—both during construction and as a result of the construction's

design—the District's contractor caused wood foundational piles supporting a portion of EL's neighboring building to fail. Revealing this tort claim's true nature, EL sued the contractor's insurer for negligence and nuisance, recovering an undisclosed amount in settlement.

As against the District, the jury found that "the removal of groundwater from E-L's property cause[d] the building to settle." A-165. The jury awarded $309,388 based, as instructed by the circuit court, on building repairs caused by this extraction of groundwater from the District's neighboring construction site. As the court of appeals acknowledged, "the jury . . . knew from the instruction that it had to consider the *effect* of the diversion of the groundwater on E-L Enterprises's property." 2009 WI App 15, ¶19 (emphasis added).

Further showing the true nature of EL's claim, the lower courts permitted EL to recover as damages attorney fees and expenses EL incurred because, in order to repair its building, it first had to sue its neighbor, who would not allow EL to use an easement over a

neighboring alley. Applying the rule that consequential damages are recoverable from private tortfeasors, the court of appeals held that "the expenditure of legal fees caused by someone causing damages are recoverable by the injured party." *Id.* ¶20.

EL's claim, as a matter of law, was premised on recovering consequential damages caused by the District's sewer construction. That claim is barred by the many decisions of this Court cited above, which hold that consequential damage caused by non-invasive government conduct is not a taking of property for public use under art. I, §13.

2. That consequential damages are not recoverable as "takings" is a soundly based rule that merits retention.

Two principles justify the consequential damages rule.

First, the Constitution's text requires compensation only when the government takes private property "for public use." Wis. Const. art. I, §13. As the U.S. Supreme Court has explained of the Fifth Amendment's similarly-worded takings clause, "[t]he Clause ex-

pressly requires compensation where government takes private property 'for public use.' It does not bar government from interfering with property rights." *Lingle*, 544 U.S. at 543 (citation omitted). "Taking of property for public use" has been understood to reach "only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879)) (alteration in original).

Article I, §13's takings provision contains no reference to government-caused property damage or government-created impediments to property use. This stands in sharp contrast to constitutional provisions adopted in some states—so called "damages clauses"—that provide compensation when private property is "taken or damaged." *See, e.g.,* Ill. Const. art. I, §15; *see also* 2A-6 NICHOLS, LAW OF EMINENT DOMAIN §6.02[4][a] & n.11 (2009) (referencing state constitutions with damages clauses). As this Court has observed, "sustain[ing] consequential damages . . . is not a taking of private

property for public use, within the inhibition of . . . section 13 of article 1, Wis. Const." *Randall v. Milwaukee*, 212 Wis. 374, 382, 249 N.W. 73 (1933); *see also Wis. Power*, 3 Wis. 2d at 6.

The plain meaning of "*taking . . . for* public use," moreover, requires that the government acquire ownership, possession, or control of property and put it to "public use" before compensation is owed. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003). As the U.S. Supreme Court has reasoned, "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). So too, the protection in art. I, §13: the District did not put EL's property to "public use" by damaging it in the course of constructing a sewer, nor did the public benefit *as a result of* the damage that made EL's building less valuable.

Second, the social compact embodied in the Constitution requires that the takings clause not be interpreted to afford compensation for all government-caused consequential property damage. Sovereign immunity pro-

vides government the ability to pursue the public good free of interfering and costly litigation. *Rouse v. Theda Clark Med. Ctr.*, 2007 WI 87, ¶96, 302 Wis. 2d 358, 735 N.W.2d 30. The takings clause limits this immunity by "'barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Lingle*, 544 U.S. at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

But threat of litigation would significantly hamper the state and municipalities in their ability to perform public works if "takings" encompassed all detrimental effects of government conduct. *See Zealy*, 201 Wis. 2d at 373; *Alexander*, 16 Wis. at 273. Budgeting for public works projects would have to include the cost of unexpected claims, some, like those here, arising many years after the project's completion. As Justice Holmes remarked about applying the takings clause to regulation of property, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general

law." *Pa. Coal*, 260 U.S. at 413. Limiting the promise of compensation to those instances when the government invades or appropriates property—acts easily identified—enables public works to be constructed without the omnipresent threat of burdensome litigation by persons claiming that incidental damages are "takings."

If public policy warrants greater relief, the Legislature can afford it by statute, thereby waiving sovereign or governmental immunity. The Constitution, however, does not mandate it: "[M]ere consequential damage to property is not a taking thereof. Art. I, sec. 13, like its equivalent in the federal constitution, 'does not undertake . . . to socialize all losses.'" *Wis. Power*, 3 Wis. 2d at 6 (quoting *United States v. Willow River*, 324 U.S. 499, 502 (1945)).

B. The Damage to EL's Building Did Not Make It Worthless or Even Diminish Its Rental Income.

Dicta in *Wisconsin Power* suggest that government-caused consequential damages can be a taking if the damage renders the property worthless. *See id.* at 7; *see also*

Wikel v. Dep't of Transp., 2001 WI App 214, ¶14, 247 Wis. 2d 626, 635 N.W.2d 213 (state's conduct allegedly rendered residence "uninhabitable and unsaleable" and resulted in "total, permanent taking").

This exception to the general rule against equating consequential damages and takings, even if recognized by this Court, cannot aid EL. EL did not claim or attempt to prove that the District's conduct destroyed its property or deprived EL of all economically beneficial use of the property. To the contrary, EL's own witnesses testified that it made continuous use of the building. R.183:169 (during 2003–2005, building rents exceeded $160,000 per year). And the jury found that the District had not caused EL to lose any rental income. A-166.

Because EL's building continued to have real and substantial value after the District's damage-causing sewer construction, the jury's finding that the building suffered consequential damages from the District's non-invasive conduct cannot be equated with finding a "taking."

II. EL Did Not Own the Extracted Groundwater, and Any Interference With EL's Right to Use Groundwater Is Not a Taking.

EL sought to recover damages to its building by claiming a physical taking. But EL did not contend—and there is no evidence—that the District physically invaded or occupied its land.

EL alleged in its complaint that the District "deprive[d] E-L Enterprises of all beneficial use of the wood piles." R.1, ¶52. That pleading is plainly barred by the consequential damages rule and by the prohibition against construing the "taking" as a portion of property adversely affected by the alleged government conduct: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *R.W. Docks*, 2001 WI 73, ¶24 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978)).

EL ultimately tried a claim that the District "took" its groundwater. As a matter of law, however, the District did not physically take EL's property by removing

groundwater from the District's construction site: the removed groundwater was not EL's property, and there is no takings remedy for the removal's interference with EL's groundwater use.

A. Whether the District's conduct constitutes a "taking" is a question of law.

At EL's request, the circuit court asked the jury, "Was the District's removal of groundwater from E-L's property a taking?" A-165. The jury's affirmative answer to this question of law is entitled to no deference, and it is wrong as a matter of law.

Whether the removal of groundwater constitutes a "taking" is a question this Court reviews *de novo*. It is an "ultimate conclusion[ ] of fact, or conclusion[ ] of law," [and this Court] is not bound by the findings of the trial court." *Howell Plaza II*, 92 Wis. 2d at 80 (quoting *Chi., Milwaukee, St. Paul, & Pac. R.R. Co. v. Milwaukee*, 47 Wis. 2d 88, 90, 176 N.W.2d 580 (1970)).

B. Groundwater is owned by the State; the owner of the land in which it temporarily resides has a limited privilege to use it.

Under Wisconsin law, free-flowing groundwater is not private property. Like navigable rivers and lakes, it belongs to the State in trust for the people as a whole. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶23, 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); *Patz v. St. Paul Fire & Marine Ins. Co.*, 817 F. Supp. 781, 783 (E.D. Wis. 1993); *see also* Wis. Stat. §281.01 (defining "waters of the state" to include groundwater).

Groundwater's constant movement and flux frees it from being the "property" of any landowner. Indeed, as one court aptly recognized, "[i]t would be impossible to accord to each overlying landowner the right to the underlying, percolating water, as withdrawal by one owner necessarily interferes with the enjoyment of the like privilege of other owners." *Cherry v. Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982).

Landowners take ownership of groundwater only by using it, which they have a qualified privilege to do. *See Michels*, 63 Wis. 2d at 301–03; *see also* RESTATEMENT (SECOND) OF TORTS §858 & cmt. b. Landowners' right to use groundwater on their lands is a fleeting right that exists until the water flows past:

> The water and the right to use it belongs to the overlying owner in a limited sense only; when the water is reduced to his possession, it ceases to be percolating water and becomes his personal property, but ***when the water flows from his land to the land of another, he loses all right to it the instant it enters the land of his neighbor***.

78 AM. JUR. 2D *Waters* §213 (2008) (footnotes omitted, emphasis added); *see also Ball v. United States*, 1 Cl. Ct. 180, 183 (1982) (reasonable use privilege as to groundwater not a property right.)

The circuit court's instructions on groundwater ownership were contrary to these well-established legal rules. It instructed the jury, over the District's objection (R.186:9–10), that "the law considers neighboring landowners to share the groundwater that flows under their lands. The law permits neighbors to use each other's

groundwater, but only so long as their use is reasonable" (A-160).

These instructions were wrong. As discussed above, groundwater belongs to the State; landowners can only "use"—extract or withdraw—groundwater *on their own land.* Even if removal resulted in groundwater migrating from another's land, this effect is not properly conceived of as a right to use "each other's groundwater." Indeed, even if the judgment below were not infected with constitutional error because it allowed EL to recover for a taking when, at most, it suffered consequential tort damages, this erroneous instruction would require reversal. By telling the jury that EL owned "its" groundwater, the court invited the incorrect finding that the District had "taken" EL's "property." A-164–65.

Wisconsin law resolves competing groundwater uses by employing nuisance law, not shared ownership rights. *See Michels*, 63 Wis. 2d at 302–03a. *Michels* expressly rejected the correlative rights rule under which all landowners are treated as having coequal rights in groundwater. *Id.* at 299–302.

Michels instead adopted the then-proposed RESTATEMENT (SECOND) OF TORTS rule, which imposes on each landowner a tort duty not to withdraw groundwater that unreasonably damages other property.[3] *Id.* at 302–03.

Under *Michels*, a landowner might be liable in nuisance for misusing her property—by withdrawing excessive amounts of groundwater—if it interferes with her neighbors' use of their land. *See id.* at 303–03a; *see also* RESTATEMENT (SECOND) OF TORTS, §858 cmt. c. But the excessive use cannot be conceived of as appropriating or invading the neighbors' property rights, since the neighbors have no rights to the ground-

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[3] The proposed rules that *Michels* adopted did not include RESTATEMENT (SECOND) OF TORTS §853(1)(b)'s correlative rights rule, which imposes liability when a "withdrawal of ground water exceeds the proprietor's share of the annual supply or total store of groundwater." The rule *Michels* adopted applied riparian rights principles only to underground streams. 63 Wis. 2d at 303. No underground stream is at issue here. Wisconsin law, therefore, does not afford landowners a vested right to ownership of a particular amount of groundwater and is different from the law of those jurisdictions that do. *See, e.g.*, *McNamara v. City of Rittman*, 838 N.E.2d 640, 643-44 (Ohio 2005); *id.* at 646 ("Ohio has statutorily defined what constitutes reasonable use"); *id.* at 647 (Moyer, C.J., concurring) (groundwater right created provided by adoption of correlative-rights component of RESTATEMENT §858(1)(b)).

water under the extracting landowner's land. *Id.* Thus, even if the takings question did not present a legal issue, which it does, the verdict below must be reversed because the jury was improperly instructed. *See, e.g., State v. Thurmond*, 2004 WI App 49, ¶26, 270 Wis. 2d 477, 677 N.W.2d 655.

C. The District did not appropriate "EL's groundwater."

The District removed groundwater from its own land, as it had the right to do. *See Michels*, 63 Wis. 2d at 303; *see also* 78 AM. JUR. 2D *Waters* §213. It did not extract groundwater from EL's land—it neither entered EL's land to pump groundwater nor took groundwater that EL had captured or extracted. Thus, it cannot be said to have appropriated EL's groundwater, even if EL could claim a property right in groundwater residing under its building, which, for the reasons explained above, it cannot.

EL has, in fact, conceded that the takings judgment here cannot be premised on the District's having appropriated groundwater specifically owned by EL: "A landowner has a property right in groundwater under

his land, but not necessarily in a specific bucket of groundwater." Resp. to Pet. 14. Indeed, if any (fictional) "specific bucket" of groundwater migrated to the construction trench on the District's property, EL had no right to it: only the District had the right to capture groundwater on its land. *Michels*, 63 Wis. 2d at 303–03a; *see also* 78 AM. JUR. 2D *Waters* §213.

D. This Court's cases on the physical taking of land do not apply to groundwater.

The authorities on which EL and the courts below relied do not support a judgment awarding compensation for a taking of groundwater. Those cases hold that the government takes land when it enters upon it or physically appropriates it, a holding that embodies the takings clauses' historical protection of the exclusive right to exclude: "[t]he hallmark of a protected property interest is the right to exclude others." *R.W. Docks*, 2001 WI 73, ¶18 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)).

1. *Damkoehler* and *Dahlman*: invasion or dispossession of land can be a taking.

EL and the lower courts principally relied on *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N.W. 706 (1904), and *Dahlman v. Milwaukee*, 131 Wis. 427, 111 N.W. 675 (1907). *Damkoehler* and *Dahlman* are two of a series of cases decided in the early 1900s involving disputes that arose when, in the course of building streets, municipalities encroached on, appropriated, or damaged neighboring properties.

Those cases collectively hold a municipality liable only if it invades or appropriates a part of the private property adjoining the street, and not for consequential damages caused by the roadwork. *See Alexander,* 16 Wis. at 273; *Dore,* 42 Wis. at 116; *Wallich v. City of Manitowoc,* 57 Wis. 9, 14 N.W. 812 (1883); *Smith*, 78 Wis. at 459; *Drummond v. City of Eau Claire*, 85 Wis. 562, 55 N.W. 1028 (1893); *McCullough v. Village of Campbellsport*, 123 Wis. 334, 101 N.W. 709 (1904).

In *Damkoehler*, which the court of appeals mistakenly found to be "most analogous

to what we have here," *see* 2009 WI App 15, ¶9, the City's excavation "caused a considerable part of [plaintiff's] land to subside and fall into the street." *Damkoehler*, 124 Wis. at 150. The Court held this was a taking because the City appropriated the land: "Such conduct of a municipality is, in effect, an actual taking of property, resulting from an invasion of private property rights." *Id.* at 151.

Dahlman, on which EL has consistently based its takings claim, involved substantially similar facts. There too, "considerable quantities of the [plaintiff's] soil fell down into the street," 131 Wis. at 438, as a result of the City's grading.

McCullough, decided the same term as *Damkoehler*, explained that these types of takings require actual physical invasion. 123 Wis. at 337–38. Distinguishing the consequential damages cases, the Court stated:

> If, however, the municipality or its agents, in making such improvements, are guilty of an actual physical invasion of the adjoining premises, either by occupying a part of them in making an embankment to raise the street, or by taking a part in grading, or by causing it to subside and fall by excavations, then they are not within the protection of the principle of the foregoing cases, and liability attaches. *Bunker v. Hudson*, 122 Wis. 43, 99

> N.W. 448 [(1904)]; *Damkoehler v. Milwaukee*, 124 Wis. —, 101 N.W. 706.

Id. at 338.

Cases like *Damkoehler* and *Dahlman*, therefore, are inapplicable here. The District neither physically invaded nor occupied EL's property. EL's land did not fall into the construction site, and EL has conceded that the "taking of E-L's groundwater did not cause removal of lateral support for E-L's building." EL Ct. App. Br. 28.

Groundwater entering the construction site, moreover, cannot be equated to the ground that fell into a street in *Damkoehler* and *Dahlman*. An owner of land has the exclusive right to the ground of which her plat consists. As discussed above, a landowner does not own the ground*water*, especially groundwater that flows under her neighbor's land, as well as her own.

2. *Price v. Marinette & Menominee Paper Co.*: invasion by flooding.

The only other decision of this Court on which EL and the court of appeals relied is *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 221 N.W. 381 (1928). *Price* also

has nothing to do with groundwater and is inapposite.

In *Price*, the Court held that the plaintiff could plead an inverse condemnation claim when a corporation with eminent domain authority flooded a part of his farmland, thus dispossessing him of it. *Id.* at 26–27. Unlike the groundwater under EL's building, but like the land in *Damkoehler* and *Dahlman*, the property of which Price was dispossessed belonged exclusively to him.

Price is best understood under the well-established theory that the invasion of private property by flooding can constitute a taking. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871) (applying takings clause of Wisconsin Constitution). *Wisconsin Power* read *Price* as an example of a case in which "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." 3 Wis. 2d at 5 (citation omitted) (explaining that the principle governs both *Price* and *Dahlman*).

Neither understanding supports the judgment here. The District did not invade EL's property. Nor did EL claim or prove deprivation of all or most of its interest in the property—a key fact overlooked entirely by the courts below.

E. The District's extraction of groundwater is not an invasion of EL's property.

While not holding that groundwater is privately owned or that the District took EL's groundwater, the court of appeals, relying principally on *Michels*, proposed that "a property owner's interest in the integrity of [ground]water may give rise to a protectable right." 2009 WI App. 15, ¶11 As explained above, however, *Michels* imposed a limitation on property use. Before *Michels*, a landowner had the absolute privilege to extract groundwater from his land, regardless of the effect his extraction had on surrounding property owners. *See Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903), *overruled by Michels*, 63 Wis. 2d at 288–89. In overruling *Huber*, *Michels* simply imposed on landowners who extract groundwater the common-law nuisance duty not to use property in a way that

unreasonably damages neighboring properties. It did not create a new property "right" or "interest." Indeed, in creating a cognizable tort duty, it specifically refused to adopt the "correlative rights" doctrine. *Michels*, 63 Wis. 2d at 300.

Michels recognizes landowners' rights to use underlying groundwater "without liability for interference" in others' uses, "unless . . . [t]he withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure." *Id.* at 303 (citation omitted). *Michels*' rule, as applicable here, only imposes a duty restricting how the District uses its own land; it does not bestow a property right on EL that can be conceived of as having been appropriated. The District's misuse of its land in violation of this duty—the most that EL proved—cannot be viewed properly as a *physical taking* of EL's property.

When the circuit court asked the jury whether the District removed an unreasonable amount of groundwater and what amount of money would compensate EL for harm caused by that use, the court was ask-

ing nuisance-type questions. And this Court held in *Hoene v. Milwaukee*, 17 Wis. 2d 209, 116 N.W.2d 112 (1962), that nuisance claims against government entities are claims for consequential damages, not actionable as takings.

Hoene owned a tavern on Blue Mound Road in Milwaukee. He alleged that the City's failure to maintain the street properly, and allowing its excessive use, caused the tavern's foundation, walls, and floors to crack, resulting in the building becoming unsalable. Hoene sued for nuisance and a taking under art. I, §13. The Court rejected the taking claim, holding that because the City had not appropriated title or possession, it had not "taken" Hoene's property, but merely caused consequential damage, stating:

> the appellants' property was not "taken" for public use in the usual sense of the word. Neither title nor possession was appropriated by the city. The appellants' property was not needed by the city to operate its street. This court has previously stated that mere consequential damage to property resulting from governmental action is not a taking thereof. Consequential damage is precisely what the appellants are alleging.

17 Wis. 2d at 217 (citation omitted).

As in *Hoene*, EL does not claim that the District appropriated title or possession of its building, and the District did not need EL's property to construct its sewer. EL's claim that the District's removal of groundwater from a neighboring property damaged the building's foundational piles is similarly premised solely on consequential damage not recoverable under art. I, §13. *Id.*

F. EL cannot meet the standards for a taking based on a restricted use of its property.

This Court has allowed takings claims based on non-invasive government conduct only in very limited circumstances. This Court has stated, "A taking can occur absent physical invasion only where there is a legally imposed restriction upon the property's use." *Howell Plaza II*, 92 Wis. 2d at 88. EL has not, and could not, claim such a restriction.

Even setting aside this principle, government interference with the use of private property only constitutes a categorical taking when it either (a) forces the owner to allow entry onto the property by another, *see R.W. Docks*, 2001 WI 73, ¶15, or (b) deprives the owner of "all economically beneficial or pro-

ductive use of land" or "substantially all practical uses of a property," *id.* (citation omitted).

Neither standard is met here. The District neither forced EL to accept entry by another nor deprived EL of all beneficial use of the property. In evaluating whether government interference deprives an owner of all beneficial or practical use, the owner's property must "be considered as a whole." *Id.* ¶25. The jury's findings entail that EL was not deprived of all beneficial or practical uses of its property.

For the same reasons, the record does not support an "ad hoc" taking claim. Government regulation or other non-invasive conduct affecting private property that satisfies neither categorical takings standard can be ruled a taking only after "an analysis of the nature and character of the governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct invest-

ment-backed expectations in the property." *Id.* ¶17; *see also Zealy*, 201 Wis. 2d at 374.[4]

The jury was not asked to consider whether the public benefit of constructing the sewer outweighed the incidental damage caused by its construction. But even if the inquiry had been made, no reasonable jury that found, as this one did, that the District's conduct did not deprive EL of rental income could find that the District interfered with EL's investment-backed expectations in the property.

III. The Lower Courts' Conclusion That EL's Claim Is One for Takings, Rather Than Consequential Damages, Misreads *Wisconsin Power*.

The circuit court acknowledged that the District's position that EL suffered only non-

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[4] In states with more expansive constitutional clauses ("damages clauses"), a government's mere interference with a landowner's use of groundwater might be compensable. *See, e.g., McNamara*, 838 N.E. at 645 (Ohio constitution "requires compensation to be made for private property taken for public use, any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises"). Proper application of Wisconsin (and federal) takings law, however, only recognizes a non-invasive taking when the government conduct substantially interferes with the property's use or renders it valueless. *R.W. Docks*, 2001 WI 73, ¶17; *see also Zealy*, 201 Wis. 2d at 374.

compensable consequential damages "makes sense." A-87. It ultimately allowed recovery based on an "apparent exception" (A-90) to this "cardinal principle[]" "for foreseeable but unintended consequences of government conduct." *Id.* In affirming, the court of appeals similarly concluded that consequential damages can give rise to a taking of property if the government "had reason to anticipate that damage would result from its acts." A-7 (internal quotation omitted).

The lower courts' suggestion that consequential damages might be takings if they are "foreseeable" or were capable of anticipation has no support. Whether there is a "taking" depends on what the government *does*, not on what it intends or anticipates doing:

> 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, 112 Wis. 2d at 430 (emphasis added). Even a casual review of the cases in which this Court has held consequential effects of government actors not to be takings demon-

strates that the lower courts misapplied the law—for example, the obstructing effect of the stairway construction in *Randall* was plainly "foreseeable," yet this Court held that the resulting effect did not amount to a taking. *See* 212 Wis. at 382. Indeed, the need to import the notion of "foreseeability" only underscores the tort-like nature of the real claim at issue here. *Cf. Coffey v. Milwaukee*, 74 Wis. 2d 526, 537, 247 N.W.2d 132 (1976) ("The concept of duty in Wisconsin, as it relates to negligence cases is inexorably interwoven with foreseeability.").

Foreseeable or not, non-invasive government conduct can constitute a taking only if it deprives the owner "of substantially all beneficial use of the property or render[s] the land useless for all reasonable purposes," *Zinn*, 112 Wis. 2d at 430; *see supra* Part II.F. That standard is indisputably not met here, given that EL continuously rented its building and the jury found no loss of rental income.

The court of appeals' contrary ruling misread *Wisconsin Power* to create an exception to the rule that consequential damages

are not takings when the government "could anticipate that damage would result from its acts" and where the harm-causing conduct served some public benefit:

> [U]nlike the situation in *Wisconsin Power & Light*, the Sewerage District had reason to anticipate that damage would result from its acts. Further, unlike the situation in *Wisconsin Power & Light*, where the public obtained no benefit from injuring the tower, draining the groundwater facilitated the Sewerage District's construction by safeguarding the workers and the work from water flowing into the tunnel being dug. Therefore, diversion of the groundwater had utility to the Sewerage District project.

2009 WI App 15, ¶10 (citations omitted).

None of these factual distinctions the court of appeals pointed to in *Wisconsin Power* addresses the fundamental principle that, in the absence of government invasion of the property, a takings claim requires deprivation of all economically beneficial property use. In *Wisconsin Power*, unlike here, the county's conduct (depositing gravel in a marsh) was reported to have resulted in the property's destruction.

Wisconsin Power nonetheless concluded that the damages were consequential and not recoverable as a taking. Against this backdrop, the Court's inquiry into the tower's util-

ity for the public purpose of constructing the road, the lack of intent by the county to acquire the tower, and the county's unawareness of the possibility of harm might better be understood as supporting a conclusion that the tower was not destroyed *for public use*. The Court reasoned that the tower's destruction was accidental—akin to being struck by a negligently driven truck—and for that reason was "not taken for public use within the meaning of sec. 13, art. I, Wis. Const." 3 Wis. 2d at 7.

Because the District did not destroy EL's building or deprive EL of all economically beneficial use of the building, the District's awareness of a risk that removing water from the construction trench might cause consequential damage is irrelevant. And, in all events, the public benefited no more from the consequential damage to EL's building than from the destruction of Wisconsin Power's tower. The court of appeals' comparison of the District's *act*—draining the water in the construction trench—to the *consequence* of the county's act in *Wisconsin Power*—destroying the tower—is fallacious.

Just as the District's act of draining the groundwater (which caused the damage here) benefited sewer construction, the county's act of filling the marsh with stone (which caused the damage in *Wisconsin Power*) benefited the road construction. Both acts occurred on government property. Both had consequential effects that damaged private property. Neither is a taking of private property for public use.

IV. The Fifth Amendment, Not Directly Applicable Here, Also Does Not Afford Compensation for Consequential Property Damage.

The Fifth Amendment, made applicable to the states by the Fourteenth, provides that private property "shall not be taken for public use, without just compensation." U.S. Const. amend. V; *see also Lingle*, 544 U.S. at 536.

A. EL has abandoned any claim under the Fifth Amendment.

EL has consistently relied only on Wisconsin law as the basis for its recovery. It did not invoke federal law in obtaining the judgment, and neither lower court considered the judgment to be one under federal law. Nor did EL rely on federal law to defend its judg-

ment before the court of appeals or in opposing the petition for review to this Court.

B. The Fifth Amendment does not recognize consequential damages as "takings."

Like this Court in interpreting art. I, §13, the U.S. Supreme Court in interpreting the Fifth Amendment has divided government conduct potentially giving rise to compensation into two types: (1) direct government appropriations or physical invasions of private property, and (2) non-invasive regulatory actions that force the owner to suffer a physical invasion or that substantially interfere with the property's use. *Lingle*, 544 U.S. at 537–38. As discussed above, no direct government appropriation or physical invasion occurred here, and no regulatory action is at issue.

Like Wisconsin law, moreover, federal law has long adhered to the principle that consequential damages from non-invasive government conduct do not amount to "takings": "Operations of the Government . . . oft times inflict serious damage . . ., but damage alone gives courts no power to require compensation where there is not an actual taking

of property." *Willow River,* 324 U.S. at 510; *see also Bedford v. United States,* 192 U.S. 217, 225 (1904) (no taking where government obstruction of river alleged to cause damage that "was strictly consequential[] [and] was the result of the action of the river through a course of years"); *Gibson v. United States,* 166 U.S. 269, 275 (1897) (damage resulting from construction of dike "was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power").[5]

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[5] The U.S. Supreme Court has addressed the takings clause's application to surface water in wholly inapposite contexts. *See Int'l Paper Co. v. United States,* 282 U.S. 399, 405 (1931) (United States appropriated paper company's "conveyance and lease, to draw . . . 730 cubic feet per second—a right that New York law treated as a corporeal hereditament and real estate" when it directed power company on Niagara River not to allow diversion); *Dugan v. Rank,* 372 U.S. 609, 625 (1963) (government's subordination of private use of river to public use "'whenever it saw fit,' may give rise to a claim for compensation if the result of the government's action was to 'deprive[e] the owner of [the] profitable use'" of its property) (dicta). Groundwater was at issue in *United States v. Alexander,* 148 U.S. 186, 187 (1893), but Congress had provided statutory condemnation relief for a landowner whose well was destroyed by tunnel construction in Washington, D.C., alleviating any need to decide whether the

C. EL's consequential damages claim would also not be a taking under federal law.

The U.S. Court of Appeals for the Federal Circuit, the federal court with appellate jurisdiction over takings claims against the United States, has propounded a multi-part test to distinguish government conduct that so substantially affects private property as to be compensable under the Fifth Amendment, from other conduct that causes non-compensable consequential tort damage. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003). This approach, which the U.S. Supreme Court has never sanctioned, would also not support the judgment here, even were this Court to embrace its methodology.

Under the Federal Circuit's approach, a court must first determine whether the plaintiff claims a taking or a tort: "a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is

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claim was for a consequential injury not recoverable under the Fifth Amendment.

the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Id.* at 1355 (citation omitted).

Here, for the reasons described above, EL had no "protected property interest" that the District "invaded." And none of the questions that must be answered to apply the Federal Circuit's "direct, natural, or probable result" analysis were presented to the jury. The jury did not find, and was not asked to find, whether "an invasion" was the "direct, natural, or probable result" of District conduct. The jury found that the removal of groundwater caused EL's property to settle. A-165. This is not an invasion. And, even if it were an invasion, the jury was instructed that the removal could be "a cause" of the settling if "it was a substantial factor in producing the building settling." A-161. This finding is insufficient to establish a taking claim under the Federal Circuit's test, which requires the jury to find that the "invasion" was the "direct, natural, or probable result" of the government conduct. *See Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005)

(proving cause-in-fact insufficient to meet "direct, natural, or probable result" standard).

The next step under the Federal Circuit's approach, if the tort-taking inquiry reveals that a takings remedy is "potentially available," is that the court must determine if the plaintiff "possesse[s] a protectable property interest in what it alleges the government has taken." *Ridge Line*, 346 F.3d at 1355. This is a question of state law, and Wisconsin law, as explained above, does not recognize ownership of groundwater or a right to use a specific amount of groundwater; it merely recognizes a tort duty not to use groundwater to unreasonably harm neighboring landowners. *See supra* Part II.B. Thus, to the extent EL claims a taking of groundwater, it possesses no protectable property interest in it. *Ridge Line*, 346 F.3d at 1355.

The final part of the Federal Circuit's analysis to determine whether conduct is a taking rather than a tort requires determining whether the conduct "appropriated a benefit to the government at the expense of the property owner, at least by preempting the property owner's right to enjoy its prop-

erty for an extended period of time, *rather than merely by inflicting an injury that reduces the property's value.*" *Moden*, 404 F.3d at 1342 (emphasis added); *see also Ridge Line*, 346 F.3d at 1355.

EL also cannot meet this part of the Federal Circuit standard. By removing water from the construction trench for safety reasons, the District did not appropriate a benefit to which EL had a right. *See supra* Part II.B. And the jury's finding that EL did not lose rent conclusively demonstrates that the District did not preempt EL's "right to enjoy its property for an extended period of time," but that it instead "merely inflict[ed] an injury that reduce[d] the property's value."

V. Reaffirmation of the Rule That Non-Invasive Government Conduct Does Not Result In Takings Is Needed to Eliminate Uncertainty and to Protect the Public Fisc.

In crafting their takings remedy for tort damages, the lower courts ignored the reliable physical invasion and appropriation markers of takings liability that have provided guidance for almost 150 years. Adopting the lower courts' approach threatens to

subject any government entity that designs, constructs, or operates a sewer, well, tunnel, or similar project to "takings claims" of uncertain duration and scope.

Because the non-invasive conduct here did not substantially interfere with the property's use, upholding a takings claim under these circumstances potentially removes an important tort-takings distinction. And, if this Court were to ignore the substantial impairment of beneficial use criterion for takings liability, even state regulation of groundwater—*e.g.*, a statute or regulation limiting groundwater use or extraction—might require compensation to all affected landowners, regardless of how minimal the impact on their property use.

The fact that the claim recognized below was brought years after the project had been planned, designed, constructed, and fully paid for also warrants pause. In stark contravention with the notice of claim statute's purposes, *see* Wis. Stat. §893.80(1), this new claim puts the public fisc at risk years, perhaps decades, after a project's completion. Under the approach embraced by the courts

below, the State and its municipalities could be subjected to claims by property owners within an unknowable vicinity to similar public works who one day claim that the government's extraction of groundwater damaged their properties.

The lower courts' decisions to cast aside the takings claim limitations, including the consequential damages limitation, is to allow EL to recover in "takings" for what is really a tort claim for which the Legislature has provided immunity. As this Court has held, governmental tort immunity applies to all discretionary activities in designing, constructing, operating, and maintaining sewers and similar public works. Wis. Stat. §893.80(4); *see also Milwaukee Metro. Sewerage Dist. v. Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658. This immunity, adopted by the Legislature at this Court's invitation, *see Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), safeguards public funds by substituting a system of public accountability and regulatory oversight for judicial inquiries into the benefits and costs of public works. Judges and juries—the

oversight boards the court of appeals' approach would put in place for government groundwater use—are ill-equipped to decide how best to design and build sewer systems and other public works in a way that minimizes unreasonable harm to private property and maximizes social benefit.

Newly created takings claims are also unnecessary supplements to tort claims against construction contractors and their insurers, such as EL's claims against CNA. EL was not left without a remedy. It sued the construction contractor's insurer for negligence and nuisance and obtained a settlement that it chose to keep confidential, in return for a *Pierringer* release. This Court should not countenance the lower courts' willingness to use the state constitution to afford additional tort-like recovery from the District.

This threat is real and significant. As the circuit court recognized, "[s]imilar claims have been made in other cases arising out of the Deep Tunnel project." A-085. Other building owners have sued the District, alleging that the construction and existence of the

$1 billion Deep Tunnel project has similarly caused damage to wooden piles, allegedly actionable as takings, as well as in nuisance and negligence. The Deep Tunnel, a 32-feet diameter tunnel mined 300 feet below the surface between 1988–1992, was constructed as part of a court-mandated water pollution abatement program that was overseen and approved by the Wisconsin Department of Natural Resources. During and after construction, the District evaluated and resolved building-owner claims of construction-caused property damage for which the District would have been responsible under its agreement with its construction contractor. Nevertheless, more than a decade after its construction, owners of the nineteenth-century Boston Store building sued the District for takings, as well as for negligence and nuisance, seeking to recover $12 million based on allegations that the Tunnel's construction and continued existence damaged the store's foundational piles. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2007AP221 (Wis. Ct. App.) (pending). The circuit court dismissed the takings claim as seeking consequential

damages and applied §893.80(3)'s limitation on tort damages. *Id.*, 03-CV-5040 (Milw. County Cir. Ct.) That case, which raises a host of statutory immunity and other issues, is pending in the court of appeals, which has ordered it held in abeyance until after a decision in this case.

These particular cases, moreover, are not the principal threat caused by an unbounded takings claim of the type devised below. The District's sewers provide service for 1.1 million customers in a 411-square-mile area.[6] And, in 2004, the U.S. EPA estimated that more than $2.8 billion of construction spending was needed in Wisconsin on sewer work alone.[7] State regulation, rather than takings litigation, is the proper means by which to accomplish this construction while protecting the rights of neighboring landowners.

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6 *See* Milwaukee Metropolitan Sewerage District, About Us, http://v3.mmsd.com/AboutUs.aspx.

7 *See* U.S. Environmental Protection Agency, Clean Watersheds Needs Survey 2004 Report to Congress, app. A, tbl. A-1 (adding columns III-VI), Jan. 2008, *available at* http://www.epa.gov/cwns/2004rtc/appendixa.pdf.

And State regulation overlies everything the District does. State law prohibits the District from constructing any significant new infrastructure without approval from the WDNR. Wis. Stat. §281.41. New projects that could significantly affect groundwater levels must be identified in a State-approved facility plan meeting the requirements of Wis. Admin. Code NR 110. State law also requires WDNR approval for "temporary dewatering of a construction site, including a construction site for a building, road, or utility." Wis. Stat. §281.34(2m). In addition, all plans and specifications for sewer construction are submitted to the WDNR, which reviews the route and geotechnical aspects of the project. Wis. Admin. Code NR §§ 110.06 & 110.07 (2001).

Municipalities that build sewers and the State, which builds and approves a variety of projects that potentially affect groundwater levels, should be able to rely on their ability to plan project costs based on condemnation of the property used to construct and house the project. Only by preserving the

traditional limits on tort liability that the courts below disregarded can this Court preserve government's ability to determine at the planning, construction, and implementation stages of a project what it is likely to cost the taxpayers. If 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.

Alexander rejected a similar attempt to use the takings clause to recover consequential damages caused by construction of a public works project. 16 Wis. at 273. Justices of this Court writing soon after the Constitution's adoption recognized that allowing takings claims of this type would subject municipalities to endless litigation and deter them from undertaking beneficial projects:

> And for damages thus sustained, . . . it is quite obvious, that if the appellant may maintain this action for them, so might every proprietor of lots lying along the river whose property had been at all affected by the work, just to the extent of his injury. This may not afford a conclusive reason why a municipal corporation should not be answerable for all such consequential damages, but it at least will convince any one, that if such corporations were answerable, few improve-

> ments of this nature would ever be undertaken by them.

Id. That observation made in 1862 is no less accurate today.

VI. EL Cannot State a Claim for Inverse Condemnation Under §32.10.

Section 32.10 affords an inverse condemnation claim when "property has been *occupied* by a person possessing the power of condemnation." Wis. Stat. §32.10 (emphasis added). Consistent with this "occupation" requirement, *Zinn* held that §32.10 relief, including attorney fees, is only available for "traditional" invasion takings, and does not extend to every kind of taking compensable under art. I, §13:

> The statute is designed solely to deal with the traditional exercise of eminent domain by the government: the government has occupied private property, plans to continue such occupation and the landowner is merely requesting just payment for this land. In effect the land which has been taken by the government without first commencing condemnation proceedings is sold to the government by the landowner.

Zinn, 112 Wis. 2d at 433; *see also Muscoda Bridge Co. v. Worden-Allen Co.*, 196 Wis. 76, 88, 219 N.W. 428 (1928).

Because the District has never "occupied" EL's property, EL does not have a claim for inverse condemnation and is not entitled to the expenses and fees that can be recoverable only in connection with such claims.

In *Zinn*, this Court considered whether a claim could be stated under either §32.10 or art. I, §13 where a declaratory ruling by the WDNR transferred to government ownership some 200 acres of land formerly belonging to a private landowner. 112 Wis. 2d at 421. That administrative ruling was ultimately reversed after several years, and the landowner sought compensation from the state under constitutional taking and inverse condemnation theories for the time during which the government had taken ownership of the property. *Id.*

This Court concluded that §32.10 did not apply because the State was not then occupying the property and the owner did not seek compensation for the property's full value:

> The landowner simply wants just compensation for the period in which the state took the property which has since been returned. Sec. 32.10, Stats., was simply not designed to remedy this type of taking.

Id. at 433–34. Similarly, the District never physically entered upon EL's property or took title to that property. Nor did EL seek to recover the full value of its property. Section 32.10 is inapplicable.

Some decisions preceding *Zinn*, such as *Howell Plaza, Inc. v. State Highway Comm'n*, 66 Wis. 2d 720, 723, 226 N.W.2d 185 (1975), contain *dicta* that might be read to suggest that §32.10 applies beyond actual occupation. But *Zinn* necessarily cabins those statements made in decisions resolving claims alleged as regulatory takings in a way that did not implicate §32.10's scope or applicability. The same can be said for the Court of Appeals' decision in *Wikel*, in which a plaintiff was permitted to proceed with a §32.10 claim based on allegations that the Wisconsin Department of Transportation's construction of a highway on adjoining property rendered the plaintiff's property "uninhabitable and unsaleable." *Wikel*, 2001 WI App 214, ¶14. *Wikel* does not mention *Zinn* and appears to assume improperly that §32.10 and art. I, §13 are coextensive.

Even if these cases were understood to establish a constructive, non-literal interpretation of what it means to "occupy" private property under §32.10—an interpretation not limited to physical invasion or possession of title cases—EL's claim fails. *Howell Plaza* and *Wikel* allowed claims to proceed because they were supported by allegations that the respective property owners had been deprived of all of the value of the property. In *Wikel*, for example, the plaintiff alleged that the government's conduct rendered the property uninhabitable and unsaleable. EL's property, in contrast, was not rendered "uninhabitable or unsaleable;" EL continued to rent the building, unaffected by the damage it claims in this action as a "taking."[8]

Where, as here, the government does not occupy the property but is alleged to have damaged it incidentally, the kinds of eminent domain principles that underlie §32.10 are

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[8] For its conclusion that an occupation had occurred, the court of appeals relied only on *Wikel*, and on *Eberle v. Dane County Bd. of Adjustment*, 227 Wis. 2d 609, 625 n.19, 595 N.W.2d 730 (1999), which held that a temporary taking can be covered by art. I, §13, although §32.10 does not provide a remedy for such claims.

not implicated. The inverse condemnation statute's purpose is to afford relief when the government decides not to follow the statutory condemnation procedure. The District did not eschew that procedure here—it never sought to occupy or take title to EL's property. Neither did the District destroy the property to benefit the public.

EL's claim for relief under §32.10 seeks to treat that statutory provision as a mirror image of the Constitution's takings provision that would apply regardless of whether the government could have exercised its condemnation authority before undertaking the challenged government action. Because EL's approach disregards the language and purpose of the statute and is contrary to this Court's holding in *Zinn*, EL's claim under §32.10 must fail. Thus, even if EL were entitled to compensation under art. I, §13, it would not be entitled to an award of expenses or fees—which are only available under §32.10.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand for entry of judgment in favor of the District on EL's takings and Wis. Stat. §32.10 claims.

Dated this 17th day of June, 2009

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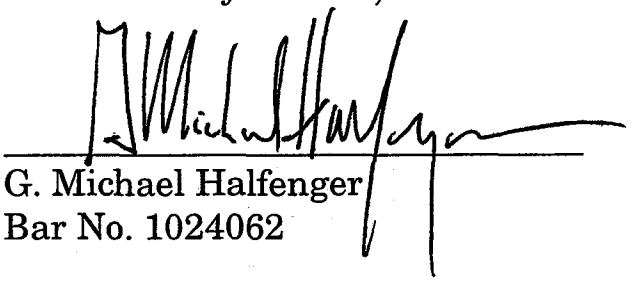
FORM AND LENGTH CERTIFICATION

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 10,954 words.

Dated this 17th day of June, 2009.



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CERTIFICATE OF MAILING

I certify that this Brief and Appendix 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 June 17, 2009. I further certify that the brief was correctly addressed and postage was pre-paid.

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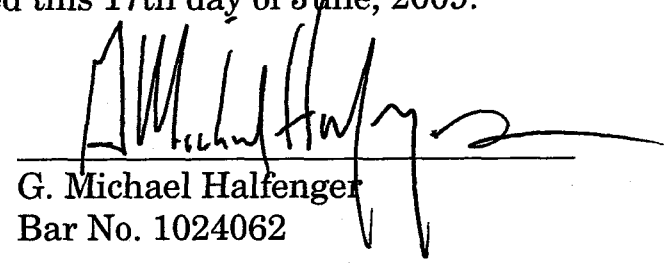

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