Appeal No. 2018AP59

Cir. Ct. Nos. 2016CV2817
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WISCONSIN COURT OF APPEALS
DISTRICT II

CLEAN WISCONSIN, INC. AND PLEASANT LAKE MANAGEMENT DISTRICT,

PETITIONERS-RESPONDENTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-APPELLANT,

WISCONSIN MANUFACTURERS & COMMERCE, DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION, WISCONSIN CHEESE MAKERS ASSOCIATION, WISCONSIN FARM BUREAU FEDERATION, WISCONSIN PAPER COUNCIL AND WISCONSIN CORN GROWERS ASSOCIATION,

INTERVENORS-CO-APPELLANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

We certify this and consolidated companion cases[1] as all address 2011 Wis. Act 21 (Act 21) and its application to the regulatory permit approval process relating to "waters of the state." These cases have constitutional (public trust doctrine) and statutory (who is the "trustee" over the waters of the state) implications that should be answered by the highest court of the state.

The State argues that Act 21 was "designed to confine agencies' authority to that 'explicitly permitted by statute,'" and prohibit agencies from "implement[ing] or enforce[ing] any standard, requirement, or threshold … unless … explicitly permitted by statute or by a rule." *See* WIS. STAT. § 227.10(2m) (2015-16).[2] Petitioners respond that ***Lake Beulah Mgmt. Dist. v. DNR.***, 2011 WI 54, ¶39, 335 Wis. 2d 47, 799 N.W.2d 73, is factually on point, has not been overruled, and holds that the Department of Natural Resources (DNR) has the authority and general duty to preserve the waters of the state and has the discretion to undertake the review it deems necessary for all proposed high capacity wells.

BACKGROUND

The DNR has been granted "general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of [WIS. STAT. ch. 281]. The department also shall formulate plans and programs for the

[1] ***Clean Wisconsin, Inc. v. DNR***, Nos. 2016AP1688, 2016AP2502, unpublished certification (WI App Jan. 16, 2019).

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

prevention and abatement of water pollution and for the maintenance and improvement of water quality." WIS. STAT. § 281.12. Relevant to this case, ch. 281 governs the withdrawal of groundwater and "combines the DNR's overarching authority and duty to manage and preserve waters of the state with certain specific, minimum statutory requirements." ***Lake Beulah***, 335 Wis. 2d 47, ¶35. The statutes create three categories of wells according to the volume of the withdrawal: (1) small wells with a capacity of less than 100,000 gallons per day (gpd); (2) "high capacity well[s]" with a withdrawal capacity of over 100,000 gpd; and (3) high capacity wells with a withdrawal of more than two million gpd. *See* WIS. STAT. §§ 281.34; 281.35.

The DNR must approve any high capacity well that can pump over 100,000 gpd, and the DNR may not approve the well "[i]f the department determines that a proposed high capacity well may impair the water supply of a public utility engaged in furnishing water to or for the public, … unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that will ensure that the water supply of the public utility will not be impaired." WIS. STAT. § 281.34(1)(b), (2), (5)(a). The statutes further provide that the DNR must conduct an "environmental review process" for high capacity wells that (1) are located in a groundwater protection area,[3] (2) have water loss of more than

[3] "Groundwater protection area" is an area within 1200 feet of a well used for fire protection purposes, a trout stream, or an outstanding or exceptional resource water under WIS. STAT. § 281.15. WIS. STAT. § 281.34(1)(a)-(am).

ninety-five percent of the amount of the water withdrawn, and (3) may have a significant environmental impact on a spring.[4] Sec. 281.34(4).

The eight wells at issue in this case fall into the second category of "high capacity wells" and are regulated primarily under WIS. STAT. § 281.34. The eight well applications were submitted between March 2014 and May 2015. For each well application, the DNR conducted varying degrees of analysis of the environmental impact. Three of the applications were delayed by concerns about neighboring waters, but no formal investigation was completed. One application was initially recommended for approval with a limited capacity, but then delayed for further evaluation. For the remaining four applications, the DNR recommended that the applications be denied based on the DNR's "obligat[ion] to consider existing cumulative impacts when making decisions on new wells," but the applicants were given the option of denial, withdrawing the application, or putting the application on hold "due to the fact that the Legislature is currently discussing legislation that may affect the review of these applications."

The Wisconsin State Assembly requested a formal opinion from the Attorney General addressing the impact of Act 21 on the court's decision in ***Lake Beulah***. In May 2016, the Wisconsin Attorney General issued his opinion that Act 21 "precluded" "any type of environmental review" for wells outside the limited "types of wells" specified in WIS. STAT. §§ 281.34 and 281.35. The Attorney General further opined that the Wisconsin Supreme Court did not "address" Act 21 in ***Lake Beulah***, and to the extent that it did address Act 21,

[4] "'Spring' means an area of concentrated groundwater discharge occurring at the surface of the land that results in a flow of at least one cubic foot per second at least 80 percent of the time." WIS. STAT. § 281.34(1)(f).

"***Lake Beulah*** … is no longer controlling." According to the Attorney General, Act 21 "revert[ed]" any residual duty to act under the public trust doctrine "back to the Legislature."

The DNR thereafter adopted the opinion of the Attorney General and began approving backlogged well applications, including the eight wells at issue in this appeal. Petitioners filed for judicial review and challenged the approval process. The DNR argued to the circuit court (1) that Act 21 precludes the DNR from considering environmental impacts outside the defined categories in WIS. STAT. §§ 281.34 and 281.35, (2) that ***Lake Beulah*** is not controlling, and (3) that § 281.34(5m) precludes a challenge based on a lack of consideration of cumulative impacts.[5]

The circuit court disagreed with the DNR's position and concluded that ***Lake Beulah*** is controlling law and vacated the eight well permits. The circuit court also found that the DNR is the unit of government that has been delegated the affirmative duty to protect the waters of the state. The State appeals.

DISCUSSION

The crux of this case is the interplay between ***Lake Beulah*** and Act 21. ***Lake Beulah*** has not been overruled, and neither the circuit court nor the court of appeals may dismiss any statement within ***Lake Beulah*** as "dictum." *See*

[5] See ***In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC***, Case Nos. IH-12-03, IH-12-05 (Wis. Div. Hearings & Appeals Sept. 3, 2014) (hereinafter, ***Richfield Dairy***), a decision from a contested case hearing, for a general discussion regarding the "cumulative" issue. As ***Lake Beulah*** encompasses the questions raised in ***Richfield Dairy***, we need not analyze ***Richfield Dairy*** for purposes of this certification.

Zarder v. Humana Ins. Co., 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. For purposes of appellate review, we must accept that Act 21 was in effect when the court issued its decision in ***Lake Beulah*** and that the court found that Act 21 did "not affect our analysis." ***Lake Beulah***, 335 Wis. 2d 47, ¶39 n.31.

Act 21 made significant changes to statutes relating to the promulgation of administrative rules. Relevant here, Act 21 created WIS. STAT. § 227.10(2m), which provides:

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in [WIS. STAT. §] 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

The DNR argues that Act 21 prohibits the DNR from considering environmental impacts of wells outside the defined categories in WIS. STAT. §§ 281.34 and 281.35 as it is not "explicitly required or explicitly permitted by statute or by a rule." *See* § 227.10(2m).

Approximately one month after Act 21 went into effect, the decision in ***Lake Beulah*** was issued. We note that the wells at issue in this case are similar to the statutory category of wells at issue in ***Lake Beulah***. The DNR issued a permit to the Village of East Troy for a municipal well, and the petitioners challenged the DNR's decision, claiming it failed to consider the potential impact the well may have on adjacent Lake Beulah, a navigable water. ***Lake Beulah***, 335 Wis. 2d 47, ¶1. ***Lake Beulah*** first addressed the public trust doctrine. It described the public trust doctrine as being "rooted" in article IX, § 1 of the Wisconsin Constitution and that the court has "long confirmed the ongoing strength and

vitality of the State's duty under the public trust doctrine to protect our valuable water resources." ***Lake Beulah***, 335 Wis. 2d 47, ¶¶30-31. The court reiterated the importance of a "broad interpretation and vigorous enforcement of the public trust doctrine," concluding that the state has delegated, by statute, its public trust duties to the DNR. ***Id.***, ¶¶31, 34 (citing ***Wisconsin's Envtl. Decade, Inc. v. DNR***, 85 Wis. 2d 518, 527-28, 271 N.W.2d 69 (1978) (referencing WIS. STAT. § 144.025 (1977), predecessor statute to WIS. STAT. §§ 281.11 and 281.12)).[6] Act 21 did not repeal, amend, or modify any part of §§ 281.11 or 281.12.

[6] WISCONSIN STAT. § 281.11 provides:

> The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter. In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. Because of the importance of Lakes Superior and Michigan and Green Bay as vast water resource reservoirs, water quality standards for those rivers emptying into Lakes Superior and Michigan and Green Bay shall be as high as is practicable.

Lake Beulah then addressed the statutory scheme governing high capacity wells and found that WIS. STAT. ch. 281 "combines the DNR's overarching authority and duty to manage and preserve waters of the state with certain specific, minimum statutory requirements." ***Lake Beulah***, 335 Wis. 2d 47, ¶35. The court concluded that through ch. 281, "the legislature has explicitly provided the DNR with the broad authority and a general duty, in part through its delegation of the State's public trust obligations, to manage, protect, and maintain waters of the state." ***Lake Beulah***, 335 Wis. 2d 47, ¶39. "Specifically, for all proposed high capacity wells, the legislature has expressly granted the DNR the authority and a general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application." ***Id.*** The court found that the DNR has "the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state." ***Id.*** The court found that there is nothing in either WIS. STAT. §§ 281.34 or 281.35 "that limits the DNR's authority to consider the environmental impacts of a proposed high capacity well, nor is there any language in subchapter II of ch. 281 that requires the DNR to issue a permit for a well if the statutory requirements are met and no formal review or findings are required." ***Lake Beulah***, 335 Wis. 2d 47, ¶41.

Lake Beulah holds that "[g]eneral standards are common in environmental statutes" and the fact that they are "broad standards does not make them non-existent ones." ***Id.***, ¶43. Act 21 was in effect when ***Lake Beulah*** was issued, and the court noted that all parties were of the opinion that Act 21 did not affect the court's analysis. The court concurred: "We agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do

not address this statutory change any further." ***Lake Beulah***, 335 Wis. 2d 47, ¶39 n.31.

CONCLUSION

As only the Wisconsin Supreme Court may amend, modify, or overrule a decision and as the questions presented have statewide concern and implication, we request that the Court accept certification in this case as well as our request for certification in case Nos. 2016AP1688/2502.