

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

RANDALL J. JASPERSON, et al.,

Plaintiffs,

vs.

Case No. 09CV1213

RACINE COUNTY,

Defendant.

FILED

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CLERK OF CIRCUIT COURTS
RACINE COUNTY

DECISION ON DEFENDANT'S SUMMARY JUDGMENT MOTION

This action is before the court on the defendant's motion for summary judgment pursuant to sec. 802.08, Stats.

The standard to be applied by the court is set forth in numerous cases. In Grams v. Boss, 97 Wis.2d 332, 338-339, 294 N.W.2d 473 (S. Ct. 1980), the court wrote:

"On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment."

And, in Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 807-808, 623 N.W.2d 751, the court wrote:

"The complaint states a simple cause of action based on negligence. Negligence is ordinarily an issue for the fact-finder and not for summary judgment. Summary judgment is uncommon in negligence actions, because the court "must be able to say that no properly instructed, reasonable jury could find, based on the facts presented, that [the defendant-driver] failed to exercise ordinary care. Erickson v. Prudential Ins. Co., 166 Wis.2d 82, 93, 479 N.W.2d 552

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(Ct. App.) (quoting *Shannon v. Shannon*, 150 Wis.2d 434, 442, 442 N.W.2d 25 (1989).”

And, in *Maynard v. Port Publications, Inc.*, 98 Wis.2d. 555, 562, 297 N.W.2d 500 (S. Ct. 1980) the court wrote:

“The summary judgment procedure is designed to eliminate unnecessary trials.”

In this case the plaintiff has alleged that Racine County which owns and operates the Wind Lake dam negligently “failed to exercise its ministerial duties and/or failed to exercise the discretion given to it, to draw down waters at Wind Lake to avoid unnecessary flooding” of the plaintiffs’ sod farms. (Complaint, page 2, paragraph 8). The plaintiffs have also alleged causes of action sounding in nuisance and trespass, illegal taking of the plaintiffs property pursuant to sec. 32.10, Stats., and a violation of 42 U.S.C.A. 1983.

[An originally named defendant, Wind Lake Management District, has been dismissed from this action.]

Racine County answered plaintiffs’ complaint denying the plaintiffs allegations and raising as an affirmative defense, among other affirmative defenses, governmental immunity.

Racine County now moves for summary judgment on the basis that there is no genuine issue of material fact that the operation of the dam is a discretionary function, that it is undisputed that there has been no permanent taking of the plaintiffs’ property under sec. 32.10, Stats., and there is no 42 U.S.C.A. 1983 claim because the State remedies are adequate.

Sec. 893.80(4), Stats., reads, in part:

“No suit may be brought against any . . . , political corporation, . . . or its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.”

In *Lifer v. Raymond*, 80 Wis.2d 503, 509, 259 N.W.2d 537, the Supreme Court wrote:

“The *Lister* holding, as well as earlier cases in accord with it, require that for an act to come within the ministerial or nondiscretionary exception to the civil immunity rule, “nothing remains for judgment or discretion.” It follows that acts which “involve the exercise of judgment or discretion rather than the mere performance of a prescribed task” do not come within the “ministerial duty” exception to civil immunity rule.

And, at pages 512, the Court wrote in *Lifer*:

“A quasi-judicial act involves the exercise of discretion and judgment in the application of a rule to specific facts. Acts that are “legislative, quasi-legislative, judicial or quasi-judicial functions,” are, by definition, nonministerial acts.”

The issue, then, is whether the operation of the dam is ministerial.

In Willow Creek Ranch v. Town of Shelby, 2000 WI 56, 235 Wis.2d 409, 425, 611 N.W.2d 693, the court wrote:

“A ministerial act, in contrast to an immune discretionary act, involves a duty that “is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.” *C.L. v. Olson*, 143 Wis.2d 701, 711-12, 422 N.W.2d 614 (1988) (quoting *Lister v. Board of Regents*, 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976).”

The Department of Natural Resources (DNR) issues orders regarding dams. As sec. 31.02(1), Stats., provides:

“The department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained and which will affect the level and flow of navigable waters; and may by order fix a level for any body of navigable waters; and may by order fix a level for any body of navigable water below which the same shall not be lowered except as provided in this chapter; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.”

The DNR issued its “New Operational Order for the Wind Lake Dam, Racine County” on October 7, 2002. All of the plaintiffs’ losses are alleged to have occurred in 2006, 2007 and 2008. (Complaint, page 3, paragraphs 9 and 10) The Order stated:

“IT IS THEREFORE ORDERED THAT:

1. The normal water level for Wind Lake is 95.15 feet P.S.C. datum.

2. The above lake elevation shall be maintained year-round insofar as possible by reasonable and proper operation of the Wind Lake Dam. Maintenance of the set lake elevation may include opening the gates of the dam as necessary during heavy rains or snow melt. Any such operational “drawdown” of the should occur when the lake level reaches 2 inches above the dam spillway. (dam spillway elevation is 95.11 P.S.C. datum)”

Relying on Lange v. Town of Norway, 77 Wis.2d 313, 253 N.W.2d 240 (1977) the plaintiffs submit that the DNR order requires only a ministerial act of Racine County’s dam operator, that is, governmental immunity does not apply. The subject of the Lange case is the Wind Lake Dam. The holding of the Lange case is on pages 321-322: “However, under all of the circumstances here present, if plaintiff can plead a cause of action that comes within the limited liability of the town in the maintenance and operation of the dam *as set forth above*, we find it proper and equitable that he be given the opportunity so to do. It is noted that the Lange case was before the Supreme Court on demurrer. It’s focus was on the allegations of the complaint unlike this motion where the focus is whether there is a genuine issue of material fact. Nevertheless, the Lange court wrote at pages 319-320:

“Applying the rule of these traffic control cases to the maintenance of the dam at the outlet of the lake by this town, we find something less than a grant of complete governmental immunity in the maintenance and operation of the dam, and particularly its floodgate. The complaint of plaintiff makes reference to the “inadequate flood gate” of the dam acquired by the town.

If, as well may be the case, this is no more than a reference to the size of the dam acquired and the capacity of its floodgate, government immunity would apply to acquisition of the structure by the town. However such governmental immunity would not include a failure to maintain as a condition of disrepair or defect or a failure to properly operate said floodgate.”

As the defendant points out the above quote is dicta. And, it has neither been alleged nor is there any genuine issue of material fact that the plaintiffs’ claim involves a disrepair or defect of the dam. Some clarity of the “properly operate said floodgate” language in the Lange decision can be gleaned from the facts of that case. It is noted that one of the DNR orders “declared the existing dam structure unsafe and dangerous to life and property”; “that the town must commence construction”; and, “complete construction by September 15, 1972 .” Lange, page 314. It was then stated on page 315: “Plaintiff’s complaint alleges that the town wrongfully continued to maintain the dam in its unsafe condition and with an inadequate floodgate past the September 15, deadline.” Although uncertain, it is logical to conclude that the “properly operate said floodgate” language had application to the allegation that the town continued to operate the dam after September 15, 1972, and thus might well have been negligent in doing so when the DNR order was “absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribed and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.” Lister, supra, page 301. The plaintiffs also invite the court’s attention to the Heuser ex rel

Jacobs v. Community Ins. Corp., 2009 WI App 151, 321 Wis.2d 729, 774 N.W.2d 653. The court discussed governmental immunity on pages 740 through 747. The focus was on the exception to government immunity, namely, known and compelling dangers. "The theory of this exception is that when a danger known to a public officer or employee is of such a compelling force, it strips that person of discretion or judgment and creates an absolute, certain and imperative duty to act. *Id.* p.34. In other words, the danger is an "accident waiting to happen." *Voss*, 297 Wis.2d 389, p. 19. And the duty is ministerial, requiring a particularized action with a self-evident "time, mode and occasion." *Lodl*, 253 Wis.2d 323, pp. 38, 40, 44. The duty part is where most issues arise." Heuser, supra, pages 741-742. As a matter of law the exception of known and compelling danger does not apply here because in the face of predicted weather condition change, such as rain, it cannot be said that the dam operator is required to take a particularized action with a self-evident time, mode and occasion. It is self-evident that a weather forecast is not a prediction of a event with certainty much less a prediction of whether, as an example, the rainfall will be not measureable, or a quarter, half or inch or even the exact geographic area where the heaviest rain will fall. The holding of the Heuser case is, essentially, that the teacher did nothing at all. The plaintiffs here draw a parallel. First, they propose that taking weather into account is mandatory in regard to the operation of the Wind Lake Dam. Then, they argue that the Racine County dam operator did nothing thus drawing on the Heuser case holding. "This is not simply an allegation of an alleged failure to execute discretion properly. Rather, it is a refusal to exercise discretion at all." (Plaintiffs' Brief, page 6) The argument goes back to the language of the DNR order.

"The second rule is generally the same rules of construction and interpretation that apply to statutes, particularly those in the same field, govern the construction and interpretation of rules and regulations of administrative agencies. Thus, rules applicable to statutes, such as construction to uphold validity; construction in accordance with legislative intent and purpose; construction as a whole, by comparing every section as part of a whole; construction to harmonize two or more provisions on the same subject, giving effect, if possible to all the provisions or the regulations; construction of general provisions as limited in their specific application by specific ones on the same subject; construction in accord with the natural and plain meaning or words; strict construction of provisions defining conduct for which criminal or penal sanctions are imposed." 2 Am Jur. 2d sec. 239, pages 258-259.

In its October 7, 2002, the Department found that "The current proposal would eliminate any winter drawdown of Wind Lake and maintain the normal water level of 95.15 feet P.S.C. datum year round" and "This Order is not intended to relieve all high water conditions currently occurring" because "Operating under that premise would greatly reduce the expected benefits of this Order (improved fish spawning, wildlife habitat, and access)." The Finding of the Order continued: "A public hearing was held at the Norway Town Hall on April 25, 2002. The hearing focused on whether to continue with the existing Dam Operation Order,, which calls for a 1-foot winter drawdown during the first two weeks of October, or to change to no winter drawdown. A significant majority of those attending voted to pursue a no drawdown Order."

The October 7, 2002, DNR Order is set forth above in its entirety. It is the Order that was in effect for the years in which the plaintiffs claim damages.

Order 1. establishes the “normal water level”. Order 2. may possibly be read as mandatory, to wit: “The above lake elevation”, meaning 95.15 feet, “**shall** be maintained year-round insofar as possible by reasonable and proper operation of the Wind Lake Dam.” (Emphasis supplied) Such construction would mandate the dam operator to not draw down in anticipation of “flood conditions, heavy rain and snow melt” because to do so would, of necessity, be a failure to maintain “the above lake elevation”. Moreover, the further language of Order 2 implies an anticipatory drawdown is not a favored operation since the Order provides “Any such operational ‘drawdown’ of the lake”, referring to the preceding sentence: - “Maintenance of the set lake elevation may include opening the gates of the dam as necessary **during** heavy rains or snow melt” - , “**should occur** when the lake level reaches 2 inches above the dam spillway (dam spillway elevation is 95.11 P.S.C. datum).” (emphasis supplied) If the Order were to be read as mandatory, that is ministerial, then it is concluded that the dam operator is prohibited from doing exactly what the plaintiffs claim he should do, and negligently did not do, that is, perform an anticipatory drawdown. It is not found that the Order is mandatory, that is, one leaving no room for judgment by the dam operator.

A more reasonable interpretation of the Order leads to the conclusion that the actions of the dam operator are discretionary. The emphasis here is on the language which reads “**insofar as possible** by reasonable and proper operation of the Wind Lake Dam.” The language means that the DNR recognizes that maintaining exactly 95.15 feet is impossible but 95.15 feet is the goal for the dam operator to achieve using “reasonable and proper operation” of the dam. A sudden influx of water, such as from heavy rains, or snow melt from a sudden thaw, could increase the lake level. The DNR Order provides that when the water level is 2 inches above the dam spillway, a ‘drawdown’ should occur to “improve fish and wildlife habitat and to improve recreational activities.” When read as a whole, including the Findings, a reasonable interpretation of the Order is for the dam operator to try to maintain as best as he can a certain level to meet the DNR goals of preserving the fish habitat, the wildlife habitat, and recreational use of the lake. To do so requires judgment. The Order says nothing of the manner or mode of operation of the gates when the water level reaches 2 inches other than that a drawdown should occur. It is left to the judgment of the operator.

It is noted that the clarification letter of Tanya L. Meyer, DNR, published in 2009, does state that: “It does not mean that Wind Lake Dam has a two inch range of operation.” And, it is further noted that Griswold Engineering report of September 17, 2008, does comment on page 2: “Currently, the WDNR order provides for a very tight dam operation with the goal of having the Lake water surface stay at the dam crest elevation or no more than 2 inches above the dam crest surface. This means that the Tainter gates must be opened to a large degree after each significant runoff event to keep the 2-inch Lake level tolerance. This large gate opening causes a significant rush of water into the downstream Canal.”

Construction of the whole of the Findings and Order of the DNR of October 7, 2002, leads to the conclusion that the focus of the Order is on the environmental conditions of Wind Lake and in carrying out that Order the dam operator's focus must be on the Wind Lake water level. The plaintiffs' contention that the dam operator's focus must be down stream of the Wind Lake Dam is rejected by this court. Indeed, the history of the Orders of the DNR confirms the focus of the October 7, 2002, Order. The prior Orders of the DNR, the Order of November 15, 1977, and the Order of October 5, 2000, both allowed for winter drawdown and it is obvious the DNR chose to abandon the idea of a winter drawdown in its 2002 Order. And, its November 24, 2008, Order specifically rejected the Racine County Drainage District's request for a drawdown.

According the court finds that the operation of the Wind Lake dam by the employee of Racine County is a discretionary act and therefore governmental immunity applies. That the dam operation is a matter of discretion is confirmed by Thomas Hubbard. Thomas Hubbard operated the Rochester dam in Racine County. He learned his dam operator job through trial and error (Trans. page 26), experience, an exercise of judgment. He testified at page 33:

- Q Because the truth of the matter is in order for you to operate this dam
Correctly, it involves the exercise of judgment, discretion. Am I right?
A You don't even have the faintest idea what it takes.
Q Then you tell me.
A You are right.

It is undisputed that an employee of Racine County, Patrick Nolan, was the Wind Lake dam operator during the time complained of by the plaintiffs. It is undisputed that during the time in question he operated the county dams. It is undisputed that he personally did so 95% per cent of the time. It is undisputed that there are two radial gates. It is undisputed that the amount of opening of the gate(s) is dependant upon the water level. It is undisputed that he inspected the dam daily and adjusts the dam daily. It is undisputed that he keeps a log book. There is no genuine issue of material fact with regard to any of these matters. The acts of Patrick Nolan in determining the amount the gate(s) should be open and in adjusting the dam daily are discretionary acts which require judgment based on experience. Unlike the teacher in the Heuser case who did nothing, Patrick Nolan does something and on a daily basis. The undisputed facts establish the exercise of discretion by Patrick Nolan, the Wind Lake dam operator.

It is questionable whether the letter of Tanya L. Meyer, Water Management Engineer, DNR, of May 28, 2009, is relevant as it was, obviously, not published until May 28, 2009, and therefore the content could not possibly have been known prior to that date. Arguendo, if it would be determined to be relevant, the direction set forth in that letter in regard to 'drawdown', to-wit: "The statement means that the dam operator shall start operating the dam (e.g., opening the gates) when water levels increase and reach two inches above the spillway" and "The intent of the statement is to provide guidance for

operating the dam at the normal water level”, is in accord with the above stated focus of the DNR and supports the conclusion that the DNR does not favor anticipatory drawdown. The DNR could have provided in its Order and clarifying statement that the dam operator should anticipate changing weather conditions in the operation of the dam and it did not do so

The court finds further that there is no substantial difference between the plaintiffs’ first cause of action sounding in negligence and an allegation of private nuisance and therefore the above findings and conclusion apply to plaintiffs’ first claim. “Just so, here we hold the complaint must stand or fall on whether it alleges negligence by the town after it acquired the dam in the maintenance and operation of said dam. If negligence is not properly pleaded, the complaint falls and “nothing is added” by terming the required negligence to “as such” constitute maintaining a public nuisance.” Lange, supra, page 321. It is noted that the plaintiffs characterize the nuisance as a private nuisance apparently because a private nuisance may not be subject to a governmental immunity. Assuming one could successfully contend that Racine County “collected” lake water in Wind Lake, the court finds as a matter of law that the dam operator in opening the gate to discharge such collected water did not do so unreasonably but rather did so in following a lawful Order of the DNR. The act of discharging water by opening of the gate at the Wind Lake dam is not an unreasonable activity. The case of Metropolitan Sewerage Dist. v. Milwaukee, 2005 WI 8, 277 Wis.2d 635, 691 N.W.2d 658, is instructive. At pages 676-677 the court wrote: Therefore, it is clear that under the law since Holytz and the enactment of the immunity statute that a municipality *may* be liable for a nuisance founded upon negligent acts. Lange, 77 Wis.2d at 320. Whether immunity exists for nuisance founded upon negligence depends upon the character of the negligent acts. If the acts complained of are legislative, quasi-legislative, judicial, or quasi-judicial-that is discretionary-the municipality is protected by immunity under s.893.80(4). Lodl, 253 Wis.2d 323 p.21; Allstate, 80 Wis.,2d at 188; Lange, 77 Wis.2d at 318. Conversely, immunity does not apply if the negligence involves an act performed pursuant to a ministerial duty. Willow Creek, 235 Wis.2d 409, p.27; Allstate, 80 Wis.2d at 16-17. Thus, when analyzing claims of immunity under s. 893.80(4) for nuisances, the proper inquiry is to examine the character of the underlying tortuous acts. Finally, when a nuisance is grounded solely upon negligent acts, there is no need to separately analyze the immunity question for both negligence and nuisance because liability for the nuisance cannot be established without proof of negligence. Lange, 77 Wis.2d at 321 (citing Raisanen, 35 Wis.2d at 514-15).” A plain reading of the plaintiffs’ complaint here is a complaint that the Wind Lake dam operator was negligent in allowing the water level to rise, then in releasing it, and in failing to anticipate weather. As the plaintiffs said, “...said acts of negligence acting as a substantial factor in causing the flooding ...” (Plaintiffs’ complaint, paragraph 8)

The plaintiffs second cause of action is for trespass. In Hillcrest Golf v. Altoona, 135 Wis.2d 431, 442, 400 N.W.2d 493 (Ct. App. 1986) the court wrote:

“Although it may be argued that Altoona trespassed on hillcrest’s land by collecting and diverting the water, Hillcrest’s

cause of action in trespass is effectively subsumed by its allegation of private nuisance. *See* W. Prosser and W. Keeton, *The Law of Torts*, sec. 87 at 594 (5th ed. 1984). Accordingly, we find it unnecessary to examine Hillcrest's trespass claim."

This court also finds it unnecessary to examine the plaintiffs trespass claim.

The plaintiffs' third cause of action is an alleged violation of sec. 32.10, Stats., an inverse condemnation proceeding. "The residents claim the City has taken their property without just compensation in violation of WIS. STAT. s. 32.10 and related constitutional provisions. Inverse condemnation is the name commonly used to describe an action commenced by a property owner to recover for an alleged uncompensated taking by a public body." Anhalt v. Cities and Villages Mutual Ins. Co., 2001 WI App 271, 249 Wis.2d 62, 82, 637 N.W.2d 422. And, further, in Anhalt at page 83: "To be a taking under WIS. STAT. s. 32.10, the flooding must constitute an actual, permanent invasion of the land." In Hillcrest, supra, the court found that the plaintiff's complaint stated a cause of action in inverse condemnation. The court recited at page 434: "Hillcrest alleges that the subdivision's streets and sewer system collected rain water that had previously evaporated or percolated harmlessly into the soil. The collected water was allegedly discharged through a culvert and then onto Hillcrest's land. Hillcrest claims that this water flow has "eroded substantial portions of the plaintiff's land, leaving huge gullies where said land previously existed, rendering said land area unfit for any use and rendering the remainder of the plaintiff's land unfit for use as a golf course."

The summary judgment motion of the defendant is opposed by the affidavit of Thomas Halter, the affidavit of Randall J. Jasperson, and the affidavit of Attorney Robert E. Hankel which attached the 55 pages of the deposition transcript of Thomas Hubbard and the 43 page deposition of John Chart. Thomas Hubbard operated the Rochester dam and stated the operation required the exercise of judgment, discretion. (Trans. page 33) Mr. Hubbard retired in January, 2000. Mr. Chart retired in 1996. Mr. Chart testified, page 38, lines 15-25:

Q You did not go to any dam to look things over?

A Why the discussion was was anticipation. They anticipated, you know, two inches the night before. He got up at 1:30 and looked at the weather and they still were -- And the only reason why he told me about it was we did not get any rain and his dams were down six inches.

Q In other words, if you anticipate rain and draw down water and you don't get rain, then you will have a lower amount of water behind the dam.

A Yes. Sir.

With regard to the plaintiffs' inverse condemnation claim it is the April 19, 2010, affidavit of Randall J. Jasperson that the plaintiffs rely upon. ("Mr. Jasperson's affidavit establishes that a substantial portion, if not all, the beneficial use of the Plaintiffs' property has been denied by the actions of Racine County." Plaintiffs Brief, page 9.) The

affidavit of Mr. Jasperson recites: "For calendar years 2006 through 2008, because of repeated flooding in all three years, nearly the entirety of all crops and sod production was destroyed and made valueless." In his deposition, Mr. Jasperson testified at page 27 that the flooding destroyed the soybean crop in 2008 and in 2006 and 2007 the sod on the Weseljak property which was being planted, cultivated and harvested by Oakridge. At page 72 Mr. Jasperson was shown exhibit 9. (Exhibits were not attached to the copy of the 250 page deposition transcript attached to the affidavit of Attorney Kris Bartos) After viewing it he testified that the Notice of Violation was "[B]ecause I was trying to repair a ditch bank that had been washed out during the flood." (Trans. page 73) The ditch bank abutted the property at issue in this case. (Trans. page 76) And on that same page it is described as the ditch bank of Mr. Jasperson. And on page 80 of the transcript the ditch bank is acknowledged as being trust land. The washed out ditch bank was 600 or 700 feet. (Trans. page 73) And Mr. Jasperson hired Gunderson Excavating to bring in fill. (Trans. page 77) Plaintiffs invite the court's attention to Anderson v. Village of Little Chute, 201 Wis.2d 467, 549 N.W.2d 737 (Ct. App. 1996). The court wrote on pages 472 and 473: "This lawsuit arose out of the Village's diversion of a large volume of storm water over a period of years through the bottom of a ravine running through the plaintiffs' residential properties"; and, "(3) the Village waived the right to claim a permanent taking." In Maxey v. Redevelopment Authority of Racine, 94 Wis.2d 375, 388, 288 N.W.2d 794 (S. Ct. 1979), the court wrote: "In order to commence inverse condemnation proceedings, however, a property owner must demonstrate that there has been either an occupation of his property within the meaning of sec. 32.10, Stats., or a taking, which must be compensated under art. 1, sec. 13, of the Wisconsin Constitution." However, as stated above, the later case of Anhalt, supra, explained that the "flooding must constitute an actual, permanent invasion of the land." The whole of the contents of the affidavit of Mr. Jasperson and his testimony does not create a genuine issue of material fact as to whether or not there has been "an actual, permanent invasion of the land."

The plaintiffs' fourth cause of action alleges what is commonly referred to as a "1983" action. 42 U.S.C.A. 1983. The parties do not disagree as to the holding of that Supreme Court decision, Loretto v. Teleprompter, 458 U.S. 419, 102 S.Ct. 3164 (1982), namely, that the flooding "must constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely injury to the property." There can be no doubt that there was temporary injury to the plaintiffs' property nor can there be any doubt that the injury was not permanent though periodically reoccurring. [The Loretto case, of course, did not factually involve flooding. It, rather, factually involved the permanent installation of cables on the plaintiff's building and the Supreme Court held that the minor but permanent physical occupation of the plaintiff's building was a "taking". In Loretto as reported in 73 L: Ed 2d at page 876-877 the court wrote: "As early as 1872, in Pumpelly v Green Bay Co., 13 Wall 166, 20 L Ed 557, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution";

and, later on page 877: “Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner’s property that causes consequential damages within, on the other. A taking has always been found only in the former situation.” The above quote – “actual, permanent invasion of the land, etc. – follows the several case citations and is a quote from Sanguinetti v. United States, 264 US 146, 149, 68 L Ed 608, 44 S Ct 264 (1924). As it has been found that there is no genuine issue of material fact regarding the plaintiffs’ land being permanent flooded the plaintiffs’ fourth cause of action must be dismissed. It is argued by the plaintiffs that since the periodic flooding has occurred for three consecutive years it is a “taking” for constitutional purposes. According to Webster’s New World Dictionary, Second College Edition, permanent means “lasting or intended to last indefinitely without change”.

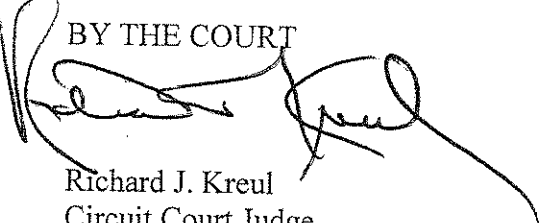
Because the linchpin of the plaintiffs’ argument, which is, in the alternative, that the 2002 Order of the DNR is mandatory or, if not mandatory, that the dam operator refused to exercise discretion, revolves around the Lange case it is revisited. In Lange “[P]laintiff alleged in his complaint that his growing crops were damaged when the Wind Lake Dam, maintained by defendant, allegedly caused the waters of Wind Lake to back up, thereby flooding plaintiff’s fields.” In this case the plaintiffs allege in their complaint that their sod fields were damaged when the Wind Lake Dam, maintained by defendant, allegedly caused the waters of Wind Lake to be released thereby flooding plaintiffs’ fields. The facts are remarkably similar. The Lange case continues and describes the DNR orders: “The order directed the town to submit plans for a new dam by May 15, 1971, and to construct the same on or before August 15, 1971.” There is no parallel order here. Moreover, the DNR order in Lange is mandatory. It specifies who, what and when. The DNR gave the Town of Norway a prescribed task. The Lange recitation continues: “Maximum and minimum lake levels were also prescribed in the order” There is no parallel to the DNR order here, the lake level was set at 95.15 feet P.S.C. Lange continues: “On April 4, 1972, a supplementary and superceding order was issued by the DNR, declaring the existing dam structure unsafe and dangerous to life and property. This supplementary order provided that the town must commence construction of a new dam by May 18, 1972, and complete construction by September 15, 1972.” In describing the DNR order the court chose to use the word “must”. It is concluded that this supplementary order was more urgent because of the unsafe condition and more mandatory. There is no parallel supplementary order here. The facts in Lange recite further that: “Plaintiff’s complaint alleges that the town wrongfully and unlawfully continued to maintain the dam in its unsafe condition and with an inadequate floodgate past the September 15, 1972 deadline.” In then understanding the Supreme Court decision and in particular the language quoted by the plaintiffs here, which appears on page 320 of the Lange decision, it is in the context that the Town of Norway simply disregard the mandate of the DNR orders and continued to maintain and operate the dam past the deadline. In contrast to the mandates of the DNR orders in Lange, the DNR here chose to qualify its order using the phrase “...insofar as possible by reasonable and proper operation of the Wind Lake Dam.” That statement of the DNR Order, here, continues: “Maintenance of the set lake elevation may include opening the gates of the

dam as necessary during heavy rains or snow melt. Any such operational "drawdown" of the lake should occur when the lake level reaches 2 inches above the dam spillway." This quoted language is permissive, "may" and "should", and implies the exercise of discretion.

Ultimately, and finally, this court finds the character of the acts complained of here are quasi-judicial, that is, discretionary and that governmental immunity applies under sec. 893.80(4), Stats. It is found and determined for all of the above reasons that the operation of the dam is nonministerial. It is further found that sec. 32.10, Stats., does not apply nor 42 U.S.C.A. 1983 because there has been no permanent physical occupation of the plaintiffs' land by flooding.

This is a final decision.

Dated this 1st day of July, 2010.

BY THE COURT

Richard J. Kreul
Circuit Court Judge

