STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

JAMES COORS, et al.,

Petitioners, Case No. 16-CV-1564

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, et al.,

Respondents.

PETITIONERS' RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OR RELIEF FROM ORDER

Petitioners James Coors and Courte Oreilles Lake Association, Inc., by the undersigned counsel, submit the following response to Respondents Wisconsin Department of Natural Resources et al.'s ("Respondent" or "DNR") Motion for Reconsideration or Relief from Order.

Over two years ago, the DNR and Petitioners stipulated to resolve some issues in this administrative agency review case brought under Wis. Stat. § 227.52 and Wis. Stat. § 227.40. (Stipulation, 4/4/17.) Now, the DNR is attempting to avoid its promises under the Stipulation and two Court orders requiring compliance. (Orders, 4/5/17, 3/22/19.) The Court should deny the DNR's motion and make such other orders as it deems necessary to finally obtain the agency's compliance.

ARGUMENT

I. The DNR Has Not Acknowledged or Satisfied the Legal Standard for Obtaining a Motion for Reconsideration or a Motion for Relief from Order.

The DNR does not recite or acknowledge the standard of review for a motion for reconsideration or, to the extent applicable, a motion for relief from order.

"To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853 (citing *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)). "Manifest error" is not demonstrated by the "disappointment of the losing party," but is instead the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.*

The DNR has not satisfied this standard. It has not introduced or identified any newly discovered evidence as part of its motion. In fact, the DNR cites the same record that has been available to the Court and to the parties all along. (*E.g.*, DNR Br. in Supp. of Mot. for Reconsid. at 4, Dkt. #230.) It also has not claimed that the Court made any manifest error of law. Its brief is largely composed of arguments already made in earlier briefing and that the Court rejected, or expanded-upon versions of arguments it already made or could have made but did not. (*Compare* DNR Resp. Br. at 31-38, Dkt. #221, *with* DNR Br. in Supp. of Mot. for Reconsid. at 1-7, Dkt. #230.) These are precisely the kind of grounds courts have rejected for reconsideration. *Koepsell*, 275 Wis. 2d 397, ¶ 44 (upholding denial of reconsideration where the movant "merely took umbrage with the court's ruling and rehashed old arguments," did not "demonstrate that there was a disregard, misapplication or failure to recognize controlling precedent," and baldly asserted that the circuit court failed to consider certain arguments); *see also Schapiro v. Pokos*, 2011 WI App 97, ¶ 18, 334 Wis. 2d 694, 706, 802 N.W.2d 204 (upholding denial of reconsideration where movant

"merely repeated the same arguments raised during the hearing and in his earlier briefs"). The Court should deny the motion for reconsideration on this basis alone.

To the extent the DNR styles its motion as a "motion for relief from order" under Wis. Stat. § 806.07(1) (Mot. at 2, Doc.#231),[1] it does not state which of the grounds in Wis. Stat. § 806.07(1)(a)-(h) justifies relief. Moreover, the DNR does not clearly state the order(s) from which it seeks relief. Its motion does seek relief from the Court's March 22, 2019, Order, which repeated the DNR's agreement in the Stipulation to "propose a phosphorus SSC for Lac Courte Oreilles." (DNR Br. at 1, Doc.#230.) However, it also appears to seek relief from the Court's April 5, 2017, Order accepting and ordering compliance with the parties' Stipulation filed April 4, 2017, and even from the Stipulation itself, which it asks the Court to declare void. (*Id*. at 1, 6.)

The grounds for review and applicable order makes a difference, since the time for filing a motion for relief from judgment or order depends upon the subsection under which relief is sought. *See* Wis. Stat. § 806.07(2). If the grounds are Wis. Stat. § 806.07(1)(d)-(h), the DNR has not made this motion within a reasonable time as to the Court's 2017 Order, entered over two years ago. Furthermore, the DNR has not developed its arguments under Wis. Stat. § 806.07 or otherwise explained why the Court should exercise its discretion to relieve it from the Stipulation and orders directing compliance with the same. For example, if its motion is made under Wis. Stat. § 806.07(1)(h), the DNR has not argued or demonstrated that "extraordinary circumstances" exist that would justify relief from order. *See In re Commitment of Sprosty*, 2001 WI App 231, ¶ 17, 248 Wis. 2d 480, 636 N.W.2d 213.

[1] The DNR's motion is styled as a "Motion for Reconsideration or Relief from Order," but the supporting brief is only a "Brief in Support of Respondent's Motion for Reconsideration." (See Doc. ##230, 231.) The brief does not cite or discuss Wis. Stat. § 806.07, though the motion does.

Reconsideration of or relief from the Court's 2019 and 2017 Orders is not warranted, as further explained below.

II. The Court Should Deny the DNR' s Motion.

The primary basis for the DNR's motion is that this is a contract case, and that contract law principles—as well as facts of record it has already discussed in prior briefing—should permit it to avoid setting an SSC. The DNR is incorrect.

First, this is not a contract case. It is an administrative agency and declaratory judgment case, within which the DNR agreed to a Stipulation in order to resolve some of the Petitioners' claims under Wis. Stat. §§ 227.50 and .52. The DNR cites the Court's question at the March 12, 2019, hearing, "Why is this not a contract issue?" (DNR Br. at 1-2.) But it fails to cite the Court's very next sentence: "Or an order that the Court signed incorporating the stipulation, which would end up having the DNR being in contempt of court because they have agreed to do this and they haven't done it?" (Hr'g Trp. at 11:15-19.)

This is a matter of judicial order, not contract. "Although stipulations of settlement have occasionally been referred to as contracts, they are not governed by contract law." *Lueck's Home Imp., Inc. v. Seal Tite Nat., Inc.*, 142 Wis. 2d 843, 419 N.W.2d 340 (Ct. App. 1987). Rather, when an order is entered pursuant to the consent of the parties to be bound thereby, it is a judicial act, subject to the court's continuing jurisdiction to modify the order. *Id*. at 843, n.4 (citing *U.S. v. Swift & Co*., 286 U.S. 106, 115, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932)). Principles of contract law may sometimes illuminate a stipulation dispute, but they are not binding. *See Phone Partners Ltd. Partnership v. C.F. Communications, Corp*., 196 Wis. 2d 702, 710-11, 542 N.W.2d 159 (Ct. App. 1995). The proper way to obtain relief from a

stipulation is pursuant to Wis. Stat. § 806.07, *id*. at 710, but as discussed above, the DNR has not explained or elaborated upon why it should get relief under this section.

Second, to the extent contract law is relevant in ***interpreting*** the Stipulation's language, Petitioners brought this up in their opening brief. (Pets' Br. at 20, Doc.#219.) The DNR agreed in its response and had the opportunity then to elaborate on how contract law affected the case. (DNR Br. at 31, Doc.#221.) The DNR now claims, citing a case from 1872, that "long-standing" principles of contract law preclude its compliance with the Stipulation and Court's order. (*Id*.) To the extent this law is relevant, is obviously not new law and could have easily been cited in the DNR's prior brief. There is no basis to grant the motion for reconsideration or relief from judgment.

Third, the DNR is essentially arguing that complying with the Stipulation it agreed to and signed would violate state law. (DNR Br. at 2, Doc. #230.) The law has not changed since the Stipulation was signed, and nothing in the Stipulation violates the language of any state statute or regulation. The DNR is really arguing that setting the SSC would violate ***its interpretation*** of Wis. Stat. § 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7). The Court has already rejected the DNR's interpretation as requiring "one hundred percent certainty" that the SSC is going to work, contrary to the DNR's duty under Wis. Stat. § 281.11 and other provisions to set standards that are protective of water quality and assure compliance with water quality standards. (*E.g.*, Hr'g Trp. at 12:17-14:4.) The DNR makes a newfound and conclusory statement that its interpretation only requires a "reasonable degree" of certainty, but this statement is undermined by its argument that there are "several other factors that may outweigh the effects of phosphorus on dissolved oxygen levels" in the lake, implying that these must all be ascertained before DNR can set a

phosphorus SSC and obtain certainty that the SSC will work. (DNR Br. at 5, Doc.#230.) As the Petitioners have argued and the Court has found, the DNR's arguments are inconsistent with Wis. Stat. §§ 281.11 and .15, as well as Wis. Admin. Code § NR 102.06(7), which recognizes that two-story fishery lakes like Lac Courte Oreilles are most suited to a phosphorus SSC. (Hr'g Trp. at 13:7-12, 18-23; Pets' Br. at 32-37, Doc.#219; Pets' Reply Br. at 10-12, 15-16, Doc.#222.)

Fourth, the DNR claims the science does not support setting an SSC, but it points to the same record that was available during the parties' earlier briefing. The DNR now emphasizes one correlation in particular: that between 1988 and 1996, phosphorus was low in the lake, but so was dissolved oxygen. (DNR Br. at 4, Doc.#230 (citing R.4875, R.5763).) However, reviewing the record cite for this claim reveals that it is based on very few data points—only 2-3 per year, and in the East basis of Lac Courte Oreilles only. (*See* R.4875, Doc.#109.) After 1996, Courte Oreilles Lakes Association and the Tribe began taking more samples, and more recently—since about 2011—data show both high phosphorus levels and low oxygen levels. (*See* R.2755, 5750.) The DNR has also previously acknowledged the relationship in the literature between phosphorus and low dissolved oxygen, and that reducing phosphorus could help the lake. (R.4839; R.5746 (Doc. #209); R.5759 (Doc. #210).) Petitioners previously explained how DNR's narrow legal interpretation resulted in a narrowed approached to the science. (Pets' Reply Br. at 12-16, Doc.#222; Pets' Br. at 35-36, Doc.#219.)

The DNR also implies that the Petitioners have relied on data that is not specific to Lac Courte Oreilles. (*E.g.*, DNR Br. at 3.) However, Petitioners' initial petition for an SSC was in fact lake-specific, relying on data collected from Lac Courte Oreilles over a period of

years to recommend an SSC of 10 ppb. (R.2707-2771.) In fact, the DNR had this data in-hand when it signed the Stipulation and agreed to set an SSC for Lac Courte Oreilles, which suggests enough comfort with the data that the agency could sign the Stipulation. This Court should reject the DNR's backtracking.

Finally, contract law—even if relevant—does not support the DNR, nor should the Court grant DNR's request to declare the Stipulation void. The DNR relies primarily on two cases (DNR Br. at 2, 5-6), one of which generally states that contracts contrary to the provisions of a statute are void, *Melchoir v. McCarthy*, 31 Wis. 252, 254 (1872) (assessing whether account to sell liquor was illegal if it was made on Sunday and plaintiff lacked proper license), and another that interpreted the language of a consent order between the Department of Agriculture Trade & Consumer Protection ("DATCP") and a defendant time-share operator, *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, 257 Wis. 2d 421, 651 N.W.2d 345. Neither case released a party from a stipulation and order because it was inconsistent with the law; in the latter, the court of appeals upheld the circuit court's denial of a request to modify a consent order on equitable grounds because DATCP engaged in alleged misconduct. *Id.* ¶ 30. The DNR generally relies on these cases to state it could only stipulate to what the law allows, but as just explained, the Stipulation is consistent with the law.

The DNR has not and cannot support its motion for reconsideration, on either the law or the facts, and the Court should deny it.

III. The Court Should Not Deem the DNR to have Complied with the Stipulation.

The DNR makes a few more contract-based arguments, including that it signed the Stipulation in good faith, and that DNR did comply with it because the agency followed the

Stipulation's enumerated steps as far as the applicable law (as DNR interprets it) allows. (DNR Br. at 6-7.) Again, these arguments should be rejected.

Because this case is not governed by contract law, the DNR's argument that it engaged in good faith and fair dealing is irrelevant. *See Peppertree Resorts*, 257 Wis. 2d 421, ¶ 28.

Furthermore, there is no argument in this case that the Stipulation is ambiguous. Whatever the agency's motives were when it signed the Stipulation, it has clearly not complied with the Stipulation or the Court's Orders to propose an SSC. The DNR admitted as much on the record at the March 2019 hearing:

> The Court: But what I am here to decide is, first of all, how do you explain the fact that in 2016 or 2017 I signed an order that says that the DNR would comply with the stipulation and produce a site-specific criteria? My understanding is the DNR has not done that. Correct?
>
> Ms. Stoltzfus: That's correct.

(Hr'g Trp. at 11:8-13.) Hence, even if relevant, there is no need to consider whether DNR violated any implied duty of good faith and fair dealing because the violation of the Stipulation's express terms, and the Court's orders directing compliance with those terms, is clear and of far greater concern.

The DNR's arguments that it complied with the Stipulation as far as it could, "until it reached roadblocks" (DNR Br. at 7) also does not equate to compliance and actually setting an SSC. There is simply no version of the applicable facts where DNR has complied with the Stipulation and the Court's orders. To the extent the DNR is arguing that equitable concerns under Wis. Stat. § 806.07(1) support a finding that it complied with the Stipulation, it—again—has not developed this argument and it should be rejected.

The Court should deny DNR's motion.

CONCLUSION

For the reasons stated above, the Court should deny the DNR's motion for reconsideration and relief from judgment, and make such other orders as are necessary to ensure the DNR's compliance with its orders of March 22, 2019, and April 5, 2017. If the Court finds the DNR in contempt or assesses sanctions against the DNR for non-compliance with the Court's orders, Petitioners reserve the right to move the Court to award its fees and costs for responding to the DNR's motion. *See* Wis. Stat. § 785.03(1)(a).

Dated this 13th day of May, 2019.

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