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United States Court of Appeals, Seventh Circuit.

Brian KREUZIGER, Plaintiff-Appellant,
v.
MILWAUKEE COUNTY, WISCONSIN, and Milwaukee Metropolitan Sewerage District, Defendants-Appellees.

No. 22-2489
|
Argued January 25, 2023
|
Decided February 13, 2023

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 19-CV-1747-JPS — **J.P. Stadtmueller**, *Judge.*

Attorneys and Law Firms

Joshua J. Brady, Attorney, Galanis, Pollack, Jacobs & Johnson, S.C., Milwaukee, WI, for Plaintiff-Appellant.

Samuel C. Hall, Jr., Daniel K. Mullin, Attorneys, Crivello Carlson, S.C., Milwaukee, WI, for Defendants-Appellees.

Before Sykes, Chief Judge, and Wood and Pryor, Circuit Judges.

Opinion

Sykes, Chief Judge.

***1** In the late 1930s, Milwaukee County built a dam on the Milwaukee River in Estabrook Park, an urban green space that runs along the east bank of the river where the City of Milwaukee borders suburban Shorewood and Whitefish Bay. In 2017 the County transferred the dam to the Milwaukee Metropolitan Sewerage District for the purpose of removing it. Demolition was completed the following year.

With the dam removed, the water level immediately upstream fell by about four feet from its previous high-water mark. Brian Kreuziger owns a home along this stretch of the river, and the drop in the water level exposed a ten-foot swath of swampy land on his waterfront that used to be submerged. He sued the District and Milwaukee County, alleging that their removal of the dam amounted to a taking of his **riparian** right to the prior surface water level without just compensation. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 13. Ruling on cross-motions for summary judgment, the district judge entered judgment for the defendants, holding that Kreuziger had no property right to have the river remain at the previous level. We affirm.

I. Background

This case comes to us from a decision on cross-motions for summary judgment, so we construe the evidence and draw reasonable inferences in favor of Kreuziger as the party against whom the motion under consideration was made. *Gill v. Scholz*, 962 F.3d 360, 363 (7th Cir. 2020).

In 1937 Milwaukee County obtained a permit from the Wisconsin Public Service Commission to build a dam on the Milwaukee River, a navigable waterway, at a location near the northern border of Estabrook Park. According to the permit, the purpose of the dam was to promote "flood control, maintain[ ] normal water level under normal conditions, and ... provide recreational facilities." Shortly thereafter, the County built what became known as the "Estabrook Dam," and it owned and operated the dam from 1938 to 2017.

Starting in 1986, the County implemented seasonal drawdowns of the river, closing the gates in the spring and opening them in the fall. When the gates were closed, the river backed up, creating an artificial impoundment and raising the water level upstream. When the gates were opened in the fall, the upstream water level receded.

In September 2000 Kreuziger and his wife purchased a riverfront home immediately upstream from the dam in suburban Glendale. In 2009 the Wisconsin Department of Natural Resources ("DNR"), which manages the state's rivers, ordered the County to repair or abandon the Estabrook Dam. Years of political controversy and litigation ensued: upstream property owners, environmentalists, and county officials clashed over the fate of the dam. In 2017 the County obtained the DNR's permission to transfer the dam to the Milwaukee Metropolitan Sewerage District for the purpose of demolishing it. The District then applied for a permit

to remove the dam. The DNR issued the permit, and the demolition was completed in 2018.

After the dam was removed, the surface water level along Kreuziger's river frontage dropped by about four feet from the high-water mark typically experienced in the summer months when the dam's gates were closed. The new water level is roughly comparable to the traditional seasonal drawdowns in the fall when the gates were opened. The lower surface level of the river exposed a ten-foot strip of marshy land between Kreuziger's seawall and the water's edge that had previously been submerged.

***2** Kreuziger sued the District and Milwaukee County under 42 U.S.C. § 1983 invoking the Takings Clause of the Fifth Amendment to the United States Constitution and the Just Compensation Clause of the Wisconsin Constitution. He alleged that by removing the dam and thereby lowering the river's water level, the defendants took his **riparian** right to the previous water level and owed him compensation. In due course, the parties filed cross-motions for summary judgment. Kreuziger sought partial summary judgment on liability; the defendants argued that they had not taken anything because Kreuziger had no property right to the maintenance of the previous water level at or below the traditional high-water mark.

The judge denied Kreuziger's motion and entered judgment for the defendants. Relying on *United States v. Willow River Power Company*, 324 U.S. 499, 509–10, 65 S.Ct. 761, 89 L.Ed. 1101 (1945), the judge determined that Kreuziger had no **riparian** right to the continuation of a particular surface water level along his river frontage; his interest in a higher water level was, at most, a convenience that must yield to the public's paramount interest in maintaining the state's navigable waterways.

II. Analysis

The Fifth Amendment to the United States Constitution provides that private property cannot "be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause applies to the States via the Fourteenth Amendment. *Kelo v. City of New London*, 545 U.S. 469, 472 n.1, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). Similarly, the Wisconsin Constitution bars the taking of private property for public use without just compensation. WIS. CONST. art. I, § 13. When the government takes private property without paying for it, the aggrieved owner may sue immediately. *Knick v. Township of Scott*, —— U.S. ——, 139 S. Ct. 2162, 2167, 204 L.Ed.2d 558 (2019) (overruling *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), which had required plaintiffs to exhaust state remedies first).

To prevail on a federal takings-clause claim, an aggrieved property owner must make a threshold showing that the government has taken, either physically or by unduly onerous regulation, private property belonging to the plaintiff. *Conyers v. City of Chicago*, 10 F.4th 704, 710–11 (7th Cir. 2021), *cert. denied*, —— U.S. ——, 142 S. Ct. 1669, 212 L.Ed.2d 578 (2022). Wisconsin law requires the same. *Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, 382 Wis.2d 377, 914 N.W.2d 660, 664–65 (2018).

Kreuziger argues that the defendants owe compensation for taking his **riparian** right to a higher water level on the river because their removal of the dam did nothing to improve navigation. His argument presumes that he has a property right to a particular water level at all. He does not.

In Wisconsin a **riparian** owner—that is, someone who owns land on a navigable waterway—has various **riparian** rights, such as "the right to use the shoreline and have access to the waters ... [and] the right to have water flow to the land without artificial obstruction." *Movrich v. Lobermeier*, 379 Wis.2d 269, 905 N.W.2d 807, 813–14 (2018) (cataloguing **riparian** rights) (quotation marks omitted). But **riparian** property rights are encumbered by and subordinate to the state's interest under the public-trust doctrine. Wisconsin holds the beds of its navigable lakes and rivers in trust for the benefit of the public, and **riparian** rights exist only insofar as they do not conflict with the public's interest in preserving navigable waters. *See R.W. Docks & Slips v. State*, 244 Wis.2d 497, 628 N.W.2d 781, 788 (2001). **Riparian** property owners cannot interfere with the public's navigation rights on the state's navigable lakes and rivers. *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 398 (1923).

"Navigation" is a term of art in this context and includes commercial transportation and noncommercial recreational activities, such as fishing, hunting, and boating. *Id.* at 395,

397. Accordingly, the public-trust doctrine is interpreted expansively to protect the public's interest in navigation, recreation, and the enjoyment of the scenic beauty of the state's lakes and rivers. *R.W. Docks & Slips*, 628 N.W.2d at 787–88.

***3** Kreuziger insists that his bundle of **riparian** rights includes the right to have the river's water level remain unchanged. He says that Wisconsin recognized this right in *Smith v. Youmans*, 96 Wis. 103, 70 N.W. 1115 (1897). There, a private dam operator sought to remove its 40-year-old dam, which had been built at the outlet of a lake where the water flowed into a stream connecting to another lake. *Id.* The dam's diversion of the natural water flow had the effect of raising the water level of the lake; removing it would have substantially lowered the lake's water level, thereby harming the property values of summer homes that had been built around the lake. *Id.* The Wisconsin Supreme Court blocked the removal of the dam because the other **riparian** owners had acquired by reliance an interest in maintaining the lake's water level. *Id.* at 1116.

Smith does not help Kreuziger. That case dealt with a clash of rights among *private* **riparian** owners. This case involves the government's interest in maintaining navigable waterways in the exercise of its responsibilities under the public-trust doctrine.

The Supreme Court's decision in *Willow River* illustrates this distinction and is decisive here. Like this case, *Willow River* concerned the **riparian** rights of a Wisconsin riverfront property owner—there, a utility company that operated a hydroelectric plant on the St. Croix River using the waters of the river to generate power. 324 U.S. at 500, 65 S.Ct. 761. In 1938 the federal government built the Red Wing Dam on the upper Mississippi River, into which the St. Croix flows; the new dam altered the water level at the power company's property, diminishing the plant's capacity to generate electricity. *Id.* at 501, 65 S.Ct. 761. The power company claimed a **riparian** right to the previous water level and brought a takings suit seeking compensation from the United States.

The Court rejected the claim, observing that the company's interest in the river's surface water level was only "a privilege or a convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but it is not an interest protected by law when it becomes inconsistent with plans authorized by Congress for improvement of navigation." *Id.* at 509, 65 S.Ct. 761. The Court confirmed that the **riparian** rights of the owners of property on navigable waterways "are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation." *Id.* When the government's regulatory authority conflicts with a **riparian** owner's interest in the surface level of a navigable waterway, the governmental interest is superior:

> Whatever rights may be as between equals such as **riparian** owners, they are not the measure of **riparian** rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict[,] they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

Id. at 510, 65 S.Ct. 761.

Put more succinctly, the **riparian** rights of waterfront property owners are subordinate to the government's authority to regulate navigable waterways under the public-trust doctrine. And the government's regulatory authority over navigable waterways is not limited to "navigation" in the commonly understood sense; rather, it broadly includes the authority to regulate in furtherance of other public interests such as recreation and environmental preservation. *R.W. Docks & Slips*, 628 N.W.2d at 787–88.

Kreuziger also suggests that he has a **riparian** right "to have water flow to the land without artificial obstruction." *Movrich*, 905 N.W.2d at 814 (quotation marks omitted). He asserts without authority that the water level the dam created is now the established water level and that removing the dam is equivalent to artificially obstructing water flow. But *Movrich* is inapposite because it dealt with **riparian** owners' competing rights of access to a man-made lake. *See id.* It

did not establish that government action *returning* a river to its natural course infringes a **riparian** owner's right to an artificial water level. *See id.*

***4** In sum, Wisconsin holds in trust its navigable waters, including the land below the ordinary high-water mark of its lakes and rivers, and "[t]he rights of **riparian** owners ... are qualified, subordinate, and subject to the paramount interest of the state and the paramount rights of the public in navigable waters." *R.W. Docks & Slips*, 628 N.W.2d at 788. The state legislature has delegated to the DNR substantial authority to administer this public trust. *Wis.'s Env't Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis.2d 518, 271 N.W.2d 69, 72 (1978). Kreuziger has not identified a case supporting his claim that he has a property right to the continuation of a particular surface water level along his river frontage. That's not surprising; rivers frequently ebb and flow, and lower water levels *as such* have never been held to implicate a taking. Quite the opposite—when a river recedes, a **riparian** owner's rights expand proportionally. *See Doemel*, 193 N.W. at 398. Because Kreuziger "had no private property right to" a particular water level in the river, he "cannot have suffered an unconstitutional taking." *R.W. Docks & Slips*, 628 N.W.2d at 787.

So Kreuziger's argument that removing the dam did not actually improve navigation is beside the point. He also argues that the judge erred by ignoring a disputed material fact—the degree to which removing the dam reduced the river's water level. But this dispute is also immaterial. No matter how much the river receded, Kreuziger had no right to have it remain at the previous high-water mark.

Finally, Kreuziger argues that the result here is "unjust, inequitable, and unconscionable" because the defendants have created an unowned,[1] unsightly strip of land abutting his property. Yet neither the Wisconsin Constitution nor the United States Constitution promises to "socialize all losses, but [only] those ... which result from a taking of property." *Willow River Power Co.*, 324 U.S. at 502, 65 S.Ct. 761; *E-L Enters. v. Milwaukee Metro. Sewerage Dist.*, 326 Wis.2d 82, 785 N.W.2d 409, 421 (2010). Without an actual taking of property, a takings claim cannot succeed. *Willow River Power Co.*, 324 U.S. at 510, 65 S.Ct. 761; *R.W. Docks & Slips*, 628 N.W.2d at 787.

Kreuziger holds no right to have the Milwaukee River remain at the high-water level created by the Estabrook Dam. The defendants cannot have taken a right that he never had.

AFFIRMED

All Citations

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Footnotes

1 Kreuziger says that the boggy strip of land is unowned, but what he seems to mean is that its ownership may be the subject of dispute. If the land is still part of the riverbed—that is, below the ordinary high-water mark—then it is held in the public trust. *R.W. Docks & Slips v. State*, 244 Wis.2d 497, 628 N.W.2d 781, 787 (2001). If the river has permanently receded, then the strip of land presumably belongs to him. *See Movrich v. Lobermeier*, 379 Wis.2d 269, 905 N.W.2d 807, 814 (2018); *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 398 (1923) (noting that the owner of riverfront property owns to the thread of the stream, except that lands submerged by navigable rivers are subject to the public trust).