

Dam Removal/Riparian Rights: Federal Appellate Court Addresses Taking Claim



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The United States Court of Appeals for the Seventh Circuit (Seventh Circuit) addressed in a February 13th Opinion an issue arising out of the removal of a dam that significantly reduced the river water level, adversely affecting an up-stream property owner. See *Kreuziger v. Milwaukee County, Wisconsin, et al.*, 2023 WL 1956609.

The property owner filed suit arguing that the removal of the dam amounted to a taking of his riparian right to the prior surface water level without just compensation in violation of the United States and Wisconsin Constitutions.

Milwaukee County, Wisconsin (“County”) constructed a dam on the Milwaukee River in the late 1930s. The dam was located in Estabrook Park which is described as an urban green space running along the east bank of the river where the City of Milwaukee borders Shorewood and Whitefish Bay.

The County transferred the dam to the Milwaukee Metropolitan Sewerage District in 2017 for the purpose of removing it. The dam was ultimately demolished in 2018. The water level upstream immediately fell by approximately four feet from its previous high-water mark.

The County had obtained a permit from the Wisconsin Public Service Commission to build the dam. The obtained permit described the purpose of the dam as to:

. . . flood control, maintain[] normal water level under normal conditions, and . . . provide recreational facilities.

The County implemented seasonal drawdowns of the river beginning in 1986. The seasonal drawdowns were accomplished by closing the gates in the spring and opening them in the fall. The closure of the gates would result in an artificial impoundment and raising of the water level upstream. Opening the gates in the fall caused the upstream water level to recede.

Brian Kreuziger and his wife purchased a home on the river immediately upstream from the dam in September 2000. The dam was subject to the jurisdiction of the Wisconsin Department of Natural Resources (“DNR”) which ordered it to be repaired or abandoned.

DNR authorized the demolition of the dam after what the Seventh Circuit describes as:

. . . years of political controversy and litigation.

Upstream property owners, environmentalists and County officials are stated to have been involved in the conflict.

The dam's removal resulted in the drop of the water level (i.e., four feet) that is stated to be roughly comparable to the traditional seasonal drawdowns in the fall when the gates were opened. This drawdown exposed a 10-foot strip of marshy land between the Kreuzigers' seawall and the water's edge that had previously been submerged.

The Kreuzigers filed suit against the Metropolitan Sewerage District ("District") and the County in United States District Court ("Court") under 42 U.S.C. § 1983 invoking the:

- Takings Clause of the Fifth Amendment to the United States Constitution
- Just Compensation Clause of the Wisconsin Constitution

The removal of the dam and the lowered river water level were argued to have taken the Kreuzigers' riparian right to the previous water level. They asked for compensation.

The Court granted the District and County's Motion for Summary Judgment, determining 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.

The Seventh Circuit notes that to prevail on a federal taking-claim a property owner must make a threshold showing that the government has taken, either physically or by unduly onerous regulation, private property. The Kreuzigers argued that compensation was owed for taking their riparian right to a higher water level because the dam's removal did not improve navigation.

The Court rejected this argument stating that the Kreuzigers did not have a property right to a particular water level. This was based on the fact that a Wisconsin riparian owner's property rights are encumbered by and subordinate to the state's interest under the public-trust doctrine (i.e., Wisconsin holds the navigable lake and riverbeds in trust for the benefit of the public). Riparian rights exist only to the extent they do not conflict with the public's interest in preserving navigable waters.

The Kreuzigers also argued that they had a riparian right to have water flow to the land without artificial obstruction. The Seventh Circuit distinguished a case cited by the Kreuzigers because it dealt with riparian owners' competing rights of access to a manmade lake. In other words, the cited case did not establish that government action returning a river to its natural course infringes a riparian owner's right to an artificial water level.

Finally, the Kreuzigers argued that the result of the dam removal is:

. . . unjust, inequitable, and unconscionable because the defendants have created an unowned, unsightly strip of land abutting his property.

This claim failed because without an actual taking of property, such a claim cannot succeed.

The Seventh Circuit upheld the Court's granting of summary judgment to the Court and District.

A copy of the Opinion can be downloaded [here](#).