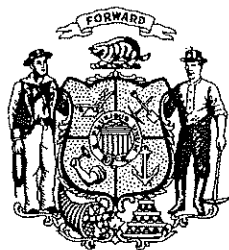


State of Wisconsin

SENATE CHAIR
Howard Marklein

316 East, State Capitol
P.O. Box 7882
Madison, WI 53707-7882
Phone: (608) 266-0703



ASSEMBLY CHAIR
Mark Born

308 East, State Capitol
P.O. Box 8592
Madison, WI 53708-8953
Phone: (608) 266-2540

Joint Committee on Finance

MEMORANDUM

To: Members
Joint Committee on Finance

From: Senator Howard Marklein
Representative Mark Born

Date: February 13, 2023

Re: 14-Day Passive Review Approval – DOJ

Pursuant to s. 165.25(6)(a)1, Stats., attached is a 14-day passive review request from the Department of Justice, received on February 13, 2023.

Please review the material and notify **Senator Marklein** or **Representative Born** no later than **Thursday, March 2, 2023**, if you have any concerns about the request or if you would like the Committee to meet formally to consider it.

Also, please contact us if you need further information.

Attachments

HM:MB;jm

CORRESPONDENCE/MEMORANDUM

DEPARTMENT OF JUSTICE

Date: February 13, 2023

To: Legislative Committee on Joint Finance

FEB 13 2023
Jt. Finance

From: Lara Sutherlin
Administrator, Division of Legal Services, DOJ

Corey Finkelmeyer
Deputy Administrator, Division of Legal Services, DOJ

Subject: Submission of proposed plan for passive review under Wis. Stat. § 165.25(6)(a)1

This memorandum provides notice to your committee pursuant to Wis. Stat. § 165.25(6)(a)1 for 14-day passive review of a proposed plan to resolve a case where DOJ represents a defendant. We are providing only publicly filed documents in conjunction with this memo.

***Jacob and Danae Becker v. Wisconsin Department of Natural Resources
Barron County Case No. 22CV25***

Plaintiffs Jacob and Danae Becker sued the Wisconsin Department of Natural Resources seeking to invalidate a conservation easement on 80 acres of land they owned in Barron County.

In 1964, a different owner granted the DNR a conservation easement on all 80 acres. The easement is titled a "Flowage Easement" and grants DNR the right to build a dam to backflow a creek that goes through the property. In addition, it placed a building restriction on the property. Finally, the easement provided

all riparian rights of every kind in the fast and unflowed lands described herein, including the right for all of the general public to go upon and across said lands for any lawful purpose

The DNR interpreted this final provision to allow public hunting on the property. The DNR properly recorded the easement.

The Beckers purchased the parcels that make up the property in 2020 and 2021. They were unaware of the easement at the time of their 2020 purchase because their title company missed the easement in its search. Soon after moving to the property, the Beckers encountered hunters parking near their house and going on the

property. They called local law enforcement, but local law enforcement stated that the Property is open to the public. The Beckers also reached out to the DNR and received the same answer. The Beckers sued DNR to invalidate this part of the easement.

As the case proceeded, DNR reviewed historical documents related to the property to make sure the original owners intended to give the DNR the right to use the land for public hunting. DNR discovered that documents from the 1960s strongly indicate that the DNR did not purchase the right for the public to hunt on non-flowed land from the original owners.

DNR and the Beckers propose to resolve this case by agreeing to the following: 1) adjust DNR's maps and records to show the property is not open to public hunting or fishing outside of the boundaries of the area that is or may be flowed; 2) the Beckers agree that the easement is valid, that DNR retains the right to backflow the creek, and that the building restriction remains in effect; and 3) the Beckers dismiss the case.

There is no exchange of monetary relief to resolve this case. This settlement does not concede that any statute is unconstitutional or otherwise invalid. Neither does it concede that any statute violates or is preempted by federal law.

5. Answering paragraph 5 of the Plaintiffs' Complaint, DNR lacks sufficient information to form a belief as to the truth of the allegations and therefore denies.
6. Answering paragraph 6 of the Plaintiffs' Complaint, DNR admits all allegations in this paragraph other than the allegation that a true and correct copy of said Conservation Easement is attached as Exhibit B to the Plaintiffs' Complaint and incorporated therein. DNR affirmatively alleges that Exhibit B to the Plaintiffs' Complaint is an unofficial copy of said Conservation Easement.
7. Answering paragraph 7 of the Plaintiffs' Complaint, DNR lacks sufficient information to form a belief as to the truth of the allegations and therefore denies.
8. Answering paragraph 8 of the Plaintiffs' Complaint, DNR lacks sufficient information to form a belief as to the truth of the allegations and therefore denies.
9. Answering paragraph 9 of the Plaintiffs' Complaint, DNR affirmatively alleges that said Conservation Easement speaks for itself and denies any characterization of it contrary to its terms.
10. Answering paragraph 10 of the Plaintiffs' Complaint, DNR affirmatively alleges that said Conservation Easement speaks for itself and denies any characterization of it contrary to its terms.

11. Answering paragraph 11 of the Plaintiffs' Complaint, DNR affirmatively alleges that said Conservation Easement speaks for itself and denies any characterization of it contrary to its terms.
12. Answering paragraph 12 of the Plaintiffs' Complaint, DNR affirmatively alleges that said Conservation Easement speaks for itself and denies any characterization of it contrary to its terms.
13. Answering paragraph 13 of the Plaintiffs' Complaint, DNR affirmatively alleges that said Conservation Easement speaks for itself and denies any characterization of it contrary to its terms.
14. Answering paragraph 14 of the Plaintiffs' Complaint, DNR affirmatively alleges that an exhibit was not attached to said Conservation Easement; instead, the Conservation Easement states that it applies to the "following described lands" and contains the legal description for the Property:

Township 34 North – Range 14 West
Section 15
SE NE & SW NE

All in the township of Almena, Barron County
(Containing 80 acres, more or less)

DNR denies that said Conservation Easement fails to provide any evidence of where the easement is to be located on the property. DNR affirmatively alleges that no map is needed to show the location of two quarter-quarter sections properly identified by quarter-quarter, section, town, and range.

15. Answering paragraph 15 of the Plaintiffs' Complaint, DNR denies.

16. Answering paragraph 16 of the Plaintiffs' Complaint, DNR denies. DNR affirmatively alleges that said Conservation Easement speaks for itself and denies any characterization of it contrary to its terms.
17. Answering paragraph 17 of the Plaintiffs' Complaint, DNR denies. DNR affirmatively alleges that while DNR has not flooded the subject property to date, the right to flood is perpetual, as are the other rights and restrictions in said Conservation Easement. DNR denies any and all other allegations in this paragraph.
18. Answering paragraph 18 of the Plaintiffs' Complaint, DNR affirmatively alleges that said Conservation Easement applies to the entire 80-acre property, consisting of the two quarter-quarter sections described, as intended, and that it permits the general public to access the property for any lawful purpose.
19. Answering paragraph 19 of the Plaintiffs' Complaint, DNR affirmatively alleges that said Conservation Easement applies to the entire 80-acre property, as intended. DNR denies that lawful uses of the subject property pursuant to said Conservation Easement impermissibly exceed the scope of said Conservation Easement. DNR further denies that said Conservation Easement unreasonably burdens the property. DNR further denies that said Conservation Easement has been rendered void or unenforceable.
20. Answering paragraph 20 of the Plaintiffs' Complaint, DNR affirmatively alleges that it has accurately and properly identified the subject property in its Public Access Lands Geographic Information System mapping as being subject

to a DNR easement making it “Open to All Activities.” See [https://dnrmaps.wi.gov/H5/?Viewer=Public Access Lands](https://dnrmaps.wi.gov/H5/?Viewer=Public%20Access%20Lands).

21. Answering paragraph 21 of the Plaintiffs’ Complaint, DNR lacks sufficient information to form a belief as to the truth of the allegations and therefore denies. DNR affirmatively alleges that said Conservation Easement permits members of the public to go on and across the subject property for any lawful purpose, including to lawfully hunt with firearms.
22. Answering paragraph 22 of the Plaintiffs’ Complaint, DNR denies.
23. Answering paragraph 23 of the Plaintiffs’ Complaint, DNR denies.
24. Any allegation neither admitted nor denied is denied.
25. DNR denies that the Plaintiffs are entitled to the requested relief.
26. DNR denies that the Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

- A. The Complaint fails to state a claim upon which relief can be granted.
- B. The doctrine of sovereign immunity may bar some or all of the Plaintiffs’ claims.
- C. This action is subject to the requirements, provisions, terms, conditions, and limitations of Wis. Stat. § 893.80 and any other notice of claim.
- D. The Plaintiffs have no cognizable damages under state or federal law.
- E. Any damages sustained by Plaintiffs were caused by intervening and/or superseding causes over which these answering Defendants had no control, including but not limited to, the acts or omissions of the Plaintiffs.

F. All or portions of Plaintiffs' Complaint must be dismissed pursuant to the doctrine of discretionary immunity.

G. DNR reserves the right to amend its affirmative defenses as discovery continues.

Dated this 1st day of April, 2022.

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Peter S. Rank
PETER S. RANK
Assistant Attorney General
State Bar #1068585

Attorneys for Wisconsin Department of
Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6370
(608) 294-2907 (Fax)
rankps@doj.state.wi.us

WI DEPT. OF
NATURAL RESOURCES

FILED
02-10-2022
Barron County, WI
Sharon Millermon
2022CV000025
Honorable Maureen D
Boyle
Branch 3

*Hand Delivered
9:50AM
ALL*

FEB 17 2022

OFFICE OF THE
SECRETARY

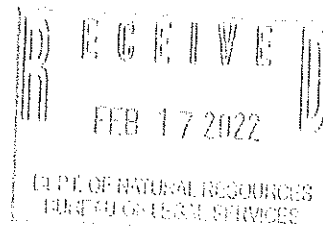
STATE OF WISCONSIN
CIRCUIT COURT
BARRON COUNTY

JACOB BECKER
396 15 1/2 Avenue
Turtle Lake, WI 54889,

Case No. 22CV _____
Other Real Estate: 30405

and

DANAE BECKER
396 15 1/2 Avenue
Turtle Lake, WI 54889,



Plaintiffs,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Madison, WI 53707,

Defendants.

COMPLAINT

NOW COMES Plaintiffs, Jacob Becker and Danae Becker, by their attorneys, NODOLF FLORY, LLP, as and for a complaint against Defendant, Wisconsin Department of Natural Resources ("DNR"), alleges as follows:

1. Plaintiff, Jacob Becker, is an adult residing at 396 15 1/2 Avenue, Turtle Lake, WI 54889.
2. Plaintiff, Danae Becker, is an adult residing at 396 15 1/2 Avenue, Turtle Lake, WI 54889.
3. Defendant, Wisconsin Department of Natural Resources ("DNR") is an administrative agency of the State of Wisconsin. The DNR's principal office is located at 101 South Webster Street, in the City of Madison, County of Dane, and State of Wisconsin.

4. Plaintiffs own real property in the Town of Almena, Barron County, Wisconsin, more particularly described in Exhibit A attached hereto and incorporated herein (“Property”).

5. Plaintiffs’ single family home, barn, and outbuildings are located on the Property.

6. The Property is subject to a Conservation Easement (Flowage) dated March 12, 1964 and recorded with the Barron County Register of Deeds as Document Number 349039, in Volume 305, Pages 683-684 (“Easement”). A true and correct copy of the Easement is attached hereto and incorporated herein as Exhibit B.

7. At the time the Plaintiffs’ purchased their home, they were not aware it was subject to the Easement.

8. When the Easement was granted, the Property was a farm with a single family home, barn, and outbuildings.

9. The Easement provides the Property was “in, near to, or adjacent to a Wisconsin Conservation Department project area now known as Barron County Scattered Wetlands...”

10. The Easement provides the Wisconsin Conservation Department, now the DNR, desired to flow the Property “with water by means of dams, dikes and other works, for the use and benefit of the general public.”

11. In accordance with the foregoing, an Easement was granted to the Wisconsin Conservation Department, now DNR, “to cause by the erection of dams, dikes or other works the water of the Lightning Creek river, creek, or watercourse to flow back on, over-and under or be withdrawn from the following described lands, together with all the rights, easements, privileges, and appurtenances which will be required or needed for the right of backing and flowage and also all riparian rights of every kind in the fast and unflowed lands described herein, including the right for all of the general public to go upon and across said lands for any lawful purpose...”

12. The Easement further contains a use and development restriction providing, “No building or premise shall be used and no building shall hereafter be erected or structurally altered except for one or more of the following uses: (a) General farming, including farm buildings, except fur farms and farms operated for the disposal of garbage, rubbish, offal or sewage.”

13. The Easement further provides, “the location of said easement being shown on Exhibit “A” attached, hereto, and made a part hereof.”

14. The Easement does not contain an Exhibit “A” and fails to provide any evidence of where the Easement is to be located on the Property.

15. The Easement’s lack of a specific legal description makes the Easement void and unenforceable.

16. The Easement granted is specific to the flowage of Lightning creek and the grantee’s intention to use Lightning Creek to flood a portion of the Property.

17. The purpose of the original grant in the Easement was never carried out and no dams, dikes, or other works were ever undertaken on Lightning creek to flood or otherwise effect any of the Property rendering the Easement void and of no further effect.

18. The DNR is utilizing the Easement as a blanket easement covering the entire Property and allows the general public to utilize the entire of the Property for all uses.

19. The Easement was never intended to be a blanket easement on the entire Property and such use impermissibly exceeds the scope of the original grant unreasonably burdening the Plaintiffs and the Property rendering the Easement void and unenforceable.

20. The DNR has publicly listed the entire Property as “Open to All Activities” for the general public.

21. As a result, Plaintiffs frequently have random members of the general public traverse the Property, including, but not limited to, their yard, right outside their home, and such individuals are often carrying firearms.

22. The DNR's use of the Easement to provide the general public full and unrestricted access to the Property for all purposes impermissibly exceeds the scope and purpose of the original grant creating an unreasonable burden to the Plaintiffs rendering the Easement void and unenforceable.

23. The DNR's use of the Easement is contrary to law and equity and the Easement must be terminated in accordance with Wis. Stat. § 700.40(3)(b).

WHEREFORE, Plaintiffs, Jacob Becker and Danae Becker, demand judgment against the Wisconsin Department of Natural Resources as follows:

- A. Declaring the Easement void and of no further effect.
- B. For Plaintiffs' attorney's fees and costs and disbursements; and
- C. For such further relief as the Court deems just and equitable.

Dated this 10th day of February, 2022.

NODOLF FLORY, LLP

By: 

Tanya M. Bruder
State Bar No. 1039670
Attorneys for Plaintiffs

ADDRESS:

526 Water Street
P.O. Box 1165
Eau Claire, WI 54702-1165
(715) 830-9771

Parcel No.: 002-1500-05-000

That part of the SE1/4 of the NE1/4 of Section 15, Township 34 North, Range 14 West, in the Town of Almena, Barron County, Wisconsin, described as follows: Beginning at the northeast corner of said SE1/4 of the NE1/4; thence North $89^{\circ}37'6''$ West, 658.93 feet along the north line of said SE1/4 of the NE1/4; thence South $0^{\circ}36'15''$ West, 1320.48 feet to the south forty line; thence South $89^{\circ}19'45''$ East, 658.93 feet along said forty line to the southeast corner of said forty; thence North along said East forty line to the point of beginning.

Parcel Nos.: 002-1500-04-000; 002-1500-05-001

Parcel I:

The Southwest Quarter of the Northeast Quarter of Section 15, Township 34 North, Range 14 West (in the Town of Almena), Barron County, Wisconsin;

AND

The Southeast Quarter of the Northeast Quarter of Section 15, Township 34 North, Range 14 West (in the Town of Almena), Barron County, Wisconsin, EXCEPT that part described as follows: Commencing at the Northeast corner of said Southeast Quarter of the Northeast Quarter; thence North $89^{\circ}37'6''$ West 658.93 feet along the North line of said Southeast Quarter of the Northeast Quarter;

thence South $0^{\circ}36'15''$ West 1320.48 feet to the South forty line;

thence South $89^{\circ}19'45''$ East 658.93 feet along said forty line to the Southeast corner of said forty; thence North along said East forty line to the place of commencement.

Parcel II:

Together with an easement for purpose of ingress and egress from the above described property over the South 66 feet of the West 190.35 feet of the East 20 acres of the Southeast Quarter of the Northeast Quarter of Section 15, Township 34 North, Range 14 West (in the Town of Almena), Barron County, Wisconsin, which easement shall be a covenant running with the land.

EXHIBIT

A

UNOFFICIAL

349039

INDEXED

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WISCONSIN CONSERVATION DEPARTMENT
Madison 1, Wisconsin

A-495

file

CONSERVATION EASEMENT
(Flowage)

THIS INDENTURE made this 12 day of March, 19 64, by and between

Emil Spletz

and

Hattie Spletz

, his wife,

of Route #1, Turtle Lake, Barron County, Wisconsin, Grantor; and the State of Wisconsin (Conservation Commission), Grantee.

WHEREAS, the Grantor E. A. S. the owner E in fee simple of certain real estate which is in, near to, or adjacent to a Wisconsin Conservation Department project area now known as Barron County Scattered Wetlands and located in Barron County, Wisconsin; and

WHEREAS, the Grantee, through its State Conservation Commission, desires to flow said lands with water by means of dams, dikes and other works, for the use and benefit of the general public.

NOW, THEREFORE,

WITNESSETH: For and in consideration of the sum of \$ 1.00 paid by the Grantee to the Grantor E., receipt whereof is hereby acknowledged, and in consideration of the covenants hereinafter contained, the Grantor E. hereby sell, transfer, grant, and convey to the Grantee, its successors and assigns, upon acceptance by said Grantee, the perpetual right, power, privilege and easement at any and all times hereafter to cause by the erection of dams, dikes or other works the water of the Lightning Creek river, creek, or watercourse to flow back on, over and under or be withdrawn from the following described lands, together with all the rights, easements, privileges, and appurtenances which will be required or needed for the right of backing and flowage and also all riparian rights of every kind in the fast and unflooded lands described herein, including the right for all of the general public to go upon and across said lands for any lawful purpose, which acceptance must be made by the Grantee within 6 (SIX) months from the date hereof.

RECEIVED FOR RECORD

8:00 a.m.
SEP 21 1964

Norma Holmstrom
REGISTER OF DEEDS
BARRON COUNTY, WIS.

Township 34 North - Range 14 West
Section 15
SE NE & SW NE

All in the township of Almena, Barron County
(Containing 80 acres, more or less)

the location of said easement being shown on Exhibit "A" attached, hereto, and made a part hereof.

The price to be paid to Grantor E. by Grantee for such easement is \$ 300.00.

To have and to hold the said easement hereby granted, unto the Grantee forever.

A covenant is hereby made with the State of Wisconsin that the Grantor E. hold the above-described premises included in the "restricted area" by good and perfect title; having good right and lawful authority to sell and convey the same; that the premises are free and clear from all liens and encumbrances whatsoever except as hereinafter set forth.

The Grantor E., for themselves, their heirs, executors, administrators, grantees, successors, and assigns, further covenant that they will neither lease nor convey any other easement in any way affecting said "restricted area" without first securing the written permission of the grantee.

No building or premise shall be used and no building shall hereafter be erected or structurally altered except for one or more of the following uses:

(a) General farming, including farm buildings, except fur farms and farms operated for the disposal of garbage, rubbish, offal or sewage.

(over)

EXHIBIT
B

UNOFFICIAL COPY

VOL 305 PAGE 684

And _____

_____ being the owner and holder of _____ certain _____ lien _____ which is _____

_____ against said premises, do hereby join in and consent to said conveyance free of said lien.

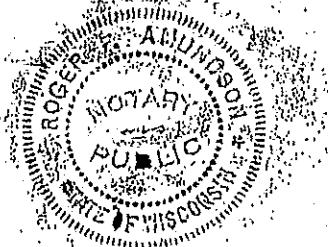
WITNESS the hands and seals of the Grantor and of any person joining in and consenting to this conveyance on the day and year hereinbefore written.

In presence of Roger F. Amundson (SEAL)
Emil Splett
Elsie Splett (SEAL)
Hattie Splett (SEAL)
 _____ (SEAL)
 _____ (SEAL)
 _____ (SEAL)

STATE OF WISCONSIN)
) ss.
 BARRON COUNTY)

Personally appeared before me this 12 day of March 19 64, the above named Emil Splett and Hattie Splett, his wife

to me known to be the persons who executed the foregoing instrument and acknowledged the same.



Roger F. Amundson
 Roger F. Amundson
 Notary Public, Barron County, Wisconsin
 My commission expires April 23, 1967

ACCEPTED this 1st day of September 19 64

State Conservation Commission of Wisconsin

by John W. Stevens

This instrument drafted by State Conservation Commission of Wisconsin

Emil Kaminski
Attorney

State of Wisconsin
Medicine, Wis
150

349039