

STATE OF WISCONSIN

CIRCUIT COURT

KEWAUNEE COUNTY

STATE OF WISCONSIN
17 West Main Street
Post Office Box 7857
Madison, WI 53707-7857,

Plaintiff,

v.

GLEN STAHL, d/b/a
STAHL FARMS,
E389 Luxemburg Road
Luxemburg, Wisconsin 54217,

Defendant.

Case No. 04-CV-121

Unclassified – Civil: 30703

Judge: Hon. Dennis Mleziva

REPLY BRIEF OF INTERVENING PLAINTIFFS

Scott and Judy Tremel and their children, Kaitlyn, Emily, and Samantha, (“Tremels”), by and through their counsel, Midwest Environmental Advocates, Inc. and Garvey & Stoddard S.C., hereby reply to Stahl Farms’ (“Stahl”) Memorandum in Opposition to the Tremels’ Motion to Intervene:

I. INTRODUCTION

The Tremels seek to intervene in this matter to protect their health and their childrens’ health, as well as their riparian property interests in School Creek. The Tremels also seek to protect their property interest in the groundwater supplying their home with water for drinking, bathing and other domestic uses.

Stahl holds a Wisconsin Pollutant Discharge Elimination System (“WPDES”) Permit WI-0062332-01-0 (“Permit”), that prohibits discharges of manure into waters such as School Creek and its tributaries. *See e.g.* Permit, Sections 1.1, 3.2.11. Stahl has violated this Permit on numerous occasions.

On June 29, 2004, the Tremls' filed a civil lawsuit in the United States District Court for the Eastern District of Wisconsin to enjoin Stahl from violating its Permit by discharging animal waste and other pollutants into School Creek and its tributaries. The Tremls own property that is riparian to these water bodies. The Tremls also brought nuisance, negligence and common law claims and seek compensation for their water well contamination and illnesses caused by Stahl's illegal discharges of animal waste.

On September 28, 2004, three months after the Tremls initiated their federal lawsuit, the State of Wisconsin brought a civil action against Stahl in this Court. Because the State's civil action may impair or impede the Tremls' ability to protect their interests in their federal lawsuit, and because the State does not adequately represent the Tremls' property interests, on October 13, 2004, the Tremls filed a timely motion with this Court to intervene in the State's civil action against Stahl.

The Tremls now reply to Stahl's Memorandum in Opposition to their Motion to Intervene.

II. THE TREMLS HAVE MET THE REQUIREMENTS OF INTERVENTION OF RIGHT, WIS. STAT. § 803.09(1).

A. The Tremls Have Demonstrated a Sufficient and Legally Protected Interest and Should be Allowed to Intervene Based on Controlling Precedent.

Stahl's attorneys incorrectly argue that the Tremls are required to have a judicially enforceable right to challenge Stahl's violations of the law in order to assert a legally protected interest in the outcome of the State's civil action against Stahl. Specifically, Stahl argues that the Tremls are required to have a private cause of action to enforce Wis. Stat. ch. 283 in order to intervene in the State's case. This simply isn't the case. For the reasons set forth below, Stahl's arguments are misleading and incorrect.

First, Stahl relies on *Grube v. Daun*, 210 Wis. 2d 682, 563 N.W.2d 523 (1997) for the proposition that there is no private cause of action to enforce Wis. Stat. ch. 283. *Grube* does not address intervention, nor does it hold that the Tremels must have a private cause of action to intervene in the State's civil action against Stahl. As a result, and as shown below, *Grube* is irrelevant to an intervention analysis in this situation. The issue for intervention is not whether the intervenor has a private cause of action, but whether the intervenor has a legally protected interest. Here, the Tremels have such an interest.

Second, Stahl's attorneys have cited a case that was overruled to support their position. Stahl cites the Court of Appeals decision in *Armada Broadcasting*, 177 Wis. 2d 272, 501 N.W.2d 889 (Ct. App. 1993) for the proposition that the Tremels must have a private cause of action to intervene in the State's case. (Resp. Br. at 3-4) However, the Wisconsin Supreme Court reversed the Court of Appeals decision in *Armada Broadcasting*. 183 Wis. 2d 463, 516 N.W.2d 357 (1994). Thus the defendant has cited a case that is no longer controlling precedent in Wisconsin.

What the defendant did not tell this court is that in *Armada Broadcasting* the Wisconsin Supreme Court reversed the Court of Appeals denial of intervention. 183 Wis. 2d at 467-468. The Supreme Court granted intervention to a school district employee who sought to intervene in a broadcasting company's lawsuit to compel access to open records related to the employee's allegations of misconduct. In granting intervention, the Court did not require the employee to have a separate, judicially enforceable right to prevent disclosure of the records. 183 Wis. 2d at 474-475. Instead, the Court pointed to the general right of privacy under Wisconsin law as a sufficient interest to justify intervention. *Id.*

Neither Wisconsin law nor the Seventh Circuit requires intervenors to have a related private cause of action to show a legally protected interest sufficient to justify intervention. *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 547, 33 N.W.2d 252 (1983) (courts look to cases and commentary related to intervention under Fed. R. Civ. P. 24 for guidance on interpreting Wis. Stat. § 803.09); *Armada Broadcasting v. Stirn*, 183 Wis.2d at 474-475 (not requiring a separate cause of action for intervenor seeking to keep records confidential); *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 745, 601 N.W.2d 301 (Ct. App. 1999); *Solid Waste Agency of Northern Cook County v. U.S Army Corps of Engineers*, 101 F.3d 503, 506 (7th Cir. 1996) (noting that a lack of any private cause of action further justifies intervention of right).

In *Wolff*,¹ the Court allowed the Town of Jamestown to intervene on behalf of Grant County in the Wolff's challenge to the County's refusal to let them build a house on land overlooking the Mississippi River. The Court granted intervention despite the fact that the Town did not have its own zoning authority and was not technically "aggrieved" by Grant County's decision to deny the permit. 229 Wis. 2d at 745. The Court *explicitly rejected* Wolff's argument that the Town must have "a related cause of action enforceable in a separate proceeding." 229 Wis. 2d at 744, 745. The Court reasoned that the Town's interest in protecting public health and safety within the Town's borders was more than sufficient interest to justify intervention. 229 Wis. 2d at 746.

¹ Stahl's attorneys mischaracterize the holding of *Wolff* as follows: "the Court of Appeals granted the Town's motion to intervene in part because it had a substantial, legally protected interest in *challenging* decisions of the board of adjustment." (Resp. br. at 4) (ital. added)

Actually, the Court in *Wolff* stated that Wisconsin law demonstrates that the Town had an interest in the "*outcome* of decisions made by the county," not necessarily in challenging those decisions. 229 Wis. 2d at 745, 746 (emphasis added). Despite the fact that the Town did not intend to challenge the County's decision, it still had an interest in the outcome of the decision and therefore had a right to intervene. 229 Wis. 2d at 746. Likewise, the Tremls do not necessarily challenge the State's decision to prosecute Stahl, but nonetheless have an interest in the outcome of that decision and therefore have a right to intervene.

Like the intervenors in *Wolff* and *Armada*, the Tremels have an interest in protecting their riparian property rights in School Creek and their property rights in the quality of the groundwater supplying their drinking water. Their interest in School Creek is protected under the Federal Water Pollution Control Act Amendments of 1972 (“Clean Water Act”). The Clean Water Act provides the Tremels with a right to file a citizen suit in federal court against Stahl to compel it to comply with its Permit. 33 U.S.C. § 1365(a)(1). The Tremels filed their case in the United States District Court for the Eastern District of Wisconsin on June 29, 2004, approximately three months before the State filed its civil action in this Court.

Moreover, the Tremels’ interest in their drinking water rests on their need to protect their private property rights. They have brought common law causes of action for nuisance, negligence, and trespass with their federal claims to protect those property interests. *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (Wis. 1974) (permitting a nuisance action to protect groundwater).

The Tremels have demonstrated a sufficient and legally-protected interest in the outcome of the State’s civil action, and therefore should be granted the right to intervene in this matter.

B. Stahl Improperly Attempts to Argue For Dismissal of Claims in Response to Motion to Intervene.

Stahl argues, without providing any facts, that several of the Tremels’ claims should be dismissed. In doing so, Stahl attempts to force the Tremels to prove their case in a Motion to Intervene rather than at trial. A response to a Motion to Intervene is not the proper vehicle for arguing that valid claims should be dismissed. Instead, the Court only needs to determine whether the Tremels have met the requirements for intervention of right under Wis. Stat. § 803.09(1). The Tremels have done so by timely moving this Court to intervene, demonstrating

their interest in the outcome of this case, showing that their interests may be impaired, and showing that the State does not adequately represent their interests.

Regardless, Stahl makes extraneous and premature factual arguments in response to the Tremels' Motion to Intervene. As one example, Stahl argues that open tile intakes and broken vent pipes are different, and therefore discharges of liquid manure into broken vent pipes draining to nearby School Creek cannot be violations of its Permit. (Resp. Br. at 6-7) The Tremels disagree. (Int. Comp. at ¶ 85) The dispute over these factual issues is improper for resolution in a Motion to Intervene.

Stahl also argues that Stahl has met and the WDNR diligently prosecuted violations of various reporting requirements under the Permit, namely Section 1.4.2 of the Permit.² (Resp. Br. at 7) Whether Stahl has actually met and continues to meet the reporting requirements of the Permit is a question of fact not appropriate for resolution in an intervention analysis.

Stahl argues that it is “beyond dispute” that it is not operating an open dump on its property. (Resp. Br. 7-8) Stahl argues this is so because it has “returned manure and process wastewater back to the soil as fertilizers,” and is therefore entitled to the exemption from the definition of “solid waste” under the Resource Conservation and Recovery Act (“RCRA”). 42 U.S.C. § 6903(27); 40 C.F.R. § 257.1(c)(1). However, the Tremels argue that Stahl is not simply

² Again, Stahl's attorneys mislead the Court by mischaracterizing the law. WDNR lacks the authority to “diligently prosecute” violations of WPDES permits by administrative action alone. *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743, 756-757 (7th Cir. 2004). “Diligent prosecution” cannot begin until the Wisconsin Department of Justice initiates a civil action in circuit court. 382 F.3d at 756-757, 759. Moreover, in order to avoid a federal lawsuit by the Tremels, the State must have timely commenced and diligently prosecuted its case. The determination of whether an action is timely commenced is a rigid one. If the State files its complaint in state court after a private party has filed its complaint in federal court, even if the State files only a few hours after the private party, the action will not be considered timely commenced. *Id.* at 754-755. The Tremels filed their federal lawsuit three months prior to the State's filing of this case. The State has not timely commenced an action for purposes of stopping the Tremels' federal action on a claim of diligent prosecution.

returning the manure to the soil, but instead is discharging it to School Creek and tributaries thereto. (Int. Compl. ¶ 127) Unless Stahl is asking this Court to take judicial notice of Stahl's manure handling procedures (or lack thereof), it is hardly "beyond dispute" that Stahl is not operating an open dump. This, too, is a factual issue to be resolved at trial, not at the intervention stage.

Stahl also argues that the Tremls have not alleged violations of Section 1.1 of the Stahl's Permit. (Resp. Br. at 6) This is incorrect. The Tremls identify in their proposed complaint at least 14 separate discharges by Stahl of animal waste into School Creek since 1982. (Int. Comp. ¶36, ¶¶ 55-65) The Tremls allege that these discharges are the result of systemic structural and management problems at Stahl's facility. (Int. Comp. at ¶ 62) Whether Stahl has permanently abated those discharges is a question of fact to be resolved at trial.

Finally, Stahl argues that Wisconsin's Right to Farm law, Wis. Stat. § 823.08, bars the Tremls' common law claims. (Resp. Br. at 8) The Tremls argue that Wis. Stat. § 823.08 does not bar their claims, or if it does, it is unconstitutional. (Int. Compl. at ¶¶ 130, 131) Whether Wis. Stat. § 823.08 applies to the Tremls' claims, and specifically, whether Stahl's actions amount to a "substantial threat to public health and safety" under that law, is a factual issue to be resolved at trial.

Stahl's arguments are irrelevant to the Tremls' interest in the outcome of the State's enforcement action, and should be disregarded until those issues arise at trial. At this point, however, the Tremls should be granted the right to intervene to protect their legal interests.

C. The State Does Not Adequately Represent the Tremls' Interests Because the Tremls Have a Riparian Property Interest in School Creek and a Private Property Interest in Protecting Their Use of Groundwater.

An intervenor can overcome the presumption of adequate representation by showing that the intervenors' interests are *different* from those of the State. *Menominee Indian Tribe of Wisconsin v. Thompson*, 164 F.R.D. 672, 675 (W.D. Wis. 1996). Adequacy of representation is presumed only where the interests of the original party and the intervenor are "identical." *Solid Waste Agency of Northern Cook County*, 101 F.3d at 508.

The State does not adequately represent the Tremls' interests in this case because the Tremls' interests are different from those of the State. Therefore, the Tremls have overcome any presumed adequacy of representation. Unlike the State, the Tremls have brought viable claims for nuisance, negligence, and trespass to protect their private property rights and their interests in the health and welfare of their family. The Tremls seek compensatory damages for their personal injuries and property damage associated with the contamination of their well and damage to their riparian property rights. The State's lawsuit will not compensate the Tremls for their losses, nor will it necessarily prevent Stahl from continuing to spread manure on the Wachal property upgradient of the Tremls' well, which, after reasonable investigation, the Tremls believe caused their well contamination. The State's interests are much broader and, while they have some overlap with the Tremls' interests, they are not "identical" by any means.

Stahl, perhaps unintentionally, underscored the Tremls' argument by attaching a newspaper article questioning the objectivity of WDNR staff in investigating the Tremls' well contamination. (Hughes Aff., Ex. K) The Tremls wrote a letter to WDNR Secretary Scott Hassett expressing concern that David Bougie, WDNR staff person responsible for oversight of

Stahl's operations, had failed to conduct a thorough investigation of the contamination of the Tremels' drinking water. More significantly, WDNR staff person Bougie authorized Stahl to spread manure in late February of 2004 on the field that the Tremels' allege caused their well contamination, suggesting a conflict of interest in having Bougie lead the WDNR investigation of the well contamination. As demonstrated in Stahl's Exhibit K, the Tremels are rightfully concerned that WDNR did not conduct a thorough and unbiased investigation into Stahl's manure spreading in early March of 2004. But even if there had been a thorough and unbiased investigation by the State, it would not have been concerned with protecting the Tremels' interests. Instead, it would have been directed only at broader public interests that do not fully overlap with and that are not "identical" to the Tremels' interests. This indicates in one respect how the State does not adequately represent the Tremels' interests in this matter.

Finally, Stahl dismisses the Tremels' concern that the State will allow a protracted schedule to come into compliance with its Permit, meanwhile allowing Stahl to continue to violate its Permit and endanger the Tremels' private property rights. (Resp. Br. at 11) Stahl has caused discharges to School Creek for over twenty years, and none of the State's actions have been effective in abating those discharges. Stahl suggests that the Tremels can simply "comment" on the State's potential and future settlement with Stahl. (Resp. Br. at 12) The Tremels are aware of no public comment procedures in state law for such matters, and Stahl points to none. Regardless, writing a letter to the WDNR hardly provides the Tremels with the opportunity to represent their interests in this matter.

III. THE TREMLS ARE ENTITLED TO PERMISSIVE INTERVENTION.

Stahl raises a number of meritless arguments against the Tremles' permissive intervention. First, Stahl suggests that this Court cannot manage the complexity of bifurcating the Tremles' common law claims. (Resp. Br. at 13) There is no basis for this argument and it appears to undermine the authority of this Court.

Second, Stahl attacks the Tremles' attorneys, referring to them as a "large, corporate public interest group." (Resp. Br. at 13) This stretches the meaning of the word "large." In fact, the Tremles are represented in part by Midwest Environmental Advocates, a non-profit environmental law center in Wisconsin that employs two full time attorneys. The Tremles are also represented by a small private law firm, Garvey & Stoddard, S.C. By contrast, the law firm representing Stahl, Michael Best & Friedrich LLP, comprises 300 attorneys in six locations around Wisconsin, Pennsylvania and Illinois. (See <http://www.mbf-law.com/about/firm.cfm> (last visited on November 15, 2004)). The effort by Stahl's attorneys to try to attack the Tremles because of the legal assistance they are receiving is unproductive, factually incorrect, and irrelevant.

Third, Stahl argues that the Tremles have made public statements regarding the events surrounding their well-contamination. (Resp. Br. at 14) Stahl's attorneys fail to inform the court that Stahl's attorneys have also made public statements regarding this case, as shown in their exhibits. (Hughes Aff., Ex. J) Neither party's statements prejudice the other, as both parties have had opportunities to address questions posed by the media.

Finally, Stahl seems oblivious to the benefits of avoiding the need to defend two separate lawsuits in two separate forums: state and federal court. Instead, Stahl (or Stahl's attorneys)

apparently would prefer to litigate its defense twice rather than once. However, having to defend the Tremls' and the State's claims in one forum rather than two will not prejudice Stahl.

Litigating in two forums is unproductive, inefficient, a waste of public resources and prejudicial to both the Tremls and Stahl. The Tremls recognized that, and this is why they filed their Motion to Intervene in this case.

The Tremls have demonstrated that their federal lawsuit involves common questions of law and fact, and that their intervention in the State's civil action against Stahl would be an efficient use of judicial resources. That Stahl would rather not defend against both the Tremls and the State, or wishes to settle with one party but not the other, is inconsequential and certainly does not show how Stahl will be prejudiced by the Tremls intervention. *C.L. v. Edson*, 140 Wis. 2d 168, 179, 409 N.W.2d 417 (1987) (having to oppose a motion or having an interest in concluding a lawsuit do not constitute prejudice).

Because Stahl has not demonstrated any prejudice by allowing the Tremls's Motion to Intervene, the Tremls should be granted permissive intervention in the State's civil action against Stahl.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Tremls' motion to intervene as required by Wis. Stat. § 803.09(1), or in the alternative, the Court should grant the Tremls' motion to intervene under Wis. Stat. § 803.09(2) because the Tremls have presented claims sharing issues of fact and law with this action.

Dated this _____ of November, 2004.

Respectfully submitted,

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