

Arsenic Cleanup Order Derailed

Environmental litigation cases are often mired in complexities so intense it is difficult to find a win-win resolution. Ruder Ware recently completed a case of this type for Wisconsin Central Limited (WCL), a subsidiary of Canadian National Railroad. The dispute involved a 15-acre wetland in the Kewaunee Marsh acquired by the Wisconsin Department of Natural Resources (DNR) in 1961 and eventually named in honor of Secretary C. D. Besadny. The marsh was later found to be heavily contaminated with arsenic.

The site is located approximately 1,200 feet from the Kewaunee River and approximately one mile upstream from the mouth of the Kewaunee River at Lake Michigan. WCL purchased the railroad right-of-way adjacent to the marsh from Green Bay & Western Railroad (GB&W) in 1993. In 1996 GB&W agreed to place a cap on an arsenic "hot spot" in the marsh. WCL subsequently filed a notice to abandon the rail line, which prompted the DNR to incorporate the right-of-way into its already extensive "Rails-to-Trails" program.

Aware of some arsenic contamination since 1993, the DNR was unaware of the extent of the contamination. Upon further investigation, the DNR found a new "hot spot" located within the adjacent right-of-way. The DNR asserted that it was WCL's responsibility to clean not only the right-of-way but also the entire wetland marsh. WCL countered that it had purchased GB&W's assets, not its liabilities. By this time, GB&W was defunct and unable to fund further site investigation or cleanup.

The DNR issued a "responsible party" (RP) letter to WCL demanding that the entire site be investigated and remediated at its expense; otherwise, the DNR would sue to recover its costs and impose penalties of up to \$5,000/day for each day of noncompliance with the RP letter.

Knowing that the state would sue WCL in state court in the event that WCL did not respond, Ruder Ware advised WCL to file suit in federal district court claiming the "Rails-to-Trails" easement granted to the DNR operated to relieve WCL of any liability. The district court ruled that the court did not hold federal subject matter jurisdiction over the suit. Ruder Ware appealed to the Seventh Circuit Court of Appeals. While the appeal was pending, a favorable settlement was reached. WCL has paid in cash roughly 50% of the state's estimate to clean up the right-of-way and the marsh in exchange for a complete release of liability. The state will undertake the cleanup.



North-facing view of the Kewaunee Marsh.

The main points of this case include: (1) the strategy of going into federal court to seek an injunction, and (2) the strategy of negotiating a lump sum payment that extinguished further liability to the state and cleanup undertaken by the state.

Though the case was layered in complexity, both our client and the DNR emerged with a mutually beneficial resolution. ♦

about Russ Wilson – attorney

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