

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

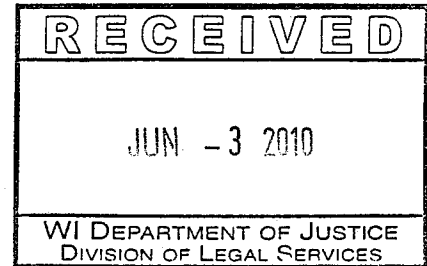
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May 6, 2010

Hon. J.B. Van Hollen
Attorney General
114 East, State Capitol
Madison, WI 53707-7857

RE: Conservation Easements on County Forest Lands

Dear Attorney General Van Hollen:



I am requesting guidance from your office in the form of an informal opinion on behalf of the Department of Natural Resources ("the Department") as to whether or not Wisconsin county forests enrolled under Wis. Stats. ss. 28.10 and 28.11 can allow for conservation easements and restrictive covenants where such easements or restrictive covenants will not interfere with the overall purpose of the county forest system.

I. Public purpose and underlying statutory authority

The purpose statement of the county forest system under Wis. Stats. s. 28.11(1) states

The purpose of this section is to provide the basis for a permanent program of county forests and to enable and encourage the planned development and management of the county forests for optimum production of forest products together with recreational opportunities, wildlife, watershed protection and stabilization of stream flow, giving full recognition to the concept of multiple-use to assure maximum public benefits; to protect the public rights, interests and investments in such lands; and to compensate the counties for the public uses, benefits and privileges these lands provide; all in a manner which will provide a reasonable revenue to the towns in which such lands lie.

The only provisions for any type of ownership interest or leaseholder other than the county is found under Wis. Stats. s. 28.11(3)(i) and (j) and s. 28.11(4)(f). Wis. Stats. s. 28.11(3)(i) and (j) do not allow for perpetual easements of any kind, but are instead provisions that allow for 10 year leases for the exploration, prospecting and extracting of ore, minerals, gas or oil, respectively. The only perpetual easements that are specifically mentioned in Wis. Stats. s. 28.11(4)(f) which states:

The department may construct and use forest fire lookout towers, telephone lines and fire lanes or other forest protection structures on any lands entered under this section and the county clerk of such county **shall execute any easement on or over such lands which the department may require for forest protection.** The general public shall enjoy the privilege of entering such lands for the purpose of hunting, fishing, trapping and other recreation pursuits subject to such regulation and restrictions as may be established by lawful authority.

(emphasis added)

It is a well accepted canon of statutory construction of "expression unius est exclusion alterius", which means that the expression of one thing excludes another. State v. Delaney, 259 Wis.2d 77, 88 (2003); Perra v. Menomonee

Mut. Ins. Co., 239 Wis. 2d 26 (Ct. App. 2000) Applying this canon of statutory construction to Wis. Stats. s. 28.11(3)(i) and (j), it would appear that the only types of leases that the county board has the authority to enter into are the 10 year leases for exploring and prospecting for and extracting ore, minerals, gas or oil, and that the only types of easements that can be entered into under Wis. Stats. s. 28.11(4)(f) are those for forest fire protection. However, there has been some nuanced interpretation of this issue when the proposed use for the lease or easement does not conflict with the purpose of Wis. Stats. s. 28.11.

II. Past interpretation in favor of allowing certain types of easements.

An opinion submitted by DNR Forestry Attorney Eric Ebersberger on May 5th, 2004, to Attorney Robert P. Rusch, entitled "Washburn County/Power Up Wisconsin" (attached) stated, in part;

Specifically, you asked whether the county execution of such an easement—including a "perpetual easement"—would trigger a withdrawal from the county forest of the affected lands.

In short, the county's execution of such an easement, even if perpetual, would not necessarily trigger a withdrawal from the county forest program. In the Department's opinion, a transmission line easement could be tailored to be consistent with the purpose of the county forest program as listed at s. 28.11 (1), Stats., and consistent with the county's comprehensive forest land use plan prepared pursuant to s. 28.11 (5), Stats. The Department believes a transmission line easement could be crafted such that it allows multiple use activities to occur that provide benefits to the public, and such that the impact on county forest management could be relatively minimal.

(emphasis added)

Underlying this analysis was the consideration that many such utility easements existed, and had for some time, on county forest lands without triggering withdrawals of county forest lands. It should also be noted that at the time the memoranda came out, a number of counties disagreed with this interpretation. However, the legislature soon provided a solution to the issue. Subsequent to this memoranda, Wis. Stats. s. 196.491(3e)(am) was enacted, which states:

Notwithstanding s. 32.03 (1), if an electric utility receives a certificate of public convenience and necessity from the commission under sub. (3) for the construction of a high-voltage transmission line that will be constructed over, on, or under land owned by a county, city, village, town, public board or commission, the owner of the land shall convey to the electric utility, at fair market value as determined under par. (b), the interest in the land necessary for the construction, operation, and maintenance of the high-voltage transmission line.

(emphasis added)

This statutory change, in conjunction with the DNR's opinion, has been interpreted to allow electric utilities to purchase permanent utility corridor easements over county forest lands where such easements do not significantly conflict with the purpose of Wis. Stats. s. 28.11.

III. Past interpretations contrary to allowing easements.

The DNR asked for, and received, an informal opinion, (attached) dated September 18, 2002, from the Wisconsin Department of Justice on the issue of the County forests issuing cabin leases to individuals, which we have attached as additional documentation. While leases are not directly analogous to perpetual easements, the analysis provided regarding the public purpose does support the easement analysis. Assistant Attorney General (AAG) Philip Peterson concluded the following:

To summarize, under Wis. Stat. s. 28.11, counties lack authority to enter into leases for private cabins within the county forests. This statute gives counties authority to enter into leases for other purposes on county forest lands but does not give them any authority to enter into leases for private cabins on county forest lands. Setting aside areas within the county forests for private cabins **conflicts with the general public purposes stated by statute** for developing and managing county forests.

(emphasis added)

AAG Peterson's opinion identified the following areas where such cabin leases conflicted with the overall purpose of the statute:

- "assur[ing] maximum public benefits," "protect[ing] the public rights [and] interests," and "public uses, benefits and privileges" (Wis. Stat. s. 28.11(1));
- "use of the county forests by the public" (Wis. Stat. s. 28.11(3)(b));
- "public hunting and fishing" (Wis. Stat. s. 28.11(4)(c)); and
- "[t]he general public shall enjoy the privilege of entering such lands for the purpose of hunting, fishing, trapping and other recreation pursuits." Wis. Stat. s. 28.11(4)(f).

However, the opinion did not directly address the issue of whether or not easements, leases, or other ownership interests that do not directly conflict with the overall purpose of the county forest law are allowed under Wis. Stats. s. 28.11.

The DNR has commented on this issue as well, denying the Ice Age Trail from obtaining easements from the County forests for their trails, and instead have required them to enter into license or land use agreements with the County. (see attached email from Attorney Jim Christensen to Count Forest Specialist Jeff Barkley, dated October 31, 2002).

Finally, there is a concern that the perpetuity of the easements or ownership interests in question would be counter to the public purpose of Wis. Stats. s. 28.11(11). One of the features of the county forest law is the ability to sell or convert the property if the county meets the requirements set forth in Wis. Stats. s. 28.11(11), although such sales or conversions are typically difficult and unlikely. A perpetual easement would restrict this stick from the "bundle of sticks" owned by the various counties in the county forest system, and could be interpreted by the courts as being contrary to the overall purpose of the county forest system.

Conclusion

The Department is requesting clarity on the issue of whether or not Wisconsin county forests enrolled under Wis. Stats. ss. 28.10 and 28.11 can allow conservation easements or restrictive covenants where such easements or restrictive covenants will not interfere with the overall purpose of the county forest system. Forestry Attorney Quinn Williams will be the Department's liaison on this matter.

Sincerely,



Matthew Frank
Secretary
Department of Natural Resources.