

REDELLEN ROAD NEIGHBORHOOD ASSOC.,
INC., et al,

Petitioners,

-vs-

Case No. 10 CV 5341
MOTION HEARING

THE DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

Proceedings held in the above-entitled matter
on the 17th day of June, 2011, before the **Honorable**
J. MAC DAVIS, Circuit Court Judge presiding in Circuit Court
Branch 7, Waukesha County Courthouse, Waukesha, Wisconsin.

APPEARANCES:

ATTORNEY WILLIAM C. GLEISNER, III, 300 Cottonwood
Avenue, Suite No. 3, Hartland, WI, 53029, appearing on
behalf of the Petitioners.

ATTORNEY WILLIAM H. HARBECK, 411 East Wisconsin
Avenue, Milwaukee, WI 53202, appearing on behalf of the
Petitioners.

ASSISTANT ATTORNEY GENERAL DIANE L. MILLIGAN, 17 West
Main Street, P.O. Box 7857, Madison, WI 53707-7857,
appearing on behalf of the Respondent.

Gail M. Villwock
Official Court Reporter

COPY

1 obligated to give your clients notice.

2 And I'm less impressed by the more
3 open-ended things because I don't see any end. I
4 mean, I'm interested in what happens to that lake even
5 though I haven't been on the water there, but I'm a
6 resident of the county like every other judge here.

7 And so how do we draw the line between any
8 other Wisconsin resident, or any local residents, or
9 anyone else who uses the lake? Or anyone who lives a
10 mile up the street, or a block up the street, or a
11 next door neighbor unless we have some particular
12 legal analysis to apply?

13 MR. GLEISNER: Yes, your Honor. I'm ready
14 to address that if your Honor wishes.

15 THE COURT: I do.

16 MR. GLEISNER: Oh, very good, your Honor.
17 Section 227.53(1)(a)2m is very clear, it says quote:

18 "Petitions for review of cases other than
19 contested cases shall be served and filed within
20 30 days after personal service, or mailing of the
21 decision by the agency." Closed quote.

22 It does not say anything about posting the
23 decision on a web page. And the legislature could
24 easily have specified that web posting of a decision
25 was an alternate means of service, but it did not.

1 We were not served with a --

2 THE COURT: Yes, I know. But why should you
3 have been? What is your status here?

4 MR. GLEISNER: Well, our status here, your
5 Honor, is that the DNR was able to serve a number of
6 other people. We have -- we can make an offer of
7 proof right now.

8 THE COURT: I don't think that matters
9 either. They could have mailed the whole
10 neighborhood. No meaningful impediment. The question
11 is what their obligation to do with respect to your
12 client.

13 MR. GLEISNER: Your Honor, Mr. Hanson lives
14 right here, and his house is immediately south of
15 the asphalt parking lot that they're going
16 to shoe-horn into our neighborhood. Mr. Hanson
17 on repeated occasions complained to the DNR that he
18 was very concerned about this asphalt parking lot
19 because his property, which is as I say right down
20 here, is immediately, immediately next to the parking
21 lot.

22 THE COURT: So how long is that common
23 boundary? A couple hundred feet or something?

24 MR. GLEISNER: It is about 200 -- well, the
25 parking lot is a football-sized piece of asphalt.

1 THE COURT: How long is your client's, or
2 Mr. Hanson you mentioned?

3 MR. GLEISNER: He goes much further back,
4 your Honor. He actually they go across his property
5 to get the access road, and there was a dispute about
6 that that was decided against Mr. Hanson. And if this
7 is 275 feet long, your Honor, and 100 feet wide, it is
8 going to be built three feet above grade, every year
9 Mr. Hanson's property floods to sometimes a great
10 extent because of storm water accumulation in this
11 area right here, which is a wet -- this is basically a
12 grove of trees back here, your Honor. And this grove
13 of trees back here is filled with what we contend, and
14 what is being adjudicated navigable waters, and so his
15 property floods on a regular basis. He complained to
16 the DNR that he was very worried.

17 THE COURT: Hang on, I want to make some
18 kind of record here. You're showing me a blown-up
19 photograph that is not -- but what you're saying is
20 Mr. Hanson owns a property that is immediately
21 adjacent to the DNR parking lot, and for 275 feet.

22 MR. GLEISNER: Yes, your Honor.

23 THE COURT: So his interest, of course,
24 would be if there is any water or run off in that
25 parking lot that it's likely to come to him if they

1 raze it. Does it say anything about the slope?

2 MR. GLEISNER: Your Honor, the exact
3 particulars of this still are not clear to
4 our environmental engineers. However, the point is
5 that Mr. Hanson complained to Lynette Check who was
6 the one person who received service and a number of
7 other people, and he was not served with this Storm
8 Water decision. And yet he is a member of the RRNA
9 Board of Directors, has been for a year, and has
10 been a member of the RRNA for the last five years.
11 And if he had known about this, if he had received the
12 Storm Water Decision, he would have immediately
13 brought it to us.

14 Now what is important here, your Honor, is
15 that both Mr. Peters, who is north of that slab,
16 and Mr. Hanson, who is south of that slab, did
17 receive copies of the November 4th of 2010 decision on
18 the Manual Code. They did not get a copy, they didn't
19 request that either, by the way, your Honor, they did
20 not get a copy of the November 4th of 2010 Storm Water
21 Decision.

22 As soon as Mr. Hanson was served with a copy
23 of the storm -- the -- strike that, the Manual Code
24 Decision he brought it to me. And I would have
25 immediately taken steps to have filed a petition for

1 judicial review if I had known about this.

2 Mr. Hanson is the lynch pin here. They
3 served him with the -- he is more than just an
4 interested person, he is a contiguous property owner.
5 They served him with the November 4th of 2010 decision
6 on the Manual Code but they didn't serve him with
7 the Storm Water Decision that came out the very same
8 day but they knew he was very interested in this.
9 They could have put both in the same envelope.

10 They also save served me as RRNA counsel
11 with a copy of that Manual Code Decision and they knew
12 that we were very interested in Storm Water as well.
13 They didn't send that to us either.

14 And the point is, your Honor, that Mr.
15 Hanson is a person who is not just any resident, he is
16 a contiguous property owner who has continuously
17 complained about storm water run off. He is an
18 individual who is part of our organization, on our
19 Board of Directors, and they didn't serve him. If
20 they had served him we wouldn't be here today. We did
21 not find out about this until December -- sorry,
22 November.

23 THE COURT: I'm thinking for this purpose
24 they could just mail it to him.

25 MR. GLEISNER: And, your Honor, if you look

1 at the two decisions, if you look at the Manuel Code
2 Decision Mr. Hanson is carbon copied in on the Manuel
3 Code Decision of November 4th of 2010. Nobody is
4 carbon copied on the Manual -- on the Storm Water
5 Decision. And I would like to also --

6 THE COURT: So mailing is sufficient?

7 MR. GLEISNER: Yeh, it would have been fine
8 if he mailed it.

9 THE COURT: So where do I look in a statute
10 or a case to see why -- assume for a minute you
11 have -- you're convincing that he is a major
12 contiguous property owner, he has a substantial and
13 real interest, and the DNR knew that. Why are they
14 required to give him -- to mail him a copy of this
15 decision?

16 MR. GLEISNER: Because, your Honor, first --

17 THE COURT: Besides the fact they should
18 have, but what is the legal requirement?

19 MR. GLEISNER: Your Honor, the decision was
20 one that deeply implicated his interest. And they
21 mailed out the November 4th Manuel Code Decision.
22 And in terms of a burden they could have put both in
23 the same envelope.

24 THE COURT: That's not the question I'm
25 asking you. What is the legal requirement on him?

1 MR. GLEISNER: 227.53(1)(a) 2m.

2 THE COURT REPORTER: Could you say that
3 again.

4 MR. GLEISNER: I apologize.

5 THE COURT: If you really want us to pay
6 attention you're going to have to make it
7 intelligible, Counsel.

8 MR. GLEISNER: I'm sorry, your Honor, I
9 apologize for that. 227.53 sub (1) sub (a) 2m.

10 So, they rendered this decision, which is
11 going to directly affect his property. It is not some
12 remote accident that is going to occur here, it is not
13 something that is of interest to a -- to people in a
14 general way. He's --

15 THE COURT: I'm not finding interest. What
16 I think you cited to me reads entirely, quote:

17 "Petitions for review of cases other than
18 the contested cases shall be served and filed within
19 30 days after a personal service or mailing of the
20 decision by the agency."

21 The question is not that question is: What
22 is their obligation to mail Mr. Hanson or your client?

23 MR. GLEISNER: Your Honor, he is a
24 contiguous property owner.

25 THE COURT: So where can I look to see that

1 contiguous property owners are entitled to notice?

2 MR. GLEISNER: Your Honor, they already
3 mailed him the Manuel Code Decision.

4 THE COURT: Then point to me something
5 that then binds them to do it in the future.

6 If you do something as a volunteer you don't
7 have to do it again unless there is some particular
8 principle that applies.

9 MR. GLEISNER: Any aggrieved person
10 under 227.01 sub (9) is a person who can appeal.

11 THE COURT: 227 what?

12 MR. GLEISNER: -- .01 sub (9).

13 THE COURT: Okay.

14 MR. GLEISNER: Defines who is an aggrieved
15 person under the -- under Chapter 227. I'll wait for
16 your Honor to get there.

17 THE COURT: All right. I see that
18 definition.

19 MR. GLEISNER: Yes, your Honor.

20 THE COURT: And where does it say that
21 aggrieved persons are entitled to get at least the
22 mail notice?

23 MR. GLEISNER: Your Honor, the fact of the
24 matter is that the notice had to -- directly affected
25 Mr. Hanson's property, and he wouldn't be able to

1 contest what they were going to do with regard to
2 storm water decisions, with the storm water decision
3 unless he received a copy of it. He is --

4 THE COURT: Is your argument that every
5 aggrieved person is entitled to get a notice of the
6 decision?

7 MR. GLEISNER: Not everybody aggrieved
8 person, your Honor, no.

9 THE COURT: Okay. So then connect, when I
10 asked you what required them to give your client a
11 notice you cited to this definition of aggrieved
12 persons. Assume for a minute that Mr. Hanson and your
13 client are aggrieved persons, now make the next link,
14 why are they entitled to a notice here?

15 MR. GLEISNER: Then I would direct your
16 attention to 227.52, which reads quote:
17 "Administrative decisions -- I'm sorry, your Honor,
18 I'll wait until you get there.

19 THE COURT: I'm there.

20 MR. GLEISNER: Administrative decisions
21 which adversely affect the substantial interest of any
22 person, whether by action or inaction, whether
23 affirmative or negative in form, are subject to review
24 as provided in this chapter, except otherwise provided
25 by law and except in -- for the following.

1 Your Honor, how could Mr. Hansen --

2 THE COURT: That sounds like a standing
3 provision, right? I don't think anybody doubts that
4 your client had standing here. The question still is:
5 Were they entitled to notice?

6 MR. GLEISNER: The difficulty is, your
7 Honor, in order to have standing, in order to get
8 there, in order to be able to protect his interests,
9 whatever they might be, he has to have notice.

10 Now in this case he gave them notice over
11 and over again that he was concerned about storm water
12 accumulation. And Lynette Check, the very person
13 who --

14 THE COURT: Who is Lynette?

15 MR. GLEISNER: Lynette Check, your Honor, is
16 the person who -- the only person that the DNR served
17 with this Storm Water Decision, and she was an
18 employee of the DNR. Lynette Check was the person
19 that Mr. Hanson was in regular contact with. He was
20 in such regular contact he would testify, your Honor,
21 that Lynette Check had given him a key to the property
22 and asked him to look after it when wardens weren't
23 available, or when the DNR staff weren't available.

24 He had a regular course of conduct, regular
25 course of contact. And the whole purpose of service,

1 your Honor, there is -- I would respectfully submit
2 that throughout the Code of Civil Procedure there are
3 many times where service is inferred.

4 Service is not necessarily just on parties
5 by virtue of 227.52, under their code it is on people
6 who are adversely affected by the substantial interest
7 that they may have. And they are not going to be able
8 to exercise their rights if they don't know that those
9 rights are being put in jeopardy. It is -- not
10 everything is a direct connect.

11 Here the only way that Mr. Hanson could
12 exercise his rights under 227.52 is by being notified,
13 at least being sent a copy of it in the mail.

14 And I think that for the DNR it's
15 disingenuous I would submit for the DNR to say that,
16 well, he should have known, he should have looked on a
17 website or whatever. Mr. Hanson made it known to them
18 for years that he was worried about what this would do
19 to his land when storm water accumulated. They knew
20 this was a problem for him. So if they served nobody
21 else they should have served him. Otherwise, he can't
22 protect his rights, which your Honor has correctly
23 characterized as standing rights under 227.52. And,
24 in fact, if Mr. Hanson had been served the RRNA would
25 have been served.

1 THE COURT: Anything you wanted to add at
2 this point?

3 MR. GLEISNER: No, your Honor.

4 THE COURT: All right. Ms. Milligan, how
5 can -- I find it kind of interesting the DNR applied
6 to itself. Most people in this world would like to be
7 both the applicant and the judge on their application.
8 And, you know, I know that you're going to say there
9 is different divisions and blah-blah-blah, but that's
10 just blah-blah-blah, the DNR is the DNR, it is one
11 agent.

12 So how can you ignore the neighbor with a
13 275 foot or longer property line immediately adjacent
14 to your football size field proposed parking lot
15 saying that they don't have any right to get notice
16 when you decide to let the lot be put there?

17 MS. MILLIGAN: Well, your Honor, there is --
18 there is nothing in NR 216, the storm water regulation
19 that I'm aware of, that requires that notice be given
20 of applications or of permit coverage decisions.

21 THE COURT: What kind of heck of law is
22 that? The DNR can apply to itself and not tell
23 anybody and grant it? That's what you just said,
24 right?

25 MS. MILLIGAN: Correct, your Honor. The DNR

1 is in charge of the storm water permitting, and there
2 is not really any other agency it could apply to to
3 get storm water permit coverage. It hired an
4 engineer.

5 THE COURT: But in that case it is the
6 applicant. I mean, for most of us there would be a
7 conflict of interest problem with that, we couldn't do
8 it. Doesn't that bother you?

9 MS. MILLIGAN: You know, if the Court
10 reached the merits, and if there were claims related
11 to the sufficiency of the permit, all that type of
12 thing would be addressed, and that's why we have 227
13 reviews. If a proper petition were filed, and if a
14 proper petition were timely filed, and if petitioners
15 raised issues about how the law is applied to this
16 application that would be all fair game. And I think,
17 you know, the record itself would support the permit
18 that was issued.

19 But we're here today because the petition
20 was filed, you know, 16 days too late. And we heard a
21 lot about, you know, I have a lot of testimony
22 from counsel about Mr. Hanson complaining over and
23 over again, regular contact which I know nothing about
24 this, there is nothing like this in the record. If
25 Lynn Check had some kind of obligation, or personal

1 obligation, or written obligation to provide Mr.
2 Hanson with something, you know, maybe I don't want to
3 suggest that they have another case, because we keep
4 getting case after case related to this boat launch,
5 but if there is some kind of right that they have --

6 THE COURT: It keeps the DNR and the
7 Department of Justice lawyers in employment though,
8 doesn't it?

9 MS. MILLIGAN: It keeps us very, very busy.

10 THE COURT: Go ahead.

11 MS. MILLIGAN: Your Honor, if I may just
12 address some of the comments that he made about the
13 Manual Code Approval Decision. I know that North Lake
14 Management District asked for a copy of that decision,
15 and I don't know if Reddelien Road District, Reddelien
16 Road Neighborhood Association asked for a copy of that
17 as well but I was assuming they did and that's why
18 they were given copies.

19 They say that there is, you know, they
20 couldn't exercise their rights. Their only way they
21 would know about this is if they were given a copy of
22 this decision when it was issued.

23 It should have been put in the envelope with
24 the other decision. Two different people made those
25 decisions, I don't know if their offices are anywhere

1 near one another but this isn't the only way they
2 knew.

3 In one of the other cases in documents that
4 I filed with this Court I show that we said there is
5 going to be a Manuel Code Decision and a Storm Water
6 Permitting Decision. They asked for copies of one,
7 they didn't ask for copies of the other. Should --
8 should they have been provided it as a courtesy?
9 Maybe but there is no requirement in law that they be
10 given a copy. And, frankly, I thought that --

11 THE COURT: Who, if anyone, is entitled to
12 get a copy or be served with the Storm Water Decision?

13 MS. MILLIGAN: Pardon?

14 THE COURT: Who, if anyone, was entitled to
15 be given notice of the Storm Water Decision under this
16 notice statute? Just the DNR, is that the only one?

17 MS. MILLIGAN: Just the permittee, yes, your
18 Honor, the person who applied.

19 And as the documents that were attached to
20 Mr. Hartsook's affidavit, there are hundreds of
21 permits, there are 261 per -- active permits right now
22 in Waukesha County. There are over 200 permits that
23 are being reviewed at DNR right now. If there were a
24 requirement that DNR give copies of every permit
25 application and decision to everyone, every adjacent

1 neighbor, the law could say that everyone within a
2 half mile or in the Reddelien Road case. You know,
3 there are all -- there are, I don't know how many, 40
4 people on here, there are people around the corner.
5 It would be impossible for DNR to meet such a service
6 burden. Had anyone asked or would people -- I had --

7 THE COURT: Why do you say it's impossible?
8 If you had to personally serve them I would see it
9 would be problematic but you can mail them.

10 MS. MILLIGAN: Yeh.

11 THE COURT: I mean, I notice living in the
12 county when somebody within a certain number of feet
13 wants a zoning variance where I live I get a letter in
14 the mail. They just kind of assume that I'd want to
15 know. I have never gone to any hearing or anything.

16 MS. MILLIGAN: I'm on the City of Madison's
17 Zoning Board of Appeals and our code requires us to
18 give notice to people within a certain number of feet.
19 And there is no requirement here. And there -- the
20 standard that they want the Court to apply, anybody
21 who might have standing or might be able to allege
22 standing to petition for judicial review, invites
23 people to say: You know, I carry my canoe into North
24 Lake from the river, and I canoe by this place, and I
25 think I'll be aggrieved, and that would be enough to

1 establish standing. And how would DNR be able to
2 figure out who all of those people might be? Or who
3 all the members of other -- of clubs?

4 THE COURT: That's a good argument but not
5 very strong compared to Mr. Hanson, is it?

6 MS. MILLIGAN: Well, Mr. Hanson didn't ask
7 as far as I know.

8 THE COURT: But it is obvious when it comes
9 to the real world he has more interest than almost
10 anyone, as an individual person more than anyone. The
11 DNR may represent the interests of five and half
12 million Wisconsinites. But for each individual that
13 is a pretty small bit, with Mr. Hanson it is a very
14 big bit.

15 MS. MILLIGAN: And if he believed that he
16 had been adversely affected it would have behooved
17 him to say, to ask DNR when he is talking to Lynnette
18 Check, who he supposedly was countless times.

19 THE COURT: But according to you that
20 doesn't matter. He could have served Lynn Check -- he
21 could have served the Secretary of DNR in Madison and
22 Lynnette Check with a demand to be given notice of
23 that hearing, and according to you he is not entitled
24 to get it so you can just ignore it; right?

25 MS. MILLIGAN: Well, he is not entitled by

1 law but as a courtesy he would have been provided a
2 copy.

3 THE COURT: Well, this is a court of law not
4 a court of courtesy, although we have civility rules.
5 But I don't find that argument convincing at all.

6 The question is here: Who is entitled to
7 get it? If they were entitled to get it then their 30
8 days started running when they got it. If they're not
9 entitled to get it, then you might be right. So
10 that's why I want to figure out who is entitled to get
11 it, and that's what I would like you to address.

12 MS. MILLIGAN: Nothing in the law entitles
13 them to a copy of the permit. If they would have
14 asked they would have been given a copy as a courtesy.

15 If they would have asked any time within the
16 30 days after it was issued they would have been given
17 a copy and they would have had time to petition for
18 judicial review.

19 THE COURT: Do you want say anything about
20 Mr. Gleisner's responses on this? It is clear that
21 under the definition Mr. Hanson is an aggrieved
22 person, isn't it?

23 MS. MILLIGAN: Yes, he would have standing.

24 And I don't know about these many other
25 people that are named petitioners.

1 THE COURT: Well, that's the least of our
2 problems, if they can get one person in the door then
3 they will be able to prosecute their claims in that
4 person's name.

5 Anything else you wanted to say?

6 MS. MILLIGAN: No, your Honor.

7 THE COURT: Well, Mr. Gleisner I sure agree
8 with you that it seems like Mr. Hanson should be
9 legally entitled to notice, and if there were any
10 equity involved in here he would win in a minute.

11 But this is a competence issue, equity
12 doesn't enter into it.

13 MR. GLEISNER: Yes, your Honor.

14 THE COURT: It ought to be black and white.
15 But I don't see that you can show me that color
16 distinction here. Try again, would you.

17 MR. GLEISNER: I will try, again, your
18 Honor.

19 227, I mean, I'm focusing now all of my
20 comments on Mr. Hanson, because I think he is the
21 person who fits this most clearly. 227.01 sub (9)
22 specifies that a person aggrieved means a person or
23 agency who has substantial interest --

24 THE COURT: Well, let's agree he is a person
25 aggrieved.

1 MR. GLEISNER: Okay, good enough, your
2 Honor. Then if he is aggrieved by a determination of
3 the DNR, which can cover a wide range of sins or
4 omissions, or whatever, that includes decisions, that
5 includes actions, the only way he can
6 possibly vindicate that is if he knows that a
7 determination has been made. It is kind of almost I
8 would have to say logical. He can't know that he is
9 aggrieved, or he has been aggrieved by a determination
10 if he hasn't been made aware of it. In the same
11 way --

12 THE COURT: The problem with that argument
13 is we have all sorts of civil statutes like that, if
14 you don't pursue your claims because you don't know
15 about them, I mean, there used to be some instances
16 where there was a discovery rule on the statute of
17 limitations, but people lose their rights all the time
18 because they don't realize or they're not conscious of
19 and the statute of limitation passes, and they're out
20 of luck; right?

21 MR. GLEISNER: No doubt, your Honor.

22 THE COURT: So how does this
23 argument distinguish itself from that problem?

24 MR. GLEISNER: The difference is, your
25 Honor, and that's why I made an offer of proof

1 earlier, is that Mr. Hanson could take the stand and
2 say that he often raised the issue of storm water. He
3 was very concerned about it and he raised it.

4 THE COURT: Let's assume that is true, you
5 know, again, that doesn't answer the question in my
6 mind. Like I said, the commonsense and the fairness
7 is all on your side. But the question is whether the
8 law is, too, and they're not always the same. The law
9 is not always the same as commonsense.

10 MR. GLEISNER: Well, that's true, your
11 Honor.

12 On the other hand, the courts exist not to
13 make the law. Courts exist to make sense of the law
14 and to draw connectors between laws when the
15 legislature hasn't done the happiest job. And they
16 often do the happiest job, the happiest job of
17 drafting laws and legislation.

18 Here you have a man who is aggrieved by a
19 determination of the DNR, we agree on that.

20 You have a man who fits the definition under
21 227.52, of a person whose substantial interests are
22 adversely affected by what the DNR has done.
23 And while I agree with your Honor totally that equity
24 has nothing to do with it; on the other side of the
25 coin, under the Code of Civil Procedure a quite

1 different result will obtain where someone
2 deliberately buries information. In other words, if
3 someone says under the Code of Civil Procedure I lost
4 my rights, I didn't know about this, that's one issue.

5 Conversely, if he says, I didn't know about
6 this because it was hidden from me through fraud,
7 or whatever, and I wasn't --

8 THE COURT: The problem is I probably
9 couldn't attribute fraud of a DNR employee to the DNR
10 itself.

11 MR. GLEISNER: Oh, no, no, your Honor, I was
12 simply making an analogy.

13 THE COURT: I understand, but that still
14 doesn't seem to make any difference to me yet.

15 MR. GLEISNER: Well, what I'm saying is,
16 your Honor, the DNR, and I wasn't trying to attribute
17 fraud to the DNR by any means, the DNR is also capable
18 of making mistakes that amount to a suppression of
19 information. These two decisions came down on the
20 exact same day two days after the election and they
21 were sent out, the whole point that Ms. Milligan makes
22 in her brief is that they were sent out when they were
23 requested. Yet Mr. Hanson received a copy of the
24 Manual Code, although he will testify he never asked
25 for a copy of the Manual Code.

1 THE COURT: I'll assume that to be true that
2 he never asked.

3 MR. GLEISNER: Right. The point is, your
4 Honor, that the DNR could have and should have
5 provided a copy of the Storm Water Decision, and
6 through whatever means they set on it they didn't
7 distribute it to anybody but an employee of the DNR.
8 And it doesn't arise to the level of fraud, and nor is
9 fraud the only reason that a person can lose the
10 benefit of a statute of limitations. It can simply be
11 a situation where they did not make known that they
12 were doing a certain action through negligence.

13 It is a situation, which is very disturbing
14 to us because the DNR is planning to do major, major
15 surgery to our neighborhood and to our lake. They
16 have -- they have polluted our lake in the past in
17 1992.

18 And now the DNR is in a hotly contested
19 litigation with the Reddelien Road and the North Lake
20 Management District. And they managed to send out the
21 Manuel Code Decision, even though they would also
22 suggest as I read Ms. Milligan's brief, they aren't
23 required to do that. But they somehow or other manage
24 to neglect to send out the Storm Water Decision, and
25 we don't find out about it until

1 December 13th.

2 THE COURT: Well, we're back off the subject
3 as far as I'm concerned, Mr. Gleisner. You said
4 you're not accusing them of fraud, I'm not either.
5 But just suppose they did it on purpose, they did it
6 to shaft your clients, they did it for bad motive,
7 they didn't want to have to be subject to review
8 because they knew that everything they did was wrong,
9 you still don't win. You got to show me that they
10 were entitled to the notice. Where is that?

11 MR. GLEISNER: Just a moment, your Honor, I
12 apologize.

13 THE COURT: Sure, go ahead.

14 MR. GLEISNER: Your Honor, I guess I
15 would -- I would also reference the fact that the 30
16 day window, which is so important, and we acknowledge
17 it is important under 2m under -- that is 227.53 sub
18 (1) sub (a) 2m doesn't begin to run until there is
19 service or filing. So, again, remembering --

20 THE COURT: She is going to say, so when
21 they gave it to their own employee, Ms. Check, that is
22 when it started running, right?

23 MR. GLEISNER: That would be a great rule,
24 wouldn't it, your Honor? I mean, you know.

25 THE COURT: I think I started at the top

1 saying what, this is kind of a strange situation.

2 MR. GLEISNER: And, your Honor, the problem
3 here is that -- the problem here is that we all agree
4 that Mr. Hanson is aggrieved. We all agree that he
5 has a right to protect his substantial interest under
6 227.52. And we all agree that the 30 day window
7 begins to run after service and filing.

8 And the DNR comes in here with an affidavit
9 and says: Oh, you got to go to the web site,
10 etcetera. Well, who cares? The point is that Mr.
11 Hanson can't protect his rights until there is service
12 and filing, service and mailing, I'm sorry, service or
13 mailing, right. And he can't -- I realize, your
14 Honor, and I respect this, I happen to be a pretty
15 conservative fella myself, judges don't make laws,
16 judges don't create new rules. But I think that all
17 judges are empowered to draw lines and connect things
18 that haven't been completely connected properly by the
19 legislature.

20 Here you have an aggrieved person, you have
21 a person who is adversely affected because of their
22 substantial interest. And you have a person who has
23 told the DNR time and time again he didn't like the
24 storm water. And so what does the DNR do? It serves
25 itself. I mean, in fact, your Honor, when you -- when

1 you take a look at the end of the Storm Water Decision
2 it says that it shall be -- it shall be served or
3 mailed within 30 days, that's what it says, an appeal
4 of it shall be. And that -- that goes along with 2m.

5 Well, your Honor, I would respectfully
6 submit that that means to somebody who is aggrieved
7 outside of the agency, if I sit in my office and I
8 say: I'm going to file a motion before this Court,
9 and I only serve it on my secretary, well, that's --
10 that's good for me, I suppose, but it doesn't work. I
11 mean, if I don't serve it on the person who
12 is aggrieved by what I'm doing it doesn't count. And
13 I think that is -- that is really what we're dealing
14 with here, we're dealing with a situation in which the
15 DNR misread, and I think this may be on purpose,
16 misread the mandate of 2m and decided that they
17 were safe as long as they mailed or served the
18 decision on an employee of the DNR. That's serving it
19 on themselves. And that -- that I just respectfully
20 submit, your Honor, is something a court can correct.
21 Thank you, your Honor.

22 THE COURT: I find that kind of attractive,
23 Ms. Milligan, that there never was any service on this
24 thing when the DNR served itself. So nobody got
25 served until at some point the DNR sent it out, which

1 I gather must -- may have been was it Mr. Hanson or
2 whatever it was asked for it.

3 MR. GLEISNER: December 16th, your Honor.

4 THE COURT: What do you think about that?

5 MS. MILLIGAN: Well, I'm still kind of
6 reacting to the deliberately bearing the fraud
7 suppressing all this stuff.

8 He talks about how, what the DNR could have
9 and should have done, and acts like this was some kind
10 of secret or some kind of surprise when counsel for
11 Mr. Hanson was aware of this permit decision was
12 coming. No one hid anything, it was on DNR website.
13 Anyone could have picked up the phone and called DNR,
14 this Lynnette Check and say: Hey, what is up with
15 that Storm Water Permit? When do you think --

16 THE COURT: I understand it is tough luck
17 for them if they didn't look it up unless you were
18 obligated to serve them.

19 The question now is: How can the 30 days
20 start running against anybody until you serve
21 somebody? And if we don't treat the DNR's left hand
22 telling the right hand what they're doing, so if
23 service on the purported application permittee
24 wasn't service nobody was served, don't they have to
25 serve somebody, and the first person gets served

1 triggers the 30 days, and that was them?

2 MS. MILLIGAN: Yes. And when we were
3 talking earlier about service --

4 THE COURT: When we were talking about
5 service of --

6 MS. MILLIGAN: Well, when he was saying,
7 when the Court was saying, you know, Counsel was
8 likely to say that it is issued, the clock stopped,
9 I'm sorry, the clock starts when the decision
10 is issued and served, Bryan Hartsook, the storm water
11 engineer that issued the permit, served it upon Lynn
12 Check, the engineer who applied for the permit. Just
13 like with the hundreds of other permits that DNR
14 issues the applicant gets a copy of the permit and it
15 is posted on the website.

16 THE COURT: So when is the next time the DNR
17 served or mailed that to anyone besides Lynette Check?

18 MS. MILLIGAN: Well, the affidavit of Bryan
19 Hartsook he says that no requests were made for a copy
20 of the North Lake Public Access Permit coverage letter
21 until DNR Attorney Edwina Kavanaugh requested a copy
22 on November 29th, 2010. Matthew Surrridge, who I
23 understand to be an attorney representing RRNA,
24 requested a copy of the cover letter on December 15th
25 of 2010. A copy of the letter was provided to Mr.

1 Surridge on December 16th of 2010.

2 So maybe Mr. Surridge gave Mr. Gleisner, who
3 gave it to Mr. Hanson, I don't know how that all
4 happened.

5 THE COURT: I need to back up. Mr. Gleisner
6 had cited -- Mr. Gleisner, what was your cite about
7 the 30 days, was that 227?

8 MR. GLEISNER: I gave you the cite of 227.53
9 sub (1) sub (a) 2m, your Honor. That was the most
10 recent cite I gave you, your Honor. Did you get that?

11 THE COURT: So the petition's review of
12 cases other than contested cases shall be served and
13 filed within the 30 days after personal service or
14 mailing of the decision by the agency.

15 Well, you know, I don't know this chapter
16 the way you folks do. But just reading that alone it
17 is not 30 days after the first service or 30 days
18 after the decision. It seems like anybody who
19 gets personal service or mailing has 30 days. I guess
20 that would -- could be a problematic thing.

21 But doesn't that language -- everything for
22 you, Ms. Milligan, relies on notification to Lynnette
23 Check being the personal service or mailing of the
24 decision by the agency?

25 MS. MILLIGAN: Yes, your Honor. It is the

1 agency's decision being challenged, it made that
2 decision that day and issued it that day.

3 THE COURT: Well, talk to me about, I guess,
4 you would say organizational law. Ordinarily it is
5 not considered an act relevant to any outside person
6 when you talk to yourself, you know, left hand, right
7 hand, same entity.

8 Here, you have to rely on the idea that the
9 DNR can notify itself, that the DNR has made a
10 decision and that has some legal significance.
11 Otherwise, you're out of the water. So talk to me
12 about that.

13 MS. MILLIGAN: Would the alternative be the
14 DNR issued -- doesn't even need to engage in the
15 permitting process? I don't know how else DNR could,
16 if it is in charge of storm water permitting and it
17 needs -- it is doing the work that requires a storm
18 water permit, I don't know what else DNR is supposed
19 to do? We have two different engineers involved. I
20 don't know if they're the in the same offices or not.

21 There is no requirement -- I deal with a lot
22 of storm water cases and there is no requirement that
23 all neighbors be notified when permits are issued. So
24 I don't think it matters that DNR applied for this
25 permit. Somebody applied for a permit and Mr. Hanson

1 the next door neighbor wasn't told, and that happens
2 all the time. And Mr. Hanson needs to -- if he knows
3 something is going on next door maybe he needs to pay
4 attention, maybe he needs to ask people. He can't --
5 what if he asked for a copy a year from now and got a
6 copy and says: I have 30 days to sue DNR even if, you
7 know, let's say it is already built.

8 It used to be 30 days for contested case
9 hearings, and six months for non-contested case
10 hearings. And in 2010 the legislature adopted the
11 section we're talking about now that said 30 days for
12 everything. People have 30 days after a decision is
13 issued to contest that decision, which is even more,
14 you know, we were talking about elections before and I
15 don't know why, but, you know, if we're open for
16 business, it's 30 days.

17 THE COURT: It doesn't seem like any of that
18 contemplated this idea where the deciding agency and
19 the applying agency were the same one, does it? It
20 might fit but it still seems strange.

21 MS. MILLIGAN: Maybe that is something
22 that the legislature needs to take up. But right now
23 we have a permittee, somebody that applied and was
24 issued a permit, and 30 days went by before anyone
25 challenged it.

1 MR. GLEISNER: May it please the Court?

2 THE COURT: Sure.

3 MR. GLEISNER: Your Honor, I do wish to take
4 issue on Mr. Hanson's behalf with some of the
5 testimony of Ms. Milligan. It -- our engineers tell
6 us that Mr. Hanson's property will virtually disappear
7 if this goes in. He couldn't be paying more
8 attention, your Honor.

9 MS. MILLIGAN: If I may?

10 THE COURT: I guess he can bring an inverse
11 condemnation case if that happens, huh.

12 Not that that is very satisfactory, but.

13 MR. GLEISNER: Well, your Honor, I think the
14 point is that he was focused on storm water problems
15 and was communicating this on a regular basis, your
16 Honor.

17 THE COURT: You said he talked to -- you
18 said Lynette Check gave him keys so he could be a good
19 neighbor. What are they keys to, a vacant lot or
20 something else?

21 MR. GLEISNER: Your Honor, this is -- I
22 didn't bring other drawings with me. But in order to
23 do this they're going to have to drop a huge amount of
24 asphalt in a wetland. And they're going to have to
25 build a 2,000 foot long access road, and then they're

1 going to have to shoe horn in this big asphalt animal
2 here.

3 And at the other end of this 2,000 foot
4 access road there is a gate, and the gate is
5 padlocked. And Ms. Check gave him keys to the DNR
6 padlock because she told him she was concerned
7 that people might get on the property, or some things
8 might happen on the property she wanted to be
9 notified.

10 THE COURT: Anybody else use or have access
11 to the DNR's 2,000 foot road?

12 MR. GLEISNER: Your Honor, actually this is
13 all open right now. The area where this parking lot
14 is going to be is all open and anybody can get in
15 there. But I think that the idea --

16 THE COURT: Mr. Hanson has his own access,
17 he doesn't use that road.

18 MR. GLEISNER: No, but, your Honor, I think
19 the point is if they need to get a fire truck down
20 there or something such as that.

21 THE COURT: Sure, emergency, or.

22 MR. GLEISNER: Exactly, your Honor. If
23 someone drowned --

24 THE COURT: Someone got stuck in the marsh
25 and that was the safest way to get out of there is

1 down that road and out that gate.

2 MR. GLEISNER: And marsh is what it is, your
3 Honor.

4 THE COURT: Okay, I get it.

5 How do I get at the factual assertion like
6 that? How do I treat it as true? As opposed to
7 ignoring it, Mr. Gleisner, in the context of this
8 motion?

9 MR. GLEISNER: Your Honor, we did not have a
10 chance to respond to Ms. Milligan's letter. But I do
11 have a legal memorandum with me and I just -- I'm just
12 mentioning this, the Court does have the power under
13 801.08 to hold a jurisdictional trial. And, in fact,
14 if there is a conflict over a service that is usually
15 the appropriate thing to do. And so that would be one
16 of my reactions, your Honor.

17 The other is, I think the Court could just
18 draw the lines. I think that it is kind of hard to
19 believe that an agency that is a party could serve
20 itself and say that that was good service.

21 I mean, with all of the ways in which Mr.
22 Hanson fits under 227.01 sub (9), 227.52, and 227.53
23 sub (1)(a), excuse me, your Honor, and also it is not
24 disputed Mr. Hanson is the owner of that -- of that
25 property.

1 With all of the ways he fits under that
2 another way to look at this is to simply say that the,
3 as Ms. Milligan properly pointed out, the legislature
4 maybe needs to do some more work. But the courts
5 exist to draw lines, your Honor. And in this
6 particular instance, under these particular facts,
7 putting equity aside, they had to do more than just
8 mail a decision to themselves. It's like putting it
9 in the drawer. That doesn't help at all, your Honor.

10 THE COURT: Maybe, Attorney Milligan, I know
11 you wanted to say some other stuff, and I'll certainly
12 give you an opportunity to say everything you wanted
13 to say. But that brings another question in my mind
14 and written filings, Mr. Gleisner raises an issue of
15 due process, which I guess is the refuge of every
16 lawyer who can't find something better at times, but
17 it is an important principle. What other due process
18 implications did the government, being able to apply
19 to itself, grant its application, notify itself, and
20 not tell anybody, especially where the plaintiff here
21 claims that they can prove that the applicant agent of
22 the DNR, Lynette Check, very well knew that Mr. Hanson
23 and this association cared deeply and almost certainly
24 would appeal any grant of anything that advanced this
25 project? Is there a due process problem with the

1 government knowing somebody is interested and doing
2 only self dealing and not telling them that a decision
3 was made, or what it was?

4 MS. MILLIGAN: I think there is a lot of
5 problems in assuming that people know, or should have
6 realized, or should have read people's minds, or
7 should have guessed, or should have assumed
8 that everyone would sue over every possible thing they
9 could have related to this boat launch. And even if
10 that is true, and maybe, you know, if that is the
11 strategy and I think it is becoming evident that it
12 is, then people should, we should send courtesy copies
13 regarding every decision.

14 But I think we have heard a lot of testimony
15 today that I don't know where it is from, and I don't
16 know if it has any basis in fact. I have -- I'm
17 surprised by an assertion that somebody in Milwaukee,
18 and an engineer is giving keys outs when there is a
19 land manager in charge of the property and in charge
20 of the mowing. But even if that is true, if there is
21 some kind of argument, if there is a due process
22 argument that somebody should have been served, I
23 think that is a separate case.

24 This is a very -- we're in this box that --
25 that is very black and white as the Court indicated at

1 the beginning, you got 30 days, and if you don't file
2 within 30 days you don't get to file. If there is a
3 due process claim I think it is a separate case.

4 MR. GLEISNER: May it please the Court?

5 THE COURT: Sure.

6 MR. GLEISNER: Your Honor, I'm loathe
7 to raise due process arguments because I think they
8 are raised too often. But I think that is the
9 connective glue that, or the bridge that one could use
10 to put these together. I mean, we're dealing with a
11 man who is going to be seriously aggrieved by
12 government action. We're dealing with a man
13 who clearly is going to have a substantial interest
14 adversely effected. And so the government decides it
15 is just going to serve itself.

16 I think that while due process, you're
17 right, is well over used, if due process means
18 anything the government should at the minimum let him
19 know that they have done something that is going
20 to hurt him.

21 MS. MILLIGAN: Your Honor, if I may?

22 THE COURT: Sure.

23 MS. MILLIGAN: Just to get back to where the
24 Court started at the beginning, we get back to the
25 question of: Where is the line drawn? Now Mr. Hanson

1 believes that he'll be -- that terrible things will
2 happen. The DNR, of course, thinks there will be no
3 impact at all outside of the boundaries of the
4 property.

5 But a lot of people think they're going to
6 be aggrieved. People a half a mile away think they're
7 going to be aggrieved, you know, maybe by some other
8 issue. But I -- we -- there is no law that
9 requires special notice to be given to Mr. Hanson.
10 And it sat there for 30 days. No one was hiding
11 anything just like every other storm water permit
12 decision.

13 THE COURT: Well, I guess I need to think
14 about this, sorry, I'm going to set another date and
15 see if I can rule from the bench when we're here next
16 time.

17 MR. GLEISNER: Thank you, your Honor. Does
18 the Court require additional briefing?

19 THE COURT: Not unless you have something
20 new on the things I have asked you about.

21 MR. GLEISNER: No, your Honor.

22 THE COURT: But, yeh, anyone is welcome.
23 Let me give you suggestions for another date.

24 If anyone wants to appear by phone, I don't
25 know -- well, what office you're out of, Ms. Milligan,

1 but if you want to the appear by phone, you're welcome
2 to come but you're welcome to appear by phone.

3 MS. MILLIGAN: Thank you, your Honor, I
4 would appreciate appearing by phone.

5 THE COURT: You, too, if you want, Mr.
6 Gleisner.

7 MR. GLEISNER: Thank you very much, your
8 Honor.

9 THE COURT: So -- let's see, I'm looking at
10 the afternoon of Friday, July 8th, that is the Friday
11 after the 4th of July in case people have vacations to
12 call your attention to it.

13 MR. GLEISNER: Sorry, your Honor, I
14 apologize, July 8th is not good for me. Most of July
15 is not good for me, your Honor. We have a lot of
16 out-of-town parties and family gatherings, kind of a
17 big party month, your Honor.

18 THE COURT: I know it is summer vacation.
19 You have a lot of school age children, do you, Mr.
20 Gleisner?

21 MR. GLEISNER: I have a lot of
22 grandchildren, your Honor, more than I would like to
23 admit, your Honor.

24 MS. MILLIGAN: Does your Honor think like a
25 30 minute telephone conference?

1 THE COURT: Yes.

2 MS. MILLIGAN: A whole month, really?

3 THE COURT: Well, I have a few conflicts
4 myself here that are making July hard but not
5 undoable. I'm still looking.

6 What about Thursday, June 30th, in the
7 afternoon?

8 MS. MILLIGAN: That works for me, your
9 Honor.

10 MR. GLEISNER: June 30th. June 30th is
11 going to be bad for me, too, your Honor.

12 I think, your Honor, that August is best for
13 us. And I would like to also represent to the Court
14 that I am going to -- I used to do a good deal of
15 disability rights, which is a subset of civil rights.
16 And I recall some case law on service and due process,
17 and I think I might just like to look at that, your
18 Honor. And you kind of invited us to submit something
19 if we were of a mind. I'm not sure I will but I --

20 THE COURT: What about July 29th, that's a
21 Friday?

22 MR. GLEISNER: That works.

23 THE COURT: In the afternoon is what I was
24 looking at, is that a possibility?

25 MS. MILLIGAN: That works for me, too.

1 THE COURT: Well, let's do that. I would
2 rather do it sooner, too, but we have to be reasonable
3 with everybody's schedule.

4 MR. GLEISNER: Thank you, your Honor.

5 THE COURT: So, three o'clock?

6 MR. GLEISNER: Thank you, your Honor, that
7 works.

8 THE COURT: July 29th, three o'clock further
9 hearing on the pending Motion to Dismiss.

10 Anybody who wants to file anything in
11 writing please get it here far enough ahead of time so
12 I have a chance to read it and the other side has a
13 chance to respond, if they wish.

14 MR. GLEISNER: Would July 15th be --

15 THE COURT: Sure, that would be great.

16 MR. GLEISNER: Okay, your Honor.

17 THE COURT: I thought a little bit about
18 whether I need to have an evidentiary hearing on some
19 of these things, and I'm not doing that at this point.
20 But I guess I would invite anybody who wants to file a
21 factual affidavit just to see if that triggers dispute
22 or lack of dispute.

23 I mean, some of the things here I didn't
24 think were relevant. Some of the facts are agreed to
25 apparently, you know, the -- this, we have talked

1 about this map that Mr. Hanson has a long common
2 property line immediately adjacent to the DNR
3 development site, and the development site is going to
4 be a big, somehow paved or covered parking lot area
5 with an access, you know, a few of the basics.
6 Because otherwise I don't have any facts except what
7 you folks agree to.

8 MR. GLEISNER: May it please the Court?

9 THE COURT: Yes.

10 MR. GLEISNER: Your Honor, I have a legal
11 memorandum here, under 801.08 that I would like to
12 share with counsel and the Court. I do believe, your
13 Honor, that the Supreme Court has ruled that if there
14 is a dispute of facts concerning jurisdiction then
15 there has to be a jurisdictional trial. May I share
16 that with you, your Honor?

17 THE COURT: Sure. Well, that's what I was
18 thinking whether I was -- there was any dispute of
19 fact that was material.

20 MR. GLEISNER: Yeh. Here you go, your
21 Honor.

22 THE COURT: So, if anybody thinks there is a
23 fact that needs to be determined for purposes of the
24 Court's ruling I guess you should file an affidavit.
25 And then if the other side disputes the fact that, and

1 I decide that it is a fact that has to be resolved,
2 then maybe we'll end up doing some kind of trial on
3 it. We'll see.

4 MR. GLEISNER: Yes, your Honor.

5 THE COURT: Okay. Thank you. Very
6 interesting.

7 (Hearing concluded)

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