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State ex rel. Friends of the Boundary Waters Wilderness v. AT & T Mobility, LLC

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***State ex rel. Friends of the Boundary Waters Wilderness v. AT & T Mobility, LLC*, 2012 Minn. App. Unpub. LEXIS 543, 2012 WL 2202984 (Minn. App. June 18, 2012).**

Clare Hansen

ABSTRACT

In this case, the Minnesota court of appeals overturned the district court's order enjoining construction of a cell phone tower near the Boundary Waters Canoe Area Wilderness. The Court of Appeals reviewed the district court's consideration of the five *Schaller* factors used to determine whether a proposed action would materially adversely affect the wilderness area under the Minnesota Environmental Rights Act. Ultimately, the Court held that the proposed tower would not materially adversely affect the Boundary Waters Canoe Area Wilderness. This case is unpublished and therefore not precedential, but may prove persuasive. Any citation to this case must follow local rules provided by Minn. St. Sec. 480A.08(3).

I. INTRODUCTION

In *State ex rel. Friends of the Boundary Waters Wilderness v. AT & T Mobility, LLC*¹, the Minnesota court of appeals reversed the district court's holding that a proposed tower in Lake County Minnesota would materially adversely affect the Boundary Waters Canoe Area Wilderness ("BWCAW") pursuant to the Minnesota Environmental Rights Act ("MERA").² Appellant AT & T argued, and the court of appeals agreed, that the district court erred as a matter of law by failing to properly consider the five factors set forth by the Minnesota Supreme Court in *State by Schaller v. County Of Blue Earth*.³

¹ *State ex rel. Friends of the Boundary Waters Wilderness v. AT & T Mobility, LLC*, 2012 WL 2202984 (Minn. App. June 18, 2012).

² *Id.* at *1.

³ *Id.* at *8.

II. FACTUAL AND PROCEDURAL BACKGROUND

Lake County borders the western edge of the BWCAW.⁴ The BWCAW is one of the first and most heavily used wilderness areas in the country, and is the only wilderness area with a 4000-foot airspace reservation.⁵ The wilderness area is federally-protected under the Wilderness Act of 1964 and the Boundary Waters Canoe Area Wilderness Act of 1978. The Minnesota Legislature also recognized the importance of the area by protecting the BWCAW in state statute, and noting the area is “of surpassing scenic beauty and solitude, free from substantially all commercial activities and artificial development”.⁶

In July 2009, Lake County Planning Commission approved appellants AT & T and American Tower Inc.’s application for a conditional use permit to build a wireless-communications tower.⁷ The 450-foot high tower would be located 1.5 miles outside the border of the BWCAW.⁸ The tower would have five sets of three guy wires and red or white blinking lights lit 24 hours a day.⁹ In July 2010, respondent Friends of the Boundary Waters Wilderness filed a complaint in Hennepin County district court seeking to enjoin AT & T from constructing the tower, arguing that it would violate MERA.¹⁰ On August 3, 2011, after a four day bench trial, the district court granted respondent’s request for declaratory and injunctive relief. The court determined that, under MERA, the tower would materially adversely affect the scenic and esthetic resources in the

⁴ *Id.* at *1.

⁵ *Id.*

⁶ Minn. Stat. § 84.523, subd. 2 (2010).

⁷ *State ex rel. Friends of the Boundary Waters Wilderness*, 2012 WL 2202984 at *1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

BWCAW and that appellants did not establish an affirmative defense.¹¹ AT & T appealed.¹²

III. ANALYSIS

The Court of Appeals solely considered the dispositive issue of whether the district court erred in concluding that the tower would materially adversely affect scenic and esthetic resources in the BWCAW.¹³ The appellate court reviewed the district court's factual findings that supported the material-adversity conclusion for clear error, and reviewed its legal conclusions *de novo*.¹⁴

MERA provides a “civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.”¹⁵ The people of the state may utilize MERA to initiate a civil action in district court to seek declaratory or other equitable relief in order to protect Minnesota's natural resources.¹⁶ Under MERA, a plaintiff has the burden of showing a prima facie case that the defendant has caused, or is likely to cause, pollution of Minnesota's air, water, land, or natural resources.¹⁷ Pollution is defined as conduct that is likely to, or does, materially and adversely affect the environment.¹⁸ Scenic and esthetic resources owned by the government are considered natural resources.¹⁹

¹¹ *Id.*

¹² *State ex rel. Friends of the Boundary Waters Wilderness*, 2012 WL 2202984 at *1.

¹³ *Id.* at *3.

¹⁴ *Id.*

¹⁵ *Id.* at *2, citing Minn. Stat. § 116B.01.

¹⁶ *Id.* at *2, citing Minn. Stat. § 116B.03, subd. 1.

¹⁷ *State ex rel. Friends of the Boundary Waters Wilderness*, 2012 WL 2202984 at *2, citing Minn. Stat. § 116B.04.

¹⁸ *Id.* at *2, citing Minn. Stat. § 116B.02, subd. 5.

¹⁹ *Id.* at *2, citing Minn. Stat. § 116B.02, subd. 4.

In *State by Schaller v. County of Blue Earth*²⁰, the Minnesota Supreme Court established five factors to be considered when determining whether, under MERA, a defendant's conduct is likely to materially and adversely affect the environment.²¹ Those five factors are:

1. The quality and severity of any adverse effects of the proposed action on the natural resources affected;
2. Whether the natural resources affected are rare, unique, endangered, or have historical significance;
3. Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
4. Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); and
5. Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.²²

These factors are non-exclusive and serve as a “flexible guideline” to be considered with the facts of each case.²³ Additionally, the Minnesota Supreme Court recognizes that to trigger MERA there must be more than a mere adverse environmental impact.²⁴

In reviewing the first factor, the appellate court held the district court erred by not weighing and analyzing the relative severity of the tower's adverse effect on scenic views.²⁵ The Court pointed to the fact that although the tower would be visible from 10 BWCAW lakes, that constitutes less than one percent of the total lakes within the

²⁰ *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260 (Minn. 1997).

²¹ *Id.* at 267.

²² *State ex rel. Friends of the Boundary Waters Wilderness*, 2012 WL 2202984 at *4, citing *State by Schaller* at 267.

²³ *Id.*

²⁴ *Id.* at *4, citing *State by Schaller* at 266.

²⁵ *Id.* at *6.

BWCAW.²⁶ The Court also emphasized that the U.S. Forest Service classified several of the 10 lakes in question as “semi-primitive motorized wilderness,” which carries the lowest degree of solitude.²⁷ These facts did not reach the level of ‘severity’ required by MERA.²⁸

Regarding the second factor, the appellate court found no error in the district court’s conclusion that the BWCAW’s scenic views are rare, unique, endangered, and of considerable historical significance.²⁹ They relied on the district court’s consideration of the unique value visitors to the BWCAW place on the scenery.³⁰

The appellate court stated the district court did not give enough significance to the second half of the third factor: whether the affected resource is easily replaceable.³¹ The appellate court held that simply removing the tower would immediately restore the BWCAW views to their original condition and so this factor did not weigh as heavily against construction of the tower.³²

The district court considered potential migratory bird deaths as a significant consequential effect on a natural resource associated with the tower.³³ The appellate court concluded that, without more facts or evidence to support this assertion, this claim was insufficient to meet the ‘significant’ threshold of the fourth factor.³⁴ Additionally, the

²⁶ *Id.* at *5.

²⁷ *State ex rel. Friends of the Boundary Waters Wilderness*, 2012 WL 2202984 at *5.

²⁸ *Id.* at *6.

²⁹ *State ex rel. Friends of the Boundary Waters Wilderness*, 2012 WL 2202984 at *6.

³⁰ *Id.*

³¹ *Id.* at *7.

³² *Id.*

³³ *Id.*

³⁴ *State ex rel. Friends of the Boundary Waters Wilderness*, 2012 WL 2202984 at *7.

appellate court found it troubling that the district court failed to consider whether the tower might make the BWCAW more accessible.³⁵

The appellate court relied heavily on the word ‘significant’ when considering the fifth and final factor.³⁶ The district court held that scenic views without human impact in the BWCAW are more likely to decrease than increase over time.³⁷ However, the appellate court held the proper standard is whether the scenic views are significantly decreasing.³⁸ Because the district court did not address the issue of significance, it erred as a matter of law when weighing this factor against construction of the tower.³⁹

IV. CONCLUSION

The Court of Appeals overturned the district court’s holding that the proposed tower would materially adversely affect the BWCAW. Because the district court’s analysis of the first, fourth, and fifth *Schaller* factors was in error, and only the second factor weighed heavily against construction of the tower, the appellate court held that respondent Friends of the Boundary Waters Wilderness failed to present a prima facie case for judicial intervention pursuant to MERA.⁴⁰ Thus, the appellate court reversed the district court’s order enjoining construction of the tower.⁴¹ The Friends of the Boundary Waters have filed a petition with the Minnesota Supreme Court asking the Court to review the case, arguing that MERA was passed to protect natural resources from this type of slowly encroaching development.

³⁵ *Id.*

³⁶ *Id.* at *8.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*