

Case No. 2024-1433

In the Supreme Court of Ohio

On Appeal from The Court of Appeals
Eleventh Judicial District
Trumbull County, Ohio
Case No. 2016-T-0085

STATE OF OHIO EX REL. AWMS WATER SOLUTIONS, LLC, et al.
Appellants/Cross-Appellees

vs.

MARY MERTZ, DIRECTOR OHIO DEPARTMENT OF NATURAL RESOURCES et al.
Appellees/Cross-Appellants

**BRIEF OF AMICUS CURIAE,
WEATHERSFIELD TOWNSHIP, TRUMBULL
COUNTY, OHIO, IN SUPPORT OF
APPELLEES/CROSS-APPELLANTS**

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae, Weathersfield Township, is a civil township located in the southern portion of Trumbull County, Ohio. Approximately 9,500 people live in the unincorporated area of the Township. The Township is governed by a three-member Board of Trustees and Fiscal Officer who are elected by the residents. Weathersfield Township has an eleven officer police department, a volunteer fire department, a zoning inspector, a four-person road department that maintains forty miles of public roads, four historic cemeteries and a park.

AWMS Water Solutions, LLC (“AWMS”) leases 5.2 acres of property in in the Mineral Ridge area of Weathersfield Township, so named because of the coal and iron ore in the area which was mined to produce iron and steel. AWMS drilled two wells on this property, to conduct the business of disposing of brine, a waste byproduct of oil and gas production, by using high pressure to inject the brine into rock formations deep in the earth. The AWMS well #2, the subject of this case, is a deep well, injecting brine more than a mile and a half below the surface of the earth. Injected brine can cause pressure to build in geologic faults, which can slip and trigger earthquakes. After AWMS well #2 was drilled, it was discovered that a geologic fault exists in the AWMS property.

The homes of thousands of residents of Weathersfield Township, the Mineral Ridge Elementary school, Middle school, and High school buildings, Weathersfield Township Fire stations, and many Weathersfield businesses are located in the immediate vicinity of the AWMS well site. The Township and its residents therefore have a direct and personal interest in this case.

The Mineral Ridge area of Weathersfield Township is also home of the Mineral Ridge Dam, which controls the Meander Reservoir, an eleven-billion-gallon water reservoir

which is the sole drinking water supply source for more than 220,000 people in Trumbull and Mahoning counties. The dam consists of an earth embankment, three concrete lined spillways, and associated infrastructure. The dam was originally constructed in 1931 and does not meet the current Ohio Department of Natural Resources (ODNR) and federal dam safety criteria. Due to its large storage capacity and downstream hazard potential, ODNR has classified the Mineral Ridge Dam as a Class I (High Hazard) structure. FEMA has determined that the dam is unstable and could fail if a maximum credible earthquake were to occur. The result would be catastrophic flooding throughout Weathersfield Township and multiple other communities in Ohio and Pennsylvania, endangering thousands of people and creating extensive economic damage.

AWMS commenced injecting brine into AWMS well #1 and AWMS well #2 in the summer of 2014. A seismic event with a magnitude of 1.7 occurred on July 28, 2014, and a second, larger earthquake with a 2.1 magnitude occurred on August 31, 2014. Experts, including two of AWMS's expert witnesses, agreed that the seismic events were likely induced by AWMS' injection operations at well #2. As a result of these seismic events, on September 3, 2014, the Chief of the Ohio Division of Oil and Gas Resources Management of ODNR ("the Division") ordered AWMS to suspend injection operations. The Division lifted the suspension order for the AWMS well #1 within a few weeks, after determining that the seismic events were not linked to injection at that much shallower well.

Because of the danger from the seismic events induced by the injection operations at AWMS well #2, injection was suspended to allow development of a satisfactory plan for restarting operations, including monitoring for seismic activity. On May 21, 2021, the Chief of the Division issued Order 2021-97 ("Restart Order") authorizing AWMS to resume

injection operations at the AWMS well #2 with seismic monitoring and provisions for suspending injection if the monitoring revealed certain levels of seismic activity. However, AWMS has not resumed injection operations.

Weathersfield Township is filing this Amicus Brief to emphasize to the Court the loss of life, personal injury, and catastrophic property damage that the residents of the township are likely to suffer if there is an induced seismic event from injection operations at the AWMS well #2. The catastrophic flooding that would occur if the Mineral Ridge dam fails because of seismic activity induced by brine injection at the AWMS well #2 would decimate Weathersfield Township and the homes and lives of thousands of people. Even lower intensity seismic events have the capacity to damage homes and businesses and cause injury and property damage.

As a township, Weathersfield has no legal ability to regulate injection wells within the township. Townships can exercise only those powers conferred by statute or necessarily implied from those powers granted. *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875). The Board of Trustees and the residents of Weathersfield Township are therefore entirely dependent on the Division to take the necessary steps to protect the health, safety, and welfare of the township residents. The Division must have the ability to appropriately regulate injection wells shown to cause earthquakes, to protect the public.

To protect the lives, safety, and economic interests of its residents, Weathersfield Township appears as *amicus* to urge the Court to affirm the decision of the court below that AWMS did not suffer a total taking and reverse the portion of the decision finding that there was a partial taking.

STATEMENT OF FACTS

Weathersfield Township adopts the statement of facts set forth by Appellees/Cross-Appellants in their merit brief.

ARGUMENT

Proposition of Law No. 1:

The state did not effectuate a total or partial regulatory taking of AWMS' property interest in well #2, as the Division's Suspension Order and Restart Order were appropriate to protect the public health and safety after two earthquakes induced by injection occurred, and earthquakes in this densely populated area could result in loss of life and property of the residents of Weathersfield Township and a breach of the Mineral Ridge Dam which would result in catastrophic flooding.

In *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 174 Ohio St.3d 401 (2024) (“*Mertz II*”) this Court remanded this case to the Court of Appeals, ordering the lower court to weigh the evidence presented at trial and determine whether AWMS suffered either a total taking or a partial taking of its property interest in their leasehold right to operate Class II saltwater-injection wells on 5.2 acres of industrial property in Weathersfield Township.

Time-honored principles of property and nuisance law inherently restrict some uses of land. Courts have long had the authority to prohibit landowners from using their property in a way that creates a private nuisance to adjacent landowners or other uniquely affected persons, or a public nuisance against the public at large. The United States Supreme Court has determined that a property owner never has the right to engage in activity that constitutes a nuisance, and therefore an order by the State prohibiting such a use does not take away a property right and does not constitute a taking requiring monetary compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 LEd.2d 798 (1992).

This Court in *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 162 Ohio St.3d 400 (2020) (“*Mertz I*”) affirmed that compensation is not required if “background principles of the State's law of property and nuisance’ impose independent restrictions on the owner's usage,” *Lucas* at 1029, quoted in *Mertz I* at ¶29.¹

¹ In *Mertz I* this Court held that the nuisance defense was waived for purposes of summary

The United States Supreme Court in *Lucas* gave examples of activities prohibited by background principles of nuisance law. A property owner restricted by government order from engaging in these activities would not be entitled to compensation for a taking, because the owner was never legally entitled to use their property to create a nuisance. One of these examples is directly applicable to the present case.

On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. **Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.** *See* Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1239–1241 (1967).

Lucas, 505 U.S. at 1029-30, (emphasis added).

Just as the government can require removal of a nuclear generating plant when it is discovered that the land on which it sits contains an earthquake fault, here, the Division acted within its authority and without necessity to pay compensation when it suspended operation of the AWMS #2 well when it was discovered that the well was drilled into a fault and two seismic events had occurred as a result of the injection of brine into the AWMS Well #2. Likewise, the Restart Order appropriately requires monitoring for seismic activity and

judgment, however, because the defense had been asserted in the answer, the issue was not waived for trial merely because it was not raised on summary judgment. Trial was held in the Court of Appeals commencing September 20, 2021, concluding on October 1, 2021, and the defense was properly raised at trial.

suspension of injection activities at AWMS Well #2 if seismic activity occurs.

Within weeks of AWMS beginning to inject brine more than eight thousand five hundred feet into the earth at the AWMS Well #2, two seismic events took place in Weathersfield Township, the first, a 1.7 magnitude earthquake, and the second, a 2.1 magnitude earthquake. Experts agreed that the seismic events were likely induced by AWMS injection operations. *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 11th Dist. 2024-Ohio-4451 at ¶17. The Division acted to protect the public by issuing a Suspension Order requiring AWMS to stop injection activity to reduce the risk of further earthquakes and to allow the Division to determine what measures were required to protect the public from the danger of injection induced earthquakes.

There is no taking, and compensation is not required for a loss to real or personal property occasioned by the State's power to abate nuisances that affect the public generally. A taking does not occur when, as here, the State acts "to forestall other grave threats to the lives and property of others." *Lucas* 505 U.S. at 1029, footnote 16. The Court below failed to properly apply the law and this Court's prior directives regarding the nuisance defense. The Court of Appeals quoted this Court's determination that:

Regarding the second factor, the Court determined "AWMS identifies no authority that requires a governmental actor to establish there is an imminent threat of harm before the government implements a regulatory action to protect public health and safety." *Id.* at ¶79. Accordingly, the Court, once again, concluded AWMS failed to create a material issue of fact on the second factor. Thus, it determined the Division was entitled to judgment as a matter of law on the "harm-preventing purpose" factor. *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 11th Dist. 2024-Ohio-4451, ¶129.

Bafflingly, the Court of Appeals proceeded to reject the Division's nuisance defense, which was based on the testimony establishing that catastrophic harm from an induced seismic event could destroy lives and property, declaring "at most, the Division provided

speculative arguments that continuing injections at the Site *could* cause a public or private nuisance.” *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 11th Dist., 2024-Ohio-4451, ¶50. The Court of Appeals application of the nuisance defense is too limited, as AWMS is not entitled to operate until a disaster occurs. In *Lucas*, the Court expressly stated that a property owner could be required to remove, without compensation, a nuclear power plant that was located on an earthquake fault, because of the risk of harm that could occur. The Court did not require as a predicate to such a removal order that an earthquake and damage actually occur – the risk of damage in itself creates a public nuisance, prohibiting the use.

Once seismic activity is triggered by brine injection, it can continue and even increase in severity, and such earthquakes are unpredictable. The AWMS #2 well is located seven miles from the Northstar #1 well in Youngstown Ohio. *Mertz I*, at ¶4. A 2.7 magnitude earthquake was recorded on December 23, 2011, and on December 30, 2011, a 4.0 magnitude earthquake was recorded, felt by over 4,000 people in Ohio, Pennsylvania, and Ontario Canada. Both earthquakes were attributed to brine injection at the Northstar #1 well, which was ordered to be shut in. *Id.*

At the hearing requested by AWMS before the Oil and Gas Commission, Professor Brian Currie from Miami University testified on behalf of AWMS. Professor Currie testified that the AWMS #2 well and the Northstar #1 well have very similar bedrock and surficial geology, the earthquakes occurred at similar depths, and both wells would be capable of producing very similar maximum magnitude events. Order of the Commission, 6/30/2022, ¶42.

Ivan Wong, Senior Principal Seismologist with Lettis Consultants International, Inc., testified on behalf of the Division at the hearing before the Oil and Gas Commission as an

expert witness qualified in the fields of seismology and earthquake risks and hazards. *Id.*, ¶43. Mr. Wong testified that an earthquake could cause ground shaking, liquefaction, and landslides, resulting in loss of life, injuries, building damage, infrastructure damage, economic loss, psychological impacts, and nuisance. *Id.* ¶49. Mr. Wong testified that the community surrounding AWMS is an urban area comprised of homes, schools, and businesses, many of which are old and vulnerable structures not designed like modern buildings to withstand earthquakes. *Id.* In the event of an earthquake of sufficient size, he testified that these buildings could have damage ranging from cracked walls to collapsing buildings and could result in injuries or deaths. *Id.*

The residents of Weathersfield Township who would be likely to suffer injury, loss of life or property damage from seismic activity in the area are mostly low and moderate income. Chief of the Weathersfield Township Volunteer Fire Department, Tom Lambert, testified at the hearing before the Commission on February 9, 2022, that the residents in the area of the Township near State Route 169, where the AWMS#2 well is located, are particularly vulnerable to damage that could result from an earthquake near the AWMS #2 well. (T.d. 1, Hearing Tr. Vol 2, Lambert Testimony). The area contains mostly older homes which were not built to withstand earthquakes, a trailer park, and many elderly residents. (T.d. 1, Hearing Tr. Vol 2, p. 376). As Chief Lambert stated in his testimony in the trial before the Court of Appeals, Weathersfield Township is “mostly blue-collar workers, a lot of older people.” (T.d. 182, Hearing Tr. Vol. 8, p. 1476).

The AWMS well site is in an industrial area of Weathersfield Township, and neighboring industrial businesses process titanium and magnesium, both metals that can catch fire, creating toxic smoke. Chief Lambert testified that he is concerned that seismic

activity in the area could cause a fire, if an electrical fixture were to fall or an electrical box break, sparking a fire. (T.d. 182, Hearing Tr. p. 1500-1505). These metal fires cannot be put out with water because a chemical reaction with the water causes an explosion. *Id.* Metal fires can only be extinguished by dumping salt on the fire, and there is not enough of the right kind of salt readily available to put out a large fire. *Id.* If a fire were to occur, the residents of the entire area would need to be evacuated because of the toxic smoke and danger of explosion. *Id.*

Chief Lambert also testified about the damage that could occur in Weathersfield Township if seismic activity broke waterlines. The main water lines in Weathersfield Township are old original cast iron lines and could easily break if the ground shifts:

it wouldn't take a lot of movement to break a 20-inch or a 24-inch line, especially if it's been under the ground since the 1930's. It's decayed, it's rusted. It's done what it's supposed to do. A little bit of seismic movement can snap that line and a 20 or 24-inch line is a lot of water coming up at once.

(T.d. 182, Hearing Tr. p. 1488-91)

A broken cast iron water line could take an extended time to repair, leaving the residents without drinking water, and the fire department without water readily available to fight a fire. (T.d. 182, Hearing Tr. p. 1490-91). Chief Lambert also explained how seismic activity in Weathersfield Township could endanger the health of the residents by damaging the resident's septic systems. The Heaton Chute area where the AWMS #2 well is located is an older area with older septic systems, not sewer lines, and the systems are fragile and easily broken, causing sewage to leak into the ground. The \$15,000-\$20,000 cost to replace a damaged septic system is much more than the residents in the area can afford. (T.d. 182, Hearing Tr. p. 1507-1508).

One of the major concerns for Weathersfield Township and the entire region is the possibility that an earthquake induced by injection at the AWMS #2 well could damage the

Mineral Ridge dam. The AWMS #2 well is within three miles of the Mineral Ridge Dam, which was built nearly 100 years ago using Depression-era standards and building techniques and not designed using modern techniques to withstand earthquakes. Order of the Commission, 6/30/2022, ¶59. The dam holds the Meander Creek Reservoir which is the drinking water source for 220,000 people. *Id.* The dam is starting to show its age of 100 years, and has some cracks and fractures, and there are concerns that the dam will not be able to hold because it is not as strong as it was when it was built 100 years ago. (Td. 1, Hearing Tr. Vol. 2, p. 393). The dam is upstream from hundreds of homes, businesses, and industrial sites that would be catastrophically flooded in the event of its breach.

Chief Lambert testified regarding the catastrophic flooding that is projected to happen if the dam were to break:

It's projected that the water would go back north. It would totally flood out the south side of Niles, downtown Niles and keep heading towards the City of Warren. Then the water would come back to the Mahoning River, which runs over the viaduct that I was speaking of earlier. That the Mahoning River runs into Mahoning County and into Pennsylvania. The projection was with a flood there that it would flood all the way into Beaver County Pennsylvania.

There would be a lot of lives involved. We would have to, you know, really focus on life first and then go back to, you know, how we recover from this. You know, what do we do for the people that now don't have any drinking water because the Sanitary District would be flooded out also. We would have to come up with ways of getting drinking water and utility water to the residents until a plan can be formed to have a secondary source of water, which I have not a clue where they would get that. Order of the Commission, 6/30/2022, ¶59

Lives would be in immediate danger in Weathersfield Township and the city of Niles if the Meander Reservoir dam were to break. (T.d. 182, Hearing Tr. p. 1480). Chief Lambert stated that he had reviewed studies projecting that if the Meander dam was breached, “the south side of Niles, which is a lot of elderly, would totally be under water, and then it would

go across in Niles. A large section of Niles also would be under water; and there would be loss of life and definitely environmental and property losses.” (T.d. 182, Hearing Tr. p. 1480-81). One of the Weathersfield Township fire stations would be wiped out, no longer standing. (T.d. 182, Hearing Tr. p. 1484). Chief Lambert stated that there are not enough resources using every fire department in Trumbull and Mahoning County combined to cover the area that would be flooded and rescue people before their demise. *Id.* Even a smaller earthquake that did not rupture the dam could shift the ground so that one of the multiple tanks at the Meander water facility that hold chlorine gas to treat the water could rupture, sending chlorine gas into the air and causing illness and lung damage. (T.d. 182, Hearing Tr. p. 1496-97).

Steven Gerberry, one of the three Weathersfield Township Trustees, testified at the trial in this matter about the concerns that all three members of the Board of Trustees have regarding the AWMS #2 well and the impact of injection induced earthquakes on the Township. Mr. Gerberry pointed out that even earthquakes that are 3.0 magnitude or less can have a cumulative effect, and there is no way to control earthquakes or prevent larger quakes from occurring. (T.d. 182, Hearing Tr. p. 1548-49).

Ivan Wong testified at the hearing before the Commission as an expert witness qualified in the fields of seismology and earthquake risks and hazards. Mr. Wong testified that if an injection well is inducing earthquakes, there is a risk of escalation and that damages from induced earthquakes, with events as small as M 3.4, can cause damage to vulnerable unreinforced masonry structures. Mr. Wong testified induced earthquakes have damage potential within five kilometers of a hypocenter for a M 4.0 earthquake. Mr. Wong testified the Mineral Ridge Dam presents a special risk. The dam is classified as a Class-I, high hazard

dam because a dam failure would result in probable loss of life and structural collapse of buildings and residences. Order of the Commission, 6/30/2022, ¶43. In his report, Mr. Wong stated that the dam breach flood analysis indicated that more than 500 structures would be flooded in the event of a catastrophic breach of the dam. Mr. Kilper of AWMS testified that he had no idea how many businesses would be wiped off the face of the earth, how many homes would be destroyed, or how many lives would be lost if the dam failed. (T.d. 1, Hearing Tr. Vol. 1, p. 197).

The public, and not AWMS, would bear the burden, both the loss of life and the financial cost of the damage that would result from an earthquake at the AWMS #2 well. Steve Kilper, Executive Vice President of AWMS testified at the hearing before the Commission that AWMS has overall insurance coverage “north of 10 million dollars” and a \$15,000 bonding requirement. This amount of insurance would not begin to cover the cost of damage to lives, homes and businesses if a stronger earthquake than those already induced by the AWMS well #2 were to damage houses or breach the Mineral Ridge dam. Mr. Kilper the AWMS representative, recognized this, stating, “regarding damages caused by an induced earthquake, he could not guarantee anything.” Order of the Commission, 6/30/2022, ¶58.

When AWMS entered the business of injection wells it knew that its rights were subject to significant regulation by the state under the police power to protect the public health and safety, and the well operations could be suspended as a result. AWMS knew that it could be drilling into a location where a fault might exist, and earthquakes could be induced. As the Court of Appeals noted, “reasonable expectations must be measured in relationship to the time AWMS acquired its interest.” *State ex rel. AWMS Water Solutions*,

L.L.C. v. Mertz, 11th Dist. 2024-Ohio-4451 ¶123. The AWMS offering memorandum issued at that time “highlighted the ‘continuing risk’ of ‘seismic events similar to the one that occurred in the Youngstown, Ohio area,’” and noted that “well operations could be suspended and/or terminated by the Ohio Environmental Protection Agency and/or the ODNR” and that no subsurface testing had been done and thus “the adequacy of the geology and the suitability of the wells” was unknown until after drilling, completion, and operation of the wells. *State ex rel. AWMS*, 2022-Ohio-4571 at ¶12.

When injection into AWMS well #2 did induce seismic activity, the response by the state in issuing the Suspension order and Restart order, requiring monitoring and suspension of injection if a 2.1M or larger earthquake occurred, was certainly within the existing regulatory authority of the Division to provide for the protection of the public and the limitations on AWMS’ property rights of which AWMS was well aware.

The Division’s Suspension order and Restart order were not a taking for which compensation is required to be paid but constitute a reasonable exercise of authority to prevent a nuisance and protect the public health and safety. Well #2 was drilled into a fault line, and injection into the well resulted in two earthquakes which prompted the state’s action. The unrefuted testimony established that an earthquake induced by injection into Well #2 would endanger the life and property of the residents of Weathersfield Township and could cause the breach of the Mineral Ridge dam which would flood property from Ohio to Pennsylvania, destroying 500 homes and leaving 200,000 people without fresh drinking water for years.

The State is not required to compensate AWMS for the financial impact of regulating brine injection at the AWMS Well #2 because AWMS never had a property right to drill

wells into a fault and cause earthquakes, endangering the lives and property of the public, including the residents of Weathersfield Township.

CONCLUSION

For the foregoing reasons, Weathersfield Township respectfully requests that the Court affirm the decision of the court below that AWMS did not suffer a total taking and reverse the portion of the decision finding that there was a partial taking, because it is a foundational principle of property law that property owners do not have the right to engage in uses of their property which create nuisance or an unreasonable risk of danger to the public, including the risk of induced earthquakes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was served via email on this 9th day of January 2025 upon the following:

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