IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CURTIS and RENEE CHRISTENSEN,
d/b/a HICKORY HILLS WHITETAILS,

OPINION AND
ORDER

Plaintiffs,

v. 06-C-0444-C

DR. ROBERT G. EHLENFELDT, D.V.M.
and DR. PETER VANDERLOO, D.V.M.,

Defendants.

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This is a civil action for declaratory and monetary relief. Plaintiffs Curtis and Renee Christensen contend that their rights to due process will be denied if defendants Dr. Robert G. Ehlenfeldt and Dr. Peter Vanderloo do not provide them an opportunity to inspect and test the tissue samples taken from a deer that died on plaintiffs' farm. Plaintiffs seek an order compelling defendants to produce a split sample of tissue and an award of just compensation if plaintiffs' deer herd is destroyed without plaintiffs' having an opportunity to test the tissue samples in advance of the destruction.

The case is before the court on defendants' motion for summary judgment.

Defendants contend that this court must abstain from hearing this case because plaintiffs have asked for a state court hearing that will provide them the opportunity to be heard on their constitutional claims and action by this court would interfere with an ongoing state proceeding that is judicial in nature and implicates important state interests. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 429 (1982). I conclude that defendants are correct. The state procedures available to plaintiffs are adequate to protect their rights, as well as meeting the other Middlesex criteria.

The case is in an odd procedural posture. When plaintiffs first sued, they named Dr. W. Ron DeHaven in addition to the two defendants in the caption. Dr. DeHaven was alleged to be an administrator with the United States Department of Agriculture, Animal & Plant Health Inspection Service. DeHaven moved for summary judgment, submitting proposed findings of fact and a brief in support. The other two defendants advised the court and plaintiffs' counsel that they were adopting DeHaven's motion as their own. Instead of opposing the motion, plaintiffs moved for dismissal without prejudice of the claims against DeHaven. DeHaven did not object to the dismissal and it was granted.

Next, plaintiffs moved for dismissal without prejudice of the claims against the remaining defendants. I granted the motion, but defendants objected, saying that they would accept dismissal of the claims against them only if the dismissal was with prejudice. I gave plaintiffs an opportunity to advise the court whether they would agree to dismiss the

case with prejudice or continue the litigation. Plaintiffs chose the latter option. However, they did not file any response to defendants' (adopted) motion for summary judgment or object to any of the facts proposed by defendant DeHaven and adopted by defendants Ehlenfeldt and Vanderloo, leaving those facts unopposed.

Because I find it necessary to abstain from hearing plaintiffs' challenge to the condemnation order and their request for independent inspection and testing of the tissue sample, it is not necessary to set out the facts of the inspection and testing done by the state. It is undisputed that chronic wasting disease is an infectious disease that can affect farm-raised white-tailed deer that can in turn contaminate the environment where affected deer and other antlered animals reside; that plaintiffs Curtis and Renee Christensen operated a deer farm in Eastman, Wisconsin, doing business as Hickory Hills Whitetails; that one of their deer herd died in January 2005 and eventually tested positive for chronic wasting disease, leading the state to quarantine their herd of farm-raised white-tailed deer; and to issue a special order for condemnation, directing the destruction of plaintiffs' deer herd. On May 11, 2005, plaintiffs requested an administrative hearing on the condemnation order before the department. As of March 19, 2007, that hearing remained pending.

OPINION

It is settled law that federal courts must abstain from enjoining certain ongoing state

proceedings. In Middlesex County, 457 U.S. 423, the Court expanded the contours of the abstention policies underlying abstention that were first spelled out in Younger v. Harris, 401 U.S. 37 (1971), a case involving a request to a federal court to stop an ongoing state criminal proceeding. The policies included "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id. at 44. In Middlesex, 427 U.S. at 429, the Court held that abstention would be required of federal courts when asked to intervene to prevent state administrative proceedings that are judicial in nature, that implicate important state interests, that offer an adequate opportunity for review of constitutional claims and that exhibit no extraordinary features such as bias or harassment that might be a reason for federal court intervention.

The administrative proceeding that plaintiffs have requested and that remains pending meets the abstention criteria of Middlesex. Wisconsin law provides the right to a hearing to persons such as plaintiffs, whose substantial interests are injured or threatened with injury by an agency action. Wis. Stat. ch. 227. That hearing is judicial in nature because it is coercive, that is, it will address the enforcement of the state's laws regulating white-tailed deer and the spread of chronic wasting disease. Majors v. Engelbrecht, 149 F.3d 709, 711 (7th Cir. 1998) ("For purposes of Younger abstention, administrative proceedings

are 'judicial in nature' when they are coercive—*i.e.*, state enforcement proceedings . . . as opposed to remedial, . . . or legislative") (internal citations omitted).

The hearing implicates an important state interest: containing the spread of a disease with serious consequences to the state's deer herd and possible risks to humans. The procedures in Ch. 227 are more than adequate to protect plaintiffs' rights and allow them to obtain review of their constitutional claims. E.g., Wis. Stat. § 227.44 (setting out procedures for contested cases). Judicial review is available. Wis. Stat. § 227.52. Finally, plaintiffs have pointed to nothing in the procedures that would suggest they are contaminated by bias or other defect.

It appears that all of the conditions are met for abstention. The next question is whether the case should be dismissed or stayed. I am persuaded that dismissal is appropriate because plaintiffs can obtain damages in the state court proceedings for any losses incurred by the condemnation of their deer herd, Wis. Stat. § 95.31 (Department of Agriculture, Trade and Consumer Protection "shall pay indemnities to the owners of animals condemned and destroyed" as provided in Wis. Stat. Ch. 95), and they have not shown that they are claiming any other damages for which they cannot obtain redress through an administrative hearing. Majors, 149 F.3d at 714 (dismissal appropriate when damages available in state court proceeding). This leaves only the question whether the dismissal should be with or without prejudice. The Court of Appeals for the Seventh Circuit has consistently held or

assumed that dismissal on abstention grounds must be without prejudice. E.g., Doctor's Associates, Inc. v. Duree, 375 F.3d 618, 622-23 (7th Cir. 2004); Crenshaw v Supreme Court of Indiana, 170 F.3d 725 (7th Cir. 1999). See also Gleash v. Yuswik, 308 F.3d 758, 760 (7th Cir. 2002) ("[W]hen prudence calls for putting a redundant suit on hold, it must be stayed rather than dismissed unless there is no possibility of prejudice to the plaintiff.") Obviously, abstention is not a decision on the merits but a decision not to decide the merits, at least not yet. (Whether there is any practical possibility that plaintiffs could revive this action after they have completed their state administrative proceedings, including judicial review, is a question that need not be answered at this time.)

It does seem odd that almost two years after plaintiffs asked for a hearing, they had not received it as of March 19, 2007, and that, as of that date, the state defendants were advising the court that the deer herd had not been destroyed. Plaintiffs do not argue, however, that the delay in the hearing has deprived them of any rights. I trust that the hearing will be held promptly, especially now that this lawsuit has been resolved.

ORDER

IT IS ORDERED that the motion for summary judgment adopted by defendants Dr. Robert G. Ehlenfeldt, D.V.M., and Dr. Peter Vanderloo, D.V.M., is GRANTED and this

case is DISMISSED on the ground of abstention.

Entered this 14th day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge