

**Objection to the Denial of ELF Claim No. 89089530, Northside Rental All
1999 OEA 1 (94-F-J-1006)**

OFFICIAL SHORT CITATION NAME: When referring to 1999 OEA 1, cite this case as
Northside Rental All, 1999 OEA 1.

TOPICS:

ELF
reimbursement
waiver
registration
estoppel
equitable estoppel
notification
public interest
fee schedule
timely paid
remediate
eligibility
payment of fees
underground storage tank
annual fees
tank fees
ignorance of law

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: James A. Smith, Esq.: Smith & Associates
IDEM: Loraine L. Seyfried

ORDER ISSUED:

January 5, 1999

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objection to the Denial of ELF Claim No. 89089530, Northside Rental All
1999 OEA 1 (94-F-J-1006)**

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTIONS TO THE DENIAL OF)
ELF CLAIM NO. 89089530)
NORTHSIDE RENT ALL)

CAUSE NO. 94-F-J-1006

FINDINGS OF FACT. CONCLUSIONS OF LAW, AND ORDER

This constitutes notice that on or about April 2, 1993, Dennistar appealed the Indiana Department of Environmental Management's (IDEM) denial of Dennistar's claim for reimbursement from the Excess Liability Fund for failure to pay tank fees. On or about May 31, 1995, the Financial Assurance Board granted IDEM's Motion for Summary Judgment. On October 11, 1996, Hendricks Circuit Court vacated all prior decisions in this matter and remanded the matter to the Office of Environmental Adjudication for a final hearing on the merits. A final hearing was held on September 28, 1998 and concluded on September 30, 1998.

The Chief Administrative Law Judge, having considered the testimony and evidence presented during the hearing, now makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. The Office of Environmental Adjudication has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to this controversy pursuant to Indiana Code § 4-21.5-7. The Chief Administrative Law Judge has authority to review the Excess Liability Fund Administrator's decision pursuant to Indiana Code § 4-21.5-7.
2. This is a Final Order issued pursuant to Indiana Code § 4-21.5-3-27. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. On June 30, 1989, Mr. and Mrs. Kenneth Adair (Adairs) contracted with the Petitioner, Dennistar Environmental, Inc. (Dennistar) to remove four (4) underground storage tanks (USTs) located on their property located at 2325 East 46th Street, Indianapolis, Indiana (site). (Petitioner's exhibit 1)
4. Dennistar has been in the business of environmental contracting for more than 20 years. (Transcript, p.7)

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5. Dennistar never owned or operated the USTs involved in this matter (Transcript, p. 58). However, Mr. Kenneth Adair's submission of a revision to the initial application has satisfied the ownership requirement of the Excess Liability Fund. (Stipulations of Fact, paragraph 1).
6. In a letter dated July 14, 1989, Dennistar notified IDEM of its intent to remove the four (4) USTs and the procedure Dennistar intended to follow. (Stipulations of Fact, paragraph 2 and Petitioner's Exhibit 2).
7. In a letter dated August 11, 1989, IDEM responded with a form letter stating the USTs may be removed on or after September 1, 1989 and provided procedures Dennistar should follow, including the submission of a notification form after removal of the USTs. (Stipulations of Fact, paragraph 3, and Petitioner's Exhibit 3).
8. Dennistar reported the discovery of contamination at the site to IDEM on August 23, 1989 (Petitioner's Exhibit 5)
9. Dennistar completed and returned to IDEM the notification form identified in IDEM's August 11, 1989 letter to Dennistar on or about September 25, 1994. (Stipulations of Fact, paragraph 7, and Petitioner's Exhibit 4).
10. Ben Ganguly, an IDEM inspector, was assigned to go to the site. (Transcript, p. 73)
11. Dale Denny, owner of Dennistar, testified that Ben Ganguly orally required Dennistar to remediate the site. (Transcript, p. 36). Mr Denny also testified that Ben Ganguly and Anne Black made oral statements to him that he would be reimbursed from the State of Indiana for the cost of the remediation that exceeded \$ 100,000 (Transcript, p. 31, 38).
12. Ben Ganguly did not testify.
13. Anne Black, section chief of the underground storage tank section within the Office of Environmental Response, denied making any statements to Dale Denny that he would be eligible for reimbursement of the remediation costs. (Transcript, p. 174).
14. IDEM did not issue any written orders requiring Dennistar or the Adairs to remediate the site. (Transcript, p. 58, 157).
15. IDEM did not issue any written document stating that Dennistar or the Adairs would be eligible for reimbursement from the Excess Liability Fund. (Transcript, p. 62, 160).
16. The Adairs never paid any tank fees. (Stipulations of Fact, paragraph 5).
17. Since the Adairs resided in Florida, tank fees were due December 15, 1988 according to the fee schedule established by IDEM. (Transcript, p. 132 and 86 and Respondent's Exhibit 1).

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18. Neither the Adairs nor Dennistar registered the USTs in accordance with 42 USC 6991a(a) prior to September 25, 1994. (Transcript, p.105, Respondent's exhibit 4).
19. IDEM did not send a written notification to the Adairs requesting that the USTs be registered or that tank fees be paid. (Stipulations of Fact, paragraphs 4 and 6).
20. IDEM conducted outreach efforts to notify tank owners of the tank registration and tank fee requirements. (Transcript, p. 68, 80).
21. On or about January 19, 1993 Dennistar submitted to IDEM a request for reimbursement from the Excess Liability Fund (Transcript, p. 53 and Petitioner's Exhibit 5).
22. On March 16, 1993, IDEM denied Dennistar's request for reimbursement on the grounds that registration fees were not paid. (Transcript, p. 192 and Respondent's Exhibit 2).

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication has jurisdiction over the decisions of the Commissioner of the IDEM pursuant to Indiana Code § 4-21.5-7.
2. Indiana Code § 13-7-20-32(b) requires the owner of a UST that is not closed to pay an annual registration fee "in accordance with a schedule established by the commissioner. The schedule must require payment of the first annual fee not before September 1, 1988, and no later than June 30, 1989." The commissioner of IDEM established a fee schedule which required the Adairs, as out of state owners of USTs living in Florida, to pay the first annual fee on December 15, 1988. No evidence was presented that the Adairs, or Dennistar, paid any registration fees.
3. The Adairs cannot be excused from payment of the fees on the grounds that they did not know fees were due. It is well settled law that "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." Texaco, Inc. v. Short, (U.S. Ind. 1982), 454 U.S. 516, 532.
4. The Adairs cannot be excused from payment of fees on the grounds that IDEM did not notify them of the fee schedule or that the fees were due. Indiana Code § 13-7-20-32(e) states that "at least thirty (30) days before payment of a fee is due in accordance with the schedule established under subsection (b), the commissioner shall attempt to notify each owner of an underground storage tank who has submitted notification to the department as required under 42 USC 6991a(a) of the requirements of this section." The USTs were not registered, as required under 42 USC 6991a(a), with IDEM prior to when the fees were due. IDEM had no statutory duty to attempt to notify the Adairs that UST fees were due. In re: Estate of Ullus Gudder, Cause No. 96-F-J-1601, February 23, 1998.

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5. The Adairs cannot be excused from payment of fees because fee payment forms were not provided to them. IDEM has no statutory duty to provide a fee payment form to an owner whom IDEM does not know exists and has never requested a fee payment form. In re: Columbia Plaza, Cause No. 94-F-J-985, August 8, 1986.
6. Indiana Code § 13-7-20-33(a) provides: "The commissioner . . . shall use money in the excess liability fund . . . for the payment of a part of the liability of owners and operators of underground petroleum storage tanks, excluding liabilities to third parties, arising out of corrective action involving releases of petroleum. However, money from the excess liability fund may be used for this purpose . . . only if all annual registration fees that are due . . . are timely paid in accordance with the schedule established under section 32(b) of this chapter." The Adairs failed to meet the statutory requirement of having timely paid all annual registration fees that were due in order to be eligible for reimbursement from the excess liability fund.
7. The doctrine of waiver is inapplicable to this matter. IDEM did not waive its right to the registration fees since the fees are automatically due under Indiana Code § 13-7-20-32. In re: Estate of Ullus Gudder, Cause No. 96-F-J-1601, February 23, 1998.
8. The elements of equitable estoppel are as follows:
 1. A representation or concealment of material facts;
 2. The representation must have been made with knowledge of the facts;
 3. The party to whom it was made must have been ignorant of the matter;
 4. It must have been made with the intention that the other party should act upon it; and
 5. The other party must have been induced to act upon it.

Advisory Board of Zoning Appeals of the City of Hammond v. The Foundation for Comprehensive Mental Health, Inc., 497 N.E.2d 1089, 1092 (Ind. App. 1986).

9. "The general rule is that the government cannot be estopped by the action of public officials. If estoppel were widely available against the government in such situations, dishonest, incompetent, or negligent public officials and workers could damage the interests of the public. Indeed, the government itself might even be precluded from functioning." Muncie Industrial Revolving Loan Fund Board v. Indiana Construction Corporation, 583 N.E.2d 769, 771 (Ind. App. 1991). Courts are especially reluctant to apply estoppel against the government where unauthorized acts of government officials implicate government spending powers or unless it is in the public interest to do so. National Salvage & Service Corporation v. Commissioner of the Indiana Department of Environmental Management, 571 N.E.2d 548, 556 (Ind. App. 1991).
10. The party claiming estoppel, Dennistar in this matter, has the burden of establishing all facts necessary to constitute estoppel. Indiana Code § 4-21.5-3-14; Indiana Department of Environmental Management v. Conard, 614 N.E.2d 916, 921 (Ind. 1993).

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11. Dennistar has not met its burden of establishing all of the elements of equitable estoppel.
- A. The only evidence presented that IDEM made a representation to Dale Denny that he would be reimbursed from the Excess Liability Fund was hearsay testimony given by Dale Denny. Ben Ganguly was not present to testify and therefore any statements allegedly made by Mr. Ganguly are solely hearsay. Anne Black denied making any such statements to Mr. Denny.
- Even if the court could find a representation had been made, reliance on such representation was unreasonable for the following reasons: Dennistar had no legal duty to remediate the site and therefore could have ceased work at any time; neither Mr. Ganguly nor Ms. Black had authority to make decisions regarding eligibility for reimbursement from the Excess Liability Fund since Indiana Code § 13-7-20-31(b) states that the Excess Liability Fund shall be administered by the Commissioner; and placing full reliance on oral representations, without written confirmation and approval, are subject to conflicting interpretations and the authority of those making such statements.
- B. Dennistar cannot be found ignorant of the eligibility requirements. "Persons who deal with the state must take notice of the Constitution, statutes, and opinions of our courts of last resort which limit the authority of the office or employee of the state when he purports to act for the state." State v. Roberts, 78 N.E.2d 440, 445 (Ind. 1948)., Dennistar failed to apprise himself of the law.
12. Even if Dennistar had met the elements of estoppel, it must be in the public interest to do so. National Salvage & Service Corporation v. Commissioner of the Indiana Department of Environmental Management, 571 N.E.2d 548 (Ind. App. 1991). The public interest in favor of using available money in the Fund for UST owners who timely paid their fees clearly outweighs reimbursing a contractor who (1) relied upon unauthorized oral representations, (2) could have stopped work at any time, and (3) failed to apprise himself of the law and its requirements for reimbursement.

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ORDER

IT IS THEREFORE ORDERED THAT:

1. The Administrator's denial of reimbursement from the Excess Liability Fund is upheld.
2. Petitioner's Petition for review is DENIED.

You are further notified that pursuant to provisions of S.E.A. 156 (P.L. 41-1995 amending IC 4-21.5-7), which became effective July 1, 1995, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petitioner for Judicial review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

Date: January 5, 1999

Wayne E. Penrod
Chief Administrative Law Judge