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COURT OF APPEALS  
STATE OF NEW YORK

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SUZANNE P.,

Appellant,

-against-

NO. 8

JOINT BOARD OF DIRECTORS,

Respondent.

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92 Franklin Street  
Buffalo, NY  
November 16, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Christy Wright  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon, everyone. I  
2 wanted to extend a special welcome to students from the  
3 University of Buffalo Law School. We're happy to have you  
4 here, and we hope to see some of you again this evening  
5 when we're over at your home. First case on today's  
6 calendar, Suzanne P. v. Joint Board of Directors. Counsel?

7 MR. QUINLAN: May it please the court. I would  
8 like to reserve two minutes for rebuttal.

9 CHIEF JUDGE WILSON: Two?

10 MR. QUINLAN: Two minutes. I'd like to welcome  
11 this court to Buffalo and to thank you for saving us and  
12 counsel in this case from making the trip to Albany. This  
13 is our reargument, and I hope you can answer some questions  
14 that came up during the first argument better this time  
15 around than last. I think I'll start off with - - - with  
16 the questions raised, what is the joint board and what are  
17 the Erie and Wyoming County Soil and Water Conservation  
18 water districts. Well, all three were created by acts of  
19 the legislature in the 1940s to do with flood control  
20 issues regarding Buffalo Creek and its tributaries. And  
21 the joint board was created because Buffalo Creek extended  
22 into both Erie and Wyoming counties, so it was in part of  
23 two districts. So a joint - - - joint district was created  
24 in order for the Erie and Wyoming County districts, to have  
25 one entity with which to deal with the federal government

1 in contracting with it to have various flood control and  
2 water erosion, I mean, soil issues - - -

3 JUDGE HALLIGAN: Counsel, can I - - - can I ask  
4 you - - - counsel, is there evidence in the record, if so,  
5 what evidence about who currently does own the land on  
6 which the dam sit?

7 MR. QUINLAN: Well, the answer - - - I think the  
8 answer is yes. But in this case, though - - -

9 JUDGE HALLIGAN: But - - - but could you tell me  
10 what - - - who does own it, and where the evidence is?  
11 That would be helpful.

12 MR. QUINLAN: Well, that evidence was not  
13 presented during the trial, and it was not presented during  
14 the trial because there were easements obtained from the  
15 original owners going all the way back to the 1950s,  
16 pursuant to the December 1959 agreement. And unlike what  
17 was represented during the prior argument, this - - - the  
18 actual language regarding easements went not only to access  
19 to the property at after the construction, but those  
20 easements were a precondition for the construction  
21 happening in the first place. During the trial of this  
22 action, Mr. Gaston, a director for the Erie District,  
23 testified that these dams, which were known as the Earsing  
24 Sills, were called that because the original adjoining  
25 landowner wasn't Mr. Earsing, from whom the easements were

1           - - - were obtained. So the issues were raised regarding,  
2           well, who owned the underlying land were taken care of by  
3           the fact of these easements without which these - - - these  
4           low-head dams would never have been constructed.

5                    JUDGE HALLIGAN: So is your position that  
6           ownership of the dams runs with the ownership of the  
7           permanent easement?

8                    MR. QUINLAN: The easement, I mean, the ownership  
9           is structured based upon the 1984 operating - - - operation  
10          and maintenance district, where I think the ownership was  
11          split between the joint board and an arm of the federal  
12          government, with the joint board being responsible for  
13          operation and maintenance and the federal government being  
14          responsible for the design of the dam and maintaining the  
15          overall structure of it.

16                    JUDGE CANNATARO: Was that your - - - was that  
17          the directed verdict at trial that both the joint board and  
18          the federal government were the owners of the dam?

19                    MR. QUINLAN: Well, the only issue was whether  
20          the joint board was an owner. And based upon the agreement  
21          and the testimony of Mr. Gaston, it was held that the joint  
22          board was an owner of these low-head dams.

23                    JUDGE CANNATARO: An owner?

24                    MR. QUINLAN: Yes.

25                    JUDGE CANNATARO: Leaving open the possibility

1 that there could be one or more - - -

2 MR. QUINLAN: Yes.

3 JUDGE CANNATARO: - - - other owners?

4 MR. QUINLAN: In a number of cases that have been  
5 placed before this court, like Labor Law 240 and 241 cases  
6 there have been held to be, like, multiple owners. And in  
7 fact, in one of the cases that was relied upon by the  
8 Appellate Division, the Metro Media case, there were like  
9 multiple owners involved with the ownership of this  
10 elevated rail station, in particular. And then there was a  
11 separate owner who was held to be an owner of real property  
12 regarding this advertising frame, which was at issue, that  
13 even though that the owner of the advertising frame had no  
14 connection, did not own the underlying land and did not  
15 even own the rest of the structure, it was still held to be  
16 an owner of the particular structure that was at issue in  
17 that case. And I would say that the same would apply here,  
18 that the - - - that the joint board is an owner of the  
19 underlying structure and would, therefore, for purposes of  
20 operation and maintenance - - -

21 JUDGE TROUTMAN: And what makes - - -

22 MR. QUINLAN: - - - and therefore would have the  
23 - - -

24 JUDGE TROUTMAN: Counselor?

25 MR. QUINLAN: - - - side warnings.

1 JUDGE TROUTMAN: What makes - - - what evidence  
2 is there that it is the joint board that owns? Why do you  
3 come to that conclusion and what supports it?

4 MR. QUINLAN: On the basis of the of the 1984  
5 operation and maintenance contract that was executed on  
6 behalf of the joint board and the prior similar - - -  
7 similar contracts going back to 1959.

8 JUDGE TROUTMAN: And the other party that was a  
9 part of that execution? It's the federal government?

10 MR. QUINLAN: It was an arm of the federal  
11 government.

12 JUDGE TROUTMAN: And what did the - - - what did  
13 the federal government do as a result of that agreement, in  
14 your view?

15 MR. QUINLAN: Well, it designed and constructed  
16 the dams.

17 JUDGE TROUTMAN: No, what did the agreement  
18 provide for?

19 MR. QUINLAN: Well, the - - -

20 JUDGE TROUTMAN: As to ownership?

21 MR. QUINLAN: Well, the - - - the agreement  
22 stated that title would vest in the joint board upon the  
23 completion of the dams, and it would continue to vest in  
24 the joint boards so long as - - -

25 JUDGE TROUTMAN: So is it your view that the - -

1 -

2 MR. QUINLAN: - - - it is their original purpose.

3 JUDGE TROUTMAN: Counsel, is it your view then  
4 that the federal government conveyed to them an ownership  
5 interest in the structure itself?

6 MR. QUINLAN: According - - - as was found by  
7 Justice Grisanti by the way, the - - - the agreement was  
8 structured that once there was completed title to the dams  
9 vested automatically in the joint board.

10 CHIEF JUDGE WILSON: I'm still, as last time,  
11 trying to understand the legal status of these various  
12 entities. So let me just start with the two Water - - -  
13 Soil and Water Conservation districts, the Wyoming and the  
14 Erie County Districts. Soil and Water Conservation  
15 District Law Section 9 says that district or soil and water  
16 conservation district means a county whose board of  
17 supervisors by resolution declared such county to be a soil  
18 and water conservation district. So I read that to say  
19 that the district is the same legal entity as the county.  
20 That may not be correct, but if it's correct or not  
21 correct, I'd like to know what you think.

22 MR. QUINLAN: Well, as I say has been pointed out  
23 in the briefs, the Erie District and the Wyoming District  
24 were created by acts of the legislature in the 1940s. So I  
25 think that the - - - the - - -



1 CHIEF JUDGE WILSON: But are they the same legal  
2 - - -

3 MR. QUINLAN: - - - statute that you're referring  
4 to - - -

5 CHIEF JUDGE WILSON: Are they the same legal  
6 entity as the county? That's the question.

7 MR. QUINLAN: They were - - - they were created  
8 as entities, legal entities. But by the same token, the  
9 joint board itself is nothing but - - -

10 CHIEF JUDGE WILSON: I'm just trying to stick  
11 with the conservation districts for the moment. Are they  
12 the same legal entity as the county? Because that's the  
13 way the section of the Soil and Water Conservation Law that  
14 I read, reads to me. Maybe yes, maybe no. I don't know.

15 MR. QUINLAN: I do not believe that's entirely  
16 correct. I think there is a separate board that was  
17 created and that the directors of which the Erie District  
18 and the Wyoming District comprise the joint board and  
19 govern everything he does. And - - -

20 CHIEF JUDGE WILSON: I'm still not asking about  
21 the Joint board yet.

22 MR. QUINLAN: But - - - but again, I do not think  
23 that - - - if you're asking that is the county, in and of  
24 itself, the Erie District, I think the short answer is no.

25 CHIEF JUDGE WILSON: And do you have any

1 authority for that?

2 MR. QUINLAN: Yeah, well, there are there are  
3 statutes that created the - - - the actual Erie District  
4 and the Wyoming District - - -

5 CHIEF JUDGE WILSON: Do you know what those - - -

6 MR. QUINLAN: - - - creation of the joint board?

7 CHIEF JUDGE WILSON: I'm not asking about the  
8 joint board again. Which statutes are those?

9 MR. QUINLAN: Well, they were acts of the  
10 legislature. I do not have the actual - - - I think  
11 they've been cited in various briefs, but.

12 CHIEF JUDGE WILSON: Okay.

13 JUDGE RIVERA: But let me let me go back to this  
14 question about the ownership of the dam. Was it necessary  
15 for the federal government - - - you said the federal  
16 government transferred that ownership to the Joint board.  
17 Was it necessary for the federal government to have  
18 ownership in the property, right, the property on either  
19 side of that dam to be able to convey ownership in the dam?

20 MR. QUINLAN: My understanding is that the fact  
21 of the permanent easements obtained by the joint board  
22 would negate the need for the federal government itself to  
23 have any ownership interest in the underlying land.

24 JUDGE RIVERA: Why is that? How does the  
25 easement get you to ownership in the structure?

1 MR. QUINLAN: That is just the way the whole  
2 transaction was structured that - - -

3 JUDGE RIVERA: Well, the easement - - - I'm  
4 sorry, let me - - -

5 MR. QUINLAN: - - - before anything could happen  
6 - - -

7 JUDGE RIVERA: But the - - -

8 MR. QUINLAN: - - - the joint board would get the  
9 easements from the landowners.

10 JUDGE RIVERA: Right, but - - - okay, so let's  
11 talk about the easements. I understood the easements to  
12 give a right of way to build the structure and then to also  
13 maintain that structure.

14 MR. QUINLAN: Yes.

15 JUDGE RIVERA: Okay. But that - - - that is not  
16 about ownership of the land at all.

17 MR. QUINLAN: No.

18 JUDGE RIVERA: The easement doesn't do that. And  
19 it's not about ownership of the thing that is constructed  
20 in this case, the dam. So how does the easement get the  
21 federal government to have an interest that allows it to  
22 transfer that interest that, what we're calling the right  
23 of ownership in the dam, to the Joint board?

24 MR. QUINLAN: Well, I think it's more due to the  
25 way the - - - the responsibilities of the federal

1 government versus the Joint board are structured, that  
2 the - - - the federal government is responsible for the  
3 maintaining the structure and if necessary, reconstructing  
4 it as it's happened in this case in the 1980s, where the  
5 subject dam was reconstructed by the federal government,  
6 and the federal government was responsible for designing  
7 the dam. But on the other hand, the day-to-day maintenance  
8 of the dam was responsible - - - the responsibility of the  
9 Joint board.

10 JUDGE RIVERA: I see. So then your position is  
11 that the federal government owned the dam because they  
12 helped build and fund the dam?

13 MR. QUINLAN: They built the dam for purposes of  
14 maintaining the - - - I mean, the overall structure of the  
15 dam, I would say.

16 JUDGE GARCIA: Counsel?

17 JUDGE SINGAS: Why wouldn't it be just as  
18 reasonable - - - I'm sorry, Judge Garcia - - - to reach a  
19 conclusion like the jury did, that the joint board doesn't  
20 own the dam because, you know, the joint board couldn't  
21 really do much without the approval of NCRS. You know,  
22 they fund the project, they hire the contractors. If I own  
23 my home, and I want to do work on it, I don't have to go to  
24 anyone else to ask for permission or to ask for the funds.  
25 So why isn't that a reasonable interpretation? And why

1 shouldn't we say that? Let's leave the jury verdict alone.  
2 And if you want to, you can appeal from that.

3 MR. QUINLAN: Because again, the responsibilities  
4 for this dam were structured according to this agreement  
5 and operation and maintenance was held to be responsibility  
6 of the joint board. So I would say that under this  
7 agreement, the quote unquote, ownership of this dam was  
8 split by virtue of the various responsibilities for it.

9 JUDGE GARCIA: Let me ask that a different way,  
10 if I could, and correct me if I'm wrong on the procedure  
11 here. But - - - and with respect to the joint board,  
12 there's a summary judgment motion which is denied, right?  
13 Summary judgment is denied as to the joint board, right?

14 MR. QUINLAN: Yes.

15 JUDGE GARCIA: So there's an issue that needs to  
16 go to the jury. That issue goes to the jury on ownership  
17 and the jury finds against you, your client, right?

18 MR. QUINLAN: Yes.

19 JUDGE GARCIA: Then the trial judge directs a  
20 verdict despite that jury verdict in your favor.

21 MR. QUINLAN: Yes.

22 JUDGE GARCIA: Correct? Then it goes up to the  
23 Appellate Division. And the Appellate Division directs a  
24 verdict in their favor, right?

25 MR. QUINLAN: Yes.

1 JUDGE GARCIA: Doesn't all of this suggest,  
2 including the denial of summary judgment, that this, and  
3 given the discussion here on who owns what and what  
4 agreement, that this was a jury issue?

5 MR. QUINLAN: I would say no, Your Honor, because  
6 of the rationale the Appellate Division used for setting  
7 aside the - - - Judge Grisanti's directed verdict, it - - -  
8 it really move the goalpost from where they were before the  
9 trial, after the first appeal in 2019, after the trial,  
10 they suddenly added this new criteria that we had to prove  
11 that the owner of the dam owned the underlying land, and  
12 they cited the Metro Media case. But if you really study  
13 the Metro Media case, you come to the complete opposite  
14 conclusion because the property owner that was at issue,  
15 the owner of the advertising frames did not own the  
16 underlying land. And they said that while that was okay,  
17 based upon the way that the parties had structured the  
18 ownership of the overall the elevated rail stations that  
19 they had structured as such that that this one company  
20 would be a concern owner of real property with respect to  
21 the advertising frames, even though it was not an owner of  
22 the underlying lands.

23 JUDGE GARCIA: And that theory that you're saying  
24 the Appellate Division went on, was that given to the jury?

25 MR. QUINLAN: No, that was something that - - -

1 well, there was arguments made about that during the trial,  
2 but that was something that was not really put to the jury  
3 in that respect. And it was only that it was the - - - it  
4 was the Appellate Division itself that had introduced the  
5 Metro Media case into this case. It was not something that  
6 any of the parties had brought up.

7 CHIEF JUDGE WILSON: Was the jury instructed that  
8 to find the joint board liable, The joint board would have  
9 to be the owner?

10 MR. QUINLAN: Well, the actual trial was only  
11 conducted upon the issue of ownership in and of itself.  
12 That was the only issue before the jury was whether the  
13 joint board was an owner.

14 CHIEF JUDGE WILSON: But you had asserted claims  
15 that were based against other entities that were based on a  
16 theory other than ownership.

17 MR. QUINLAN: Well, we have presented a claim  
18 regarding the town of West Seneca that as an adjoining  
19 owner with special knowledge of a nonobvious danger which  
20 could be accessed from its property, it would have a duty  
21 to warrant under this - - - this court's decision in that  
22 case.

23 CHIEF JUDGE WILSON: But also, I think your  
24 claims against Erie and Wyoming County are also based not  
25 on their ownership; is that right?

1 MR. QUINLAN: Well, the Erie and Wyoming  
2 Districts, we're saying that they should - - -

3 CHIEF JUDGE WILSON: But you also - - - I'm  
4 sorry, you say - - - you say - - -

5 MR. QUINLAN: Well, the Erie County - - - there's  
6 two arguments we make. One, under the Environmental  
7 Conservation Law that they basically assumed a duty of an  
8 owner because they contracted for maintenance of this dam  
9 with the Erie District and that if - - - so they would  
10 assume the duty of an owner by basis of fact that they - -  
11 - they assumed a contract for the maintenance of - - - of  
12 the thing, and therefore they should be held to be an  
13 owner. But our second theory was based upon the fact that  
14 they stood in the way of warnings being posted regarding  
15 the dangers of these dams by the joint board and the town  
16 of West Seneca.

17 CHIEF JUDGE WILSON: So just to get to the end of  
18 what I was trying to ask your, you do have other theories  
19 that are not based on ownership, but those weren't tied to  
20 the jury because those defendants had been granted summary  
21 judgment before you got to the jury; is that right?

22 MR. QUINLAN: Yes.

23 CHIEF JUDGE WILSON: Okay. And those - - - and  
24 you're appealing those here?

25 MR. QUINLAN: Yes. Okay. Thank you.



1                   MR. TOTH: Thank you, Your Honors. Jeremy Toth  
2                   for the municipal entity known as Erie County. And I'd  
3                   also like to welcome you to Erie County and welcome you to  
4                   the Erie County Soil and Water Conservation District,  
5                   because I've spent the last nine months contemplating your  
6                   question to me, Justice Wilson, and I think I have an  
7                   answer.

8                   CHIEF JUDGE WILSON: I'm all ears.

9                   MR. TOTH: So you point out that the definitional  
10                  section says that a district - - - soil and water  
11                  conservation district, means a county whose board of  
12                  supervisors. But what I take that to mean is that it's the  
13                  geographical location. It is not the municipal entity  
14                  known as Erie County, and I have a few - - - few sources  
15                  for that. Later in the statute, two places, Section 5 and  
16                  Section 6, it - - - in Section 5, it says when the board of  
17                  supervisors, dot, dot, dot, declares the county to be a  
18                  soil and water conservation district, as if the board of  
19                  supervisors is proclaiming all of Erie County is now part  
20                  of the Lake Erie watershed and we are proclaiming every  
21                  inch of Erie County to be part of this water conservation  
22                  district.

23                  It is not saying that Erie County is the Soil and  
24                  Water Conservation District and that the Soil and Water  
25                  Conservation District is the County. It's saying we are

1 saying for public policy purposes we are declaring this all  
2 to be water conservation and then we are going to establish  
3 a board of directors to manage it. But that process is a  
4 separate and distinct entity.

5 Section 6 also says when a county has been  
6 declared a soil and water conservation district. There's  
7 also a case from the Third Department which I cited in my -  
8 - - my brief, which relies on an opinion from the attorney  
9 general from 1980. It has to do with the employment status  
10 of an employee of one of the soil and water conservation  
11 districts. So it's not directly on point, but I think the  
12 analysis is the same. And the attorney general in 1980  
13 said that it is a distinct entity.

14 Finally, what I would say to answer your question  
15 is that in practice throughout upstate New York, this is  
16 how they have been operated as separate and distinct legal  
17 entities that can sue or be sued. And it would be a fairly  
18 dramatic change if this court were to determine that they  
19 were interchangeable. And so that is how I answer your  
20 question, Justice - - -

21 CHIEF JUDGE WILSON: That's a thorough answer.

22 MR. TOTH: Okay.

23 JUDGE RIVERA: Counsel, can I just - - - to  
24 clarify on that first part of your answer, I take it that  
25 you're - - - what you're saying is that county refers to a

1 geographic nomer versus county as the government structure.

2 MR. TOTH: Correct.

3 JUDGE RIVERA: Thank you.

4 MR. TOTH: Right. So that - - - and this  
5 happens, quite frankly, in my - - - in my office a lot  
6 where we get - - - we get named in a lawsuit because  
7 something happened in Erie County, even though we had  
8 nothing to do with it. And I think the statute, as I read  
9 it, with the Third Department case, with the Attorney  
10 General opinion, that's you know, that's a lot of dominoes  
11 - - - I think dominoes - - - it's a lot of bricks to undo  
12 at this point, 80 years down the road. The other thing I  
13 would add, a lot of discussion about the easements. It's  
14 my understanding, and I think it was you, Justice Singas,  
15 who asked us if the easements were in the record and  
16 they're not. There is testimony about the easements, but  
17 the easements themselves - - - and they were - - - they are  
18 on NYSCEF, but they are not in the record before this  
19 court. And I'm not sure why because the county was out of  
20 this case years ago. We were not involved in the trial so  
21 - - -

22 JUDGE SINGAS: Well, thank you, because I too  
23 have been thinking about that for nine months.

24 MR. TOTH: So it's difficult, I think, at this  
25 point, at this appellate level, to discuss in detail

1 easements that are not part of the record and to - - -

2 JUDGE HALLIGAN: Do you have a position, counsel,  
3 if warnings were appropriate, who was responsible for  
4 providing them?

5 MR. TOTH: I submit to this day that counsel that  
6 was given long before I worked for the county attorney's  
7 office was accurate because it was not either the county or  
8 the Erie County Soil and Water Conservation District or the  
9 Joint Board of Directors.

10 JUDGE HALLIGAN: Okay. So then who was it,  
11 though, if it - - - if in your view it was none of those  
12 entities?

13 MR. TOTH: So under - - -

14 JUDGE HALLIGAN: If we if we have something that  
15 requires a warning here, I'm not saying we do, but if we  
16 do, who needs to provide it?

17 MR. TOTH: My understanding, based on sort of  
18 centuries-old riparian rights, is that when in doubt, the  
19 state is responsible for navigable waterways within its  
20 limit. This is a navigable waterway. Clearly, it's  
21 unclear who owns the structure, but I think we can say with  
22 certainty that the water that flows over that structure - -  
23 -

24 JUDGE HALLIGAN: What about the bed?

25 MR. TOTH: And that - - - and the bed underneath

1 is the responsibility of the state.

2 JUDGE HALLIGAN: So your view is that the  
3 riparian rights doctrine extends to the bed as well as the  
4 water itself?

5 MR. TOTH: And that's based on some Supreme Court  
6 decisions, some old court of appeals and New York State  
7 decisions. But in the state of America, the state of  
8 Alaska, this is from 1997, United States Supreme Court  
9 referencing an opinion from 1849, essentially - - - not  
10 essentially, they say, a court deciding a question of title  
11 to the bed of a navigable water must begin with a strong  
12 presumption against defeat for state's title.

13 JUDGE TROUTMAN: So what did the federal  
14 government contract to give?

15 MR. TOTH: I think they just installed a dam and  
16 said, joint board, you operate it, you maintain it as a  
17 dam. And that's another critical piece of information.  
18 This dam still exists.

19 JUDGE TROUTMAN: But did they have ownership  
20 rights?

21 MR. TOTH: No, I don't believe they did. And if  
22 they did, I think those ended once it was permanently  
23 affixed in a state navigable waterway.

24 JUDGE TROUTMAN: Could - - - so they could not  
25 give ownership by the agreement?

1           MR. TOTH: I don't believe they could. Once it's  
2 affixed to that navigable waterway and the bed and clients  
3 here, all they have is an easement to maintain - - - not  
4 just - - - the easements are not just for the structure.  
5 The easements were created to have access to the river from  
6 one end of Erie County to the other. They were not just  
7 for the structure, and they still exist so that the clients  
8 here can perform their duties.

9           JUDGE RIVERA: So who owns the structure?

10          MR. TOTH: I'm sorry?

11          JUDGE RIVERA: Who owns the dam?

12          MR. TOTH: I believe when - - - when push comes  
13 to shove, it has to be the state because there is no other  
14 clear owner. It's just not - - - I mean, here we are.

15          JUDGE CANNATARO: So based on that answer, do you  
16 support or dispute the appellate division holding - - - the  
17 2021 appellate division holding, which suggests or says  
18 that the - - - once affixed to the land, that the  
19 structures run with the land?

20          MR. TOTH: I think that makes the most sense,  
21 certainly in this case. There might be, I mean, there  
22 might be situations where a - - -

23          JUDGE TROUTMAN: Why isn't it treated as a trade  
24 fixture?

25          MR. TOTH: I'm sorry?

1 JUDGE TROUTMAN: Why isn't it treated as a  
2 fixture, an exception that it would run with the land?

3 MR. TOTH: Because I - - - I - - - because it's  
4 been there for 80 years. It's not moving. And I just - -  
5 - it was built by the federal government. And quite  
6 frankly, the federal government said, okay, our job is done  
7 here.

8 JUDGE TROUTMAN: So is the owner of the land then  
9 to be responsible? Was that the intent of the government?

10 MR. TOTH: I don't know what the intent of the  
11 federal government was, but - - -

12 JUDGE TROUTMAN: That's what I'm asking.

13 MR. TOTH: Right. But what I would say is that,  
14 if the intent of the federal government was to walk away  
15 from ownership of this structure, then the only arguable  
16 owners left are either the state of New York or the private  
17 landowners who have deeds to the middle of their - - -

18 JUDGE CANNATARO: That's - - - that's not the  
19 agreement. We heard that the agreement that the federal  
20 government entered into was to convey title upon completion  
21 to the joint board; is that not accurate?

22 MR. TOTH: That's what it says. But I don't  
23 think that that is an effective way or a legal way - - -

24 JUDGE CANNATARO: Well, effective doesn't really  
25 matter, but legal does.

1 MR. TOTH: I don't believe that without having an  
2 interest in the land or at least articulating in that  
3 agreement something to do with navigable waterways, the  
4 bed, the water flowing over it, that a one sentence - - -

5 JUDGE TROUTMAN: So then by - - -

6 MR. TOTH: - - - in an agreement - - -

7 JUDGE TROUTMAN: By what authority then if they  
8 don't own it, how did it get there? Are you saying it just  
9 magically appeared and they could just do this? Why?

10 MR. TOTH: I mean, I would say it's it would be  
11 similar to if it was a private entity, building something  
12 on somebody else's land. That doesn't make it - - -

13 JUDGE RIVERA: Okay. But did the landowners sign  
14 an agreement?

15 JUDGE TROUTMAN: Right.

16 MR. TOTH: The landowners did not.

17 JUDGE RIVERA: Okay. So then you're saying that  
18 they're trespassers, not on the easement. We got the  
19 easement, even though we don't see what the easement is,  
20 let's just work with there's a valid easement. No one's  
21 saying they've somehow violated the easement in the  
22 construction or maintenance. I mean, what they're  
23 trespassing by having the dam. Somebody's got to now get  
24 rid of the dam because they're trespassing?

25 MR. TOTH: Well, I think again, I would then - -



1 - and it does, I mean, I understand it goes round and  
2 round, but then I would - - - I would - - - I would suggest  
3 that - - - and I don't think anybody's suggesting that the  
4 private landowners would have responsibility here, but I  
5 think they have more responsibility - - -

6 JUDGE RIVERA: Why not if it's a fixture?

7 MR. TOTH: Well, because then I think it goes  
8 back to the - - - to the sort of fundamental basics - - -  
9 not basics, the fundamental understandings of what a  
10 navigable waterway is.

11 JUDGE HALLIGAN: Those cases, counsel, that  
12 you're referring to, I thought they were cases where the  
13 state retains some involvement in the project. Are there  
14 any cases that you're aware of where there's something on a  
15 bed and the state - - - so far as I can tell, the state's  
16 had no involvement in this project from the record to date,  
17 but you'll correct me if I'm wrong. And so the notion that  
18 the state is somehow responsible because pursuant to an  
19 agreement that they're not party to someone built something  
20 on the bed of a navigable water doesn't seem obvious to me.  
21 So that's why I'm wondering if you can point to any cases  
22 that holds the state responsible. And as the owner  
23 effectively under riparian rights where they don't have any  
24 participation.

25 MR. TOTH: No, is the answer. I cannot, but I

1 would push back a little bit. The state created the system  
2 of soil and water conservation - - -

3 JUDGE HALLIGAN: But are they a party to - - - I  
4 didn't see them as a party to any of the agreements in the  
5 record, unless - - -

6 MR. TOTH: They are not a party. But by using  
7 that same theory, neither is the county of Erie, and  
8 neither are the two soil and water conservation districts.

9 CHIEF JUDGE WILSON: Can Erie County be held  
10 liable through its involvement in the operating agreement?

11 MR. TOTH: Well, my answer is no.

12 CHIEF JUDGE WILSON: And so - - -

13 MR. TOTH: I don't believe - - -

14 CHIEF JUDGE WILSON: That is - - - that is  
15 assuming - - - let's assume it's not an owner, can  
16 liability attach on a tort theory?

17 MR. TOTH: I don't believe so. I don't - - - I  
18 don't know how you would attach it - - -

19 CHIEF JUDGE WILSON: On a third-party beneficiary  
20 of the contract theory?

21 MR. TOTH: I mean, if you are the - - -the county  
22 and all municipal governments spend their money with  
23 outside entities and not-for-profits and private  
24 individuals, and if all of that money starts attaching  
25 potential liability, that, too, I would suggest, is a

1           pretty - - - pretty significant departure from the way  
2           we've understood how it is municipal entities can spend  
3           their money by giving it to independent entities, which is  
4           what we did here.

5                    JUDGE TROUTMAN:  So what - - - we have a contract  
6           where the federal government purports to convey an interest  
7           to the joint board in the structure.  What evidence is it  
8           that they had no right to do that?

9                    MR. TOTH:  Well, I mean, I'm not - - - what I  
10          would call it, it's an operation and maintenance agreement.  
11          And I think - - - I think that's you know, that's a  
12          distinction.  And I think they are saying we're going to  
13          build this as a dam, and you, joint board, are going to  
14          make sure it keeps working as a dam.

15                   JUDGE RIVERA:  Yeah, but if they don't own it,  
16          which I think is what you're saying.  If they don't own the  
17          dam, what could it possibly matter that they authorize  
18          someone else to take care of the dam if they don't own it?  
19          Couldn't the owner of the dam the next day say, you're  
20          trespassing; you can't touch my dam?

21                   MR. TOTH:  Well, in this case, if you follow my  
22          theory, it would be the state.  And I, you know, the state,  
23          I think, would have had - - -

24                   JUDGE TROUTMAN:  The state, who's not a party to  
25          the agreement?

1 MR. TOTH: The state, who's not a part of the  
2 agreement, but who has exercised and created the quasi-  
3 governmental entities that are in - - -

4 JUDGE RIVERA: And the landowner - - - the  
5 landowners are not parties to the agreement, correct?

6 MR. TOTH: The landowners are not part of the  
7 agreement. That's also correct.

8 JUDGE CANNATARO: But when you say - - - I'm  
9 sorry, when you say landowners, you're referring to the  
10 adjacent land? Because your argument is that the state is  
11 the landowner under its riparian rights, correct?

12 MR. TOTH: Well, my argument is the county of  
13 Erie is not the owner. And that leads us to this  
14 discussion about who is.

15 JUDGE CANNATARO: Anybody else. Yeah.

16 MR. TOTH: And the best I can come up with - - -

17 JUDGE CANNATARO: But I'm just curious, when you  
18 say the owners are not party to the agreement, are you  
19 referring to the state, which obviously is not a party to  
20 the agreement, or to some other group of owners who might  
21 be adjacent to the dam?

22 MR. TOTH: I believe I take justice's question to  
23 mean the - - - the private landowners where the deed marks  
24 go to the center of the river.

25 JUDGE CANNATARO: Um-hum.

1                   MR. TOTH: Then the question is, what is the  
2                   impact of those - - - of those actual deeds, those metes  
3                   and bounds? And I think my argument is that because it is  
4                   a navigable waterway, that the state maintains ownership  
5                   despite those deeds.

6                   JUDGE CANNATARO: So even though the dotted line  
7                   goes to the middle of the creek, the real ownership  
8                   interest ends at the bank?

9                   MR. TOTH: That would be my - - - that's my  
10                  reading of the case law.

11                  CHIEF JUDGE WILSON: Thank you.

12                  MR. TOTH: Thank you.

13                  MR. HAMMOND: May it please the court. Paul  
14                  Hammond on behalf of the town of West Seneca. I can't tell  
15                  this illustrious court who owns the dam, but I can tell you  
16                  who doesn't.

17                  CHIEF JUDGE WILSON: It seems to be a common  
18                  thread here.

19                  MR. HAMMOND: And the issue then becomes, is  
20                  there some duty in the part of the town of West Seneca to  
21                  give some sort of warning to the general public about the  
22                  possible hazards involved in this flood control dam. And  
23                  as the case law has been submitted, the key is ownership.  
24                  If you have some sort of ownership or control over the dam,  
25                  then you may have a duty to give notice to casual

1           trespassers upon the dam of the potential dangers. The  
2           other way you could be considered as having a duty of  
3           giving notice is if you've done something that perhaps  
4           enhance the danger. Or you had demonstrated - - -

5                   JUDGE TROUTMAN: So in your assessment, was the  
6           federal government in a position to convey anything, with  
7           respect to the structure itself, not the land?

8                   MR. HAMMOND: Well, Your Honor, the town of West  
9           Seneca was not a party to those agreements there. There  
10          are no responsibilities with regards to maintenance of the  
11          dams or construction or repair of the dams, and we are a  
12          separate entity. This is simply a dam that exists within  
13          the town boundaries, and I don't think there's any  
14          responsibility on the town.

15                  JUDGE TROUTMAN: So whatever rights they had, it  
16          doesn't affect you because you didn't have anything to do  
17          with it?

18                  MR. HAMMOND: That's absolutely correct, Your  
19          Honor.

20                  JUDGE TROUTMAN: Okay. Any other questions? If  
21          not, I'll sit down.

22                  CHIEF JUDGE WILSON: Thank you.

23                  MR. DELLA POSTA: May it please the court. Mark  
24          Della Posta, on behalf of the joint board.

25                  JUDGE HALLIGAN: Counsel, can I ask you the same

1 question I asked your colleague? If your position is that  
2 you are not responsible for any warnings that might be  
3 appropriate, who is?

4 MR. DELLA POSTA: Well, you assume that the NCRS,  
5 or the federal government, is the owner of the structure,  
6 and my client only has the ability to maintain and inspect  
7 the structure. I would - - - I would say that it's the  
8 federal government that has the duty to warn.

9 JUDGE HALLIGAN: Even though under the agreement  
10 you assume responsibility for maintenance, your view is  
11 that that would not extend to providing a warning?

12 MR. DELLA POSTA: The - - - the scope of what I  
13 can do, or my client can do, is very, very limited. If you  
14 want to do anything outside of that, which I would submit  
15 includes warnings, you would have to get permission from  
16 the federal government.

17 JUDGE HALLIGAN: But I take it there was no  
18 effort to obtain any permission. I mean, it's not as if -  
19 - - as if there was some attempt made that was thwarted by  
20 the federal government.

21 MR. DELLA POSTA: Over the years, it's my  
22 understanding there were many issues with the federal  
23 government that were addressed - - -

24 JUDGE HALLIGAN: Sorry, let me ask a better  
25 question. Is there anything in the record which suggests

1 that with respect to this particular dam and whatever  
2 drowning risk there might have been, that there was an  
3 effort made to seek any permission to post a warning from  
4 the federal government?

5 MR. DELLA POSTA: Not that I'm aware of, Your  
6 Honor.

7 JUDGE HALLIGAN: Thank you. Okay.

8 JUDGE GARCIA: Counsel, can I ask you - - -  
9 Counsel, I'm sorry here, a procedural question also. I'm  
10 struggling a little bit to understand what exactly is here.  
11 So there's directed verdict against your client and you  
12 appeal that, right? My understanding of - - - and there's  
13 a jury verdict. But there's a directed verdict against  
14 you. Jury and directed verdict against. That goes to the  
15 appellate division. The appellate division, I'm assuming  
16 by what they do, undoes the directed verdict and directs a  
17 verdict for you?

18 MR. DELLA POSTA: Yes.

19 JUDGE GARCIA: So it seems to me, let's say  
20 hypothetically, if we were to reverse the directed verdict,  
21 no court has considered whether or not the jury verdict was  
22 appropriate, because here's the follow up to that. If  
23 you're reviewing a jury verdict, the standard would be the  
24 party receiving the verdict gets every inference that can  
25 be drawn, right? So if we review a legal issue of



1 ownership outside the jury verdict, would we be applying  
2 the wrong standard?

3 MR. DELLA POSTA: I think - - - and my second  
4 point in my brief is that if you don't find that this is  
5 ripe for a directed verdict, then I believe you can  
6 reinstate the jury's verdict. Now, it may be procedurally  
7 that you would have to send it back to the trial court to  
8 have an appeal or a review of that jury verdict and whether  
9 that was warranted and whether there was any rational basis  
10 for it in the record.

11 JUDGE GARCIA: Right. And no one's ever done  
12 that, as far as I can tell.

13 MR. DELLA POSTA: No. We never got to that point  
14 because judge immediately after the jury's verdict directed  
15 the verdict against my client. So that's where that ended  
16 in the state court, and it went to the appellate division.

17 JUDGE GARCIA: And again, because it seems to me  
18 reviewing a jury verdict is a very different standard for  
19 us, right? Hearing a jury verdict would be, if there's  
20 support, whatever, giving every inference the party  
21 received a verdict, not kind of a de novo review of  
22 documents to see who is an owner?

23 MR. DELLA POSTA: No, I think - - - I think the  
24 directed verdict is obviously a higher standard that I  
25 believe I met, and the appellate division agreed with that.

1 But a lower standard is whether there's a rational basis or  
2 anything in the record to support that verdict. It gives a  
3 wide discretion, and you're right, that has not been  
4 considered by an appellate court yet.

5 JUDGE RIVERA: What - - - what, if any, different  
6 evidence, let me put it that way, was submitted to the  
7 jury, different from the summary judgment?

8 MR. DELLA POSTA: There really was no different  
9 evidence. There were the pictures, there was the  
10 agreement, and the deposition testimony of Mark Gaston,  
11 which was submitted in the summary judgment motion. The  
12 court at the trial, it was slightly different because his -  
13 - - his testimony was slightly different.

14 JUDGE RIVERA: Live testimony.

15 MR. DELLA POSTA: And that - - - and that was the  
16 basis for it. So that's the only change really is the - -  
17 - whatever he testified to, which was slightly different.

18 JUDGE RIVERA: So the difference - - - but also  
19 the live testimony.

20 MR. DELLA POSTA: I'm sorry?

21 JUDGE RIVERA: Also that it's live testimony as  
22 opposed to just reading it off the page.

23 MR. DELLA POSTA: I couldn't understand.

24 JUDGE RIVERA: I'm sorry. Also that it's live  
25 testimony.

1 MR. DELLA POSTA: Yes.

2 JUDGE RIVERA: As opposed to reading it off the  
3 page, which includes sort of credibility determinations in  
4 that, right?

5 MR. DELLA POSTA: Absolutely.

6 JUDGE RIVERA: Yeah.

7 JUDGE GARCIA: The issue here really isn't  
8 whether you are entitled to summary judgment, right? The  
9 issue is, were you entitled to the jury verdict? Is there  
10 a rational, reasonable basis for it, right? I mean, the  
11 summary judgment motion was just a denial based on the  
12 papers. The review of the jury verdict would be based on  
13 the testimony and the exhibits, etcetera, right?

14 MR. DELLA POSTA: Exactly. In the summary  
15 judgment motion they said I hadn't gone far enough to  
16 disprove the plaintiff's entitlement to a verdict. As Norm  
17 Crosby would say, now we're at trial, the burden is on the  
18 other foot. So in this case, he, the plaintiff, has to - -  
19 - has to make that proof. And the jury concluded that they  
20 didn't make that proof, and the appellate division agreed  
21 with that.

22 JUDGE GARCIA: But you - - -

23 JUDGE RIVERA: So who owns the dam?

24 MR. DELLA POSTA: Who owns the dam?

25 JUDGE RIVERA: I know you don't - - - I know your

1 client doesn't own the dam. That's your view. Who owns  
2 the dam? You agree that it's the state?

3 MR. DELLA POSTA: I think it has to be the state  
4 because it's on riverbed, riparian rights, and the  
5 navigable waterway.

6 JUDGE RIVERA: Well, if the state owns the dam,  
7 what interest does the feds have to convey? Doesn't that  
8 mean the state had to convey interest to you?

9 MR. DELLA POSTA: Correct.

10 JUDGE RIVERA: So what interest did you get from  
11 the feds? They don't own the dam.

12 MR. DELLA POSTA: I don't believe - - -

13 JUDGE RIVERA: So then are you trespassers every  
14 time you go and work on the dam?

15 MR. DELLA POSTA: I don't think they - - - all  
16 they - - - we have is basically an agreement to maintain it  
17 for them and inspect it.

18 JUDGE RIVERA: Yes, but if they have no interest  
19 in it?

20 MR. DELLA POSTA: They have no real property  
21 interest. They have no - - - because it's a fixture - - -

22 JUDGE RIVERA: Is there's some other interest  
23 based on this federal flood control process they were going  
24 through for decades, which is in part why you have this  
25 particular structure?

1 MR. DELLA POSTA: I'm sorry, Your Honor?

2 JUDGE RIVERA: Is there something else beyond - -  
3 - I mean, we're looking at this in a very discreet way.  
4 What are these agreements? What are these particular  
5 parties? But of course, this is against the backdrop of a  
6 large - - - larger project from the federal government. So  
7 I'm wondering if there might be any particular interest  
8 that draws from that for the feds and or the state.

9 MR. DELLA POSTA: Well, as Mr. Toth pointed out,  
10 I think the state sort of got this all started by  
11 establishing these conservation soil and water conservation  
12 districts. So to that extent, they have some interest in  
13 it. Not ownership - - -

14 JUDGE RIVERA: But I'm saying, isn't that because  
15 there's a federal flood control project going on throughout  
16 the country?

17 MR. DELLA POSTA: No, which is, I mean, there's  
18 the state's part of that in terms of partnership, but not  
19 directly. But I would want to point out one thing, Your  
20 Honors, on the Metro Media case, I think that case is very  
21 distinguishable, and here's why. That contract that was  
22 drafted between Metro Media and the owners was very  
23 specific in that this sign was attached and that at the  
24 conclusion of the lease, the owners could tell them to get  
25 that off of there and it could be removed in one day. And

1           it's - - - and it's attached with nuts and bolts. Here we  
2           have a dam that is not moveable, not - - -

3                   CHIEF JUDGE WILSON: Well, but you think - - -  
4           but you think that the state is the owner and presumably  
5           could remove it if it wanted to.

6                   MR. DELLA POSTA: Well, I guess anything can be  
7           done. But the sign is removable. It can be put up  
8           somewhere else. I mean, it's not like a pole or a pipe.  
9           It's something - - - you'd never be able to use it again.  
10          You got to take it out. And that's why it's attached to  
11          the party - - - attached to the property and part of the  
12          property.

13                   JUDGE HALLIGAN: But so if I'm understanding you  
14          correctly, there are a number of flood control mechanisms  
15          in various riverbeds, streams, creeks around the state.  
16          And your view is that the state owns all of those and is  
17          responsible for policing them and making sure that there  
18          are no hazards and proceeding accordingly and can take them  
19          out if they want to do that? That seems to all flow from  
20          your ownership theory.

21                   MR. DELLA POSTA: Well, I don't know, other than  
22          the five dams in this river, what those other agreements  
23          say.

24                   JUDGE HALLIGAN: Okay. Well, we could stick  
25          with - - - with the five dams here. But - - - but the

1 state, without any prior participation that's reflected in  
2 the record, anyway, was responsible for all these decades  
3 for making sure that it was safe and it was not creating  
4 any hazard to the community and could take it out, I  
5 assume, if it chose to do so?

6 MR. DELLA POSTA: It chose to do so yes.

7 JUDGE TROUTMAN: So - - - so - - -

8 JUDGE HALLIGAN: I would think that might  
9 surprise the state to know that.

10 MR. DELLA POSTA: Well, I still think that the  
11 federal government is owner of the structure itself, which  
12 is part of the property, and the fact that they're  
13 contracting with us to maintain it, I think it's the  
14 federal government that has the final say on what to do - -  
15 -

16 JUDGE TROUTMAN: So with respect to the joint  
17 boards back in 1959, is it fair to say that they did obtain  
18 the easement or the agreement with the federal government?

19 MR. DELLA POSTA: Yes, the easements were  
20 obtained.

21 JUDGE TROUTMAN: So why would they obtain the  
22 easement if they have no rights or responsibilities that  
23 were conveyed?

24 MR. DELLA POSTA: If you look at the soil and  
25 water law, they're an agent of the federal government to -

1 - - for purposes of getting these easements.

2 JUDGE TROUTMAN: So does the federal government  
3 own the structure then?

4 MR. DELLA POSTA: I think they - - - I think - -  
5 - I think if this contract had been structured differently,  
6 like in the Metro Media case, they could have structured it  
7 such that they own just the structure and - - -

8 JUDGE TROUTMAN: But you're saying they didn't,  
9 so they couldn't convey it to the board?

10 MR. DELLA POSTA: Exactly. It's a package deal,  
11 the way it's set up this, this, and this.

12 CHIEF JUDGE WILSON: So now it sounds like you're  
13 saying that the reusability of the fixture doesn't actually  
14 make a difference. It's just what's in the contract.

15 MR. DELLA POSTA: Right. The contract controls,  
16 I think, here. And we have a duty just to do what's under  
17 the contract. We aren't the owner. And unless we're an  
18 owner, public policy-wise, we have no ability to make  
19 changes or do anything to make it safer. It's not our  
20 responsibility. That's not - - - we can't do that.

21 JUDGE GARCIA: Counsel, did the jury determine -  
22 - - I don't know the answer to this, but did the jury  
23 determine who owned the - - - who was the owner, or did  
24 they just determine you were not the owner?

25 MR. DELLA POSTA: The way the verdict sheet was



1 structured was, was the joint board an owner of the  
2 project. And we argued over that. But that's how it was  
3 it came out, and that was the decision that they made.

4 JUDGE RIVERA: So let me just clarify. Did I  
5 hear you correctly that you said the federal government  
6 owns the structure?

7 MR. DELLA POSTA: I think they built it, they  
8 designed it, put it onto a piece of property for the extent  
9 it's a fixture to the property, then it's a package deal.  
10 But I think the federal government could have, but they  
11 didn't, write a better agreement such that just the  
12 structure itself, not the land, was transferred to us.  
13 They didn't do that. They could've done a lot of things.  
14 They didn't.

15 JUDGE CANNATARO: Before it became a fixture - -  
16 - counsel, before it became a fixture to the property, I  
17 guess it would be - - - it was a trespass on the property?

18 MR. DELLA POSTA: I don't think they were  
19 trespassing because they had the ability under the easement  
20 to go on the property.

21 JUDGE CANNATARO: Well, the easement provides you  
22 the right of passage to the - - - to the dam, but the land  
23 upon which it's affixed is, I believe you said, the state's  
24 land.

25 MR. DELLA POSTA: It is the state's land.

1                   JUDGE CANNATARO: So that sounds like a trespass  
2 to me.

3                   MR. DELLA POSTA: As Mr. Toth said, there's sort  
4 of some circular arguments that go on here. You never get  
5 to the end of it just because there's so many different  
6 moving parts and - - - and not a great answer.

7                   JUDGE HALLIGAN: I might be - - - I might be  
8 misunderstanding, but I thought you said that the state  
9 owns under the case law the riverbed and it has riparian  
10 rights to the water.

11                  MR. DELLA POSTA: Yes.

12                  JUDGE HALLIGAN: And if your view is that, and  
13 maybe it's not, but if your view is that a fixture runs  
14 with the land, then I would think that would mean that the  
15 state would be the owner of the dam and not the federal  
16 government. What am I missing there?

17                  MR. DELLA POSTA: Under Real Property Law,  
18 riparian law, that is correct. I'm saying that they could  
19 have structured it differently like they did in the Metro  
20 Media case and say we're in a for purposes of this  
21 agreement with whomever it is, we're going to separate  
22 those two things out. They could have done that or tried  
23 to do it. They didn't do any of that. They just said real  
24 property, including fixtures. It's yours. But they didn't  
25 have the right to do that.

1 CHIEF JUDGE WILSON: And just going back to one  
2 of Judge Halligan's questions for a minute. What is your  
3 basis for believing you have to get the federal  
4 government's permission to put up warning signs?

5 MR. DELLA POSTA: The - - - if you read over that  
6 three-page agreement, plus the five pages of standards, the  
7 scope of that agreement is so comprehensive in terms of, we  
8 have to get permission to do anything, anything. They  
9 don't give you permission to do anything other than inspect  
10 and report to us if there's any problem. That's all we can  
11 do.

12 CHIEF JUDGE WILSON: When you say all we can do,  
13 you say to do anything to the dam - - -

14 MR. DELLA POSTA: Right.

15 CHIEF JUDGE WILSON: Right? But what about  
16 signage on the riverbank?

17 MR. DELLA POSTA: I think if you read that  
18 contract, it - - -

19 CHIEF JUDGE WILSON: Okay. So the answer is it's  
20 the contract is what requires that?

21 MR. DELLA POSTA: Yeah, the contract prohibits us  
22 from doing anything. They don't want us to do anything.  
23 We're just at their beck and call.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. DELLA POSTA: Thank you, Your Honors.

1 MR. HENDRICKS: Good afternoon, Justin Hendricks  
2 on behalf of the Erie County Soil and Water Conservation  
3 District. I'd like to pick up first with that question  
4 about the trespass issue, if the riparian rights should  
5 hold in the underlying bed should be New York State's  
6 property. I think that it's not a trespass in large part  
7 because New York State specifically created the joint board  
8 in 1949 to take federal monies and do what was necessary in  
9 the Buffalo Creek watershed. It is not a very long law  
10 that created the joint board.

11 JUDGE CANNATARO: It was something like a - - -  
12 it was something like a license from the state?

13 MR. HENDRICKS: Perhaps I'm not going to pretend  
14 to know exactly what the title of the conveyance was, but  
15 the Buffalo Creek watershed is specifically stated in the  
16 chapter 374 law. So there is no question that the  
17 legislature knew that they were creating a joint board  
18 whose purpose was to do the acquiring of monies from the  
19 federal government and then spending that monies. So I  
20 think that the argument can be made that New York State is  
21 not, in this case, I can't speak to any others, some  
22 unknowing owner of various dams throughout New York State.  
23 Here they - - - they can - - - they asked that this  
24 happened, and it did.

25 JUDGE RIVERA: So then can the agreement with the

1       feds be seen as the state through the joint - - - let me  
2       put it this way, the joint board as a state's agent - - -  
3       it sounds like what you're suggesting. I may misunderstand  
4       you. You'll correct me if I'm wrong, is then accepting the  
5       ownership, recognizing the ownership and simply has  
6       negotiated maintenance?

7               MR. HENDRICKS: I - - - I believe that the  
8       agreement, as counsel for the joint board just detailed, is  
9       incredibly specific on what the joint board is and is not  
10      able to do, and that New York State has effectively signed  
11      off on that because they created the joint board  
12      specifically. This is not a situation where Erie County  
13      and Wyoming County decided to get together and approach the  
14      federal government to try and control the Buffalo Creek  
15      watershed. The New York State legislature specifically  
16      made this joint board. And I think that that point here -  
17      - -

18             JUDGE TROUTMAN: So it's your view that New York  
19      State and New York State alone is responsible for the  
20      structure?

21             MR. HENDRICKS: I mean, the word responsible  
22      could be very broad there, Your Honor. I think that New  
23      York State now owns the structure because it's permanently  
24      affixed to the waterbed that they own. Yes.

25             JUDGE TROUTMAN: What did the agreement provide

1 for between the federal government and the joint board?

2 MR. HENDRICKS: It provided for a number of  
3 things, specifically what - - -

4 JUDGE TROUTMAN: Did they transfer ownership?  
5 That is the federal government transfer ownership to the  
6 joint board or anyone else?

7 MR. HENDRICKS: I mean, I think we've all taken a  
8 stab at answering that question, Your Honor. And to be  
9 honest, my answer is not going to be any different than  
10 what they have said.

11 JUDGE TROUTMAN: Is your answer, basically, it's  
12 not us?

13 MR. HENDRICKS: Well, it's certainly not the Erie  
14 County Soil and Water Conservation District. We're not a  
15 party to that agreement.

16 JUDGE TROUTMAN: But you believe it's the state?

17 MR. HENDRICKS: I think it has to be the state  
18 because of where it is now located.

19 JUDGE TROUTMAN: And they didn't have to sign any  
20 agreement, it's just default?

21 MR. HENDRICKS: I don't, I mean, again, my  
22 position would be that they effectively did because they  
23 affirmatively created the joint board. There was nothing -  
24 - - you know that, again, this was not Erie County - - -

25 JUDGE TROUTMAN: Did they control the boards

1 after their creation?

2 MR. HENDRICKS: I'm so sorry, ma'am.?

3 JUDGE TROUTMAN: Do they control the boards after  
4 they create them? Do they direct them and tell them what  
5 to do?

6 MR. HENDRICKS: Well, certainly not. But I  
7 think, frankly, that would be impractical, which is why  
8 they've created this board to have - - -

9 JUDGE TROUTMAN: So they create them, then they  
10 can't do anything about what they do or don't do, but then  
11 they're ultimately responsible because they created them?  
12 It was conceded that this is kind of circular.

13 MR. HENDRICKS: Well, it certainly is. But to  
14 pick up my point, they could pass another law.

15 JUDGE CANNATARO: Well, to go back to the  
16 question another way, they are an independent entity that  
17 can sue and be sued, aren't they?

18 MR. HENDRICKS: I'm sorry, who is this?

19 JUDGE CANNATARO: The - - - the district.

20 MR. HENDRICKS: My district?

21 JUDGE CANNATARO: Yeah, the conservation  
22 district.

23 MR. HENDRICKS: Oh, I mean, that's - - - that's  
24 black and white. That's Section 9, sub 9, says that - - -  
25 authorizes the district to sue and be sued.

1                   JUDGE CANNATARO: So it undercuts - - - it  
2 somewhat undercuts the argument that somehow there's a  
3 vicarious ownership that runs through the joint board to  
4 the state, doesn't it?

5                   MR. HENDRICKS: Perhaps in some respects, but I  
6 don't know why that would be the case here when, again,  
7 we're talking about a permanent structure that now exists  
8 in a navigable waterway.

9                   CHIEF JUDGE WILSON: It's not exactly correct, is  
10 it, to say that the state created the joint board? Didn't  
11 what the state do is enact legislation that allowed two or  
12 more counties to, if they chose to do so, create a joint  
13 board?

14                   MR. HENDRICKS: Well, I don't believe so, Your  
15 Honor, respectfully, because the Erie County Soil and Water  
16 Conservation District already existed. The Wyoming County  
17 Soil and Water conservation already existed.

18                   CHIEF JUDGE WILSON: By choice of those counties,  
19 right?

20                   MR. HENDRICKS: But when read right chapter 374 -  
21 - -

22                   CHIEF JUDGE WILSON: Right. Just try that for a  
23 second. By choice of the counties, yes?

24                   MR. HENDRICKS: Well, certainly - - -

25                   CHIEF JUDGE WILSON: The county could have



1           decided not to declare a district, right? But to take an  
2           affirmative act.

3                     MR. HENDRICKS: But when 374 was written, they  
4           did exist.

5                     CHIEF JUDGE WILSON: Right.

6                     MR. HENDRICKS: The legislature knew that. And  
7           it says that they shall constitute a joint board. It  
8           didn't say that feel free to go now and make a joint board.  
9           And here's what that joint board can do. It said, you now  
10          have a joint board. It exists. Here are its powers.

11                    CHIEF JUDGE WILSON: Thank you.

12                    MR. HENDRICKS: Thank you, Your Honors.

13                    MR. BARTH: Good afternoon. If it pleases the  
14          court. Phil Barth on behalf of the Wyoming district. I  
15          couldn't help listening about all the conversations about  
16          whether the state's an owner or not an owner. As was  
17          correctly pointed out, I can only say that my client is not  
18          an owner, but there is a pending court of claims case. And  
19          perhaps that's the question that would be answered there as  
20          opposed to here.

21                    CHIEF JUDGE WILSON: Well, I mean, that case  
22          might wind up saying the state is not an owner and then we  
23          have no owner.

24                    MR. BARTH: That's - - - that's an interesting  
25          question, Judge. I don't know what a court of claims judge

1 is going to do, but with respect to my client, we're - - -  
2 our contention we're seriously not an owner. We don't have  
3 any contracts. It's not even in our county. The - - - we  
4 have no operating agreement. We don't - - - we didn't  
5 build it. We don't fix it. We don't maintain it. We are  
6 a separate entity from the joint board. I think that's  
7 been established that the joint board is its own entity,  
8 can make contracts, can engage in easements, can be sued,  
9 can sue. Obviously, they've been sued. So the Wyoming  
10 board has no connection to the dam - - -

11 JUDGE RIVERA: And the joint board can hold title  
12 to property?

13 MR. BARTH: It doesn't.

14 JUDGE RIVERA: I'm sorry, what?

15 MR. BARTH: It does not. In my - - - I'm - - - I  
16 represent Wyoming, so I can't speak for the joint board,  
17 but my understanding from this case is that the joint board  
18 does not own property, does not have any assets, does not  
19 have any employees, and essentially uses other people to do  
20 the work that it's contracted to do. If there's no more  
21 questions, thank you.

22 MR. QUINLAN: If I may address some of these  
23 points. In this case, there has never been any evidence or  
24 any finding regarding whether the Buffalo Creek in the area  
25 of this dam, was before it was constructed, or is now,

1        navigable. And certainly, as a matter of fact, it is not  
2        navigable. As people who tried to do boating or tubing in  
3        the - - - in the vicinity of this dam, died. And secondly,  
4        I would like to address the point about before this  
5        accident on a couple of occasions, the joint board, in  
6        fact, did seek permission to - - - to put up warnings. If  
7        you look at pages 87 to 91 of the record and page 93, and  
8        as is covered in our briefs, that after the accident  
9        happened, the joint board, in fact, did erect - - - or the  
10       joint board and or the Erie district did erect warnings at  
11       various places regarding this dam, both on the dam itself  
12       and on property owned by West Seneca.

13                    And I just think that overall that this agreement  
14       - - - and finally, I would say that, you know, with various  
15       things like utility poles and so forth, you know, they are  
16       not owned by the owners of the land. Rather, the utility  
17       gets the - - - gets an easement and then they build and are  
18       considered to be the owner. And finally, regarding the  
19       Metro Media case, that this was considered to be a fixture,  
20       even though there was a time period involved that was quite  
21       much shorter than involved in our case. But I don't think  
22       that that really - - - that law didn't really matter. The  
23       Metro Media cases the way was decided more on the basis of  
24       what the parties intended. And here the - - - the parties  
25       to the agreement intended that for the purposes of

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operation and maintenance, which to me - - - which includes  
the right to place warnings, that the joint board was an  
owner for those purposes. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Suzanne P. v. Joint Board of Directors, No. APL 2022-33 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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