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SUPREME COURT

JUN 26 1995

ENTRY ORDER

SUPREME COURT DOCKET NO. 94-165

MAY TERM, 1995

In re Poultney River Committee

APPEALED FROM:

Rutland Superior Court

DOCKET NO. S0693-92RcCa

In the above-entitled cause, the Clerk will enter:

The Poultney River Committee appeals from a superior court order affirming a decision of the Water Resources Board, which concluded that the Committee was collaterally estopped from challenging an aquatic nuisance permit issued to the Department of Fish and Wildlife. We affirm.

In March 1990, the Department of Environmental Conservation (DEC) issued a permit, C90-01, pursuant to 10 V.S.A. § 1263a, to the Department of Fish and Wildlife (DFW) to institute a temporary chemical treatment program in specific waters and delta areas of Lake Champlain to control the sea lamprey population. In October 1990, DFW filed a request with DEC to amend the permit to extend the time period for treatment and to expand the treated waters to include the Poultney and Hubbardton Rivers. DEC held a public meeting on the proposed modification, which was attended by several members of the Poultney River Committee. Following the meeting, DEC made findings and concluded that DFW's request satisfied § 1263a's statutory requirements. DEC then granted an amended permit, C90-01A. Pursuant to its rules, DEC sent notification of the amended permit to the people who attended the public meeting. The letter instructed interested parties to notify the Water Resources Board (WRB) within thirty days of an intent to appeal DEC's decision. 10 V.S.A. § 1269. No one appealed.

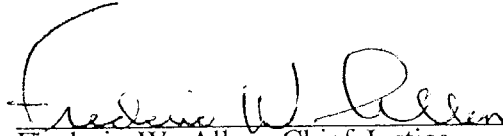
In January 1992, DFW applied for a modification to the amended permit. The requested modifications included time extensions and material alterations to the treatment of the same water sources specified in C90-01A, including the Poultney river. DEC published notice of its intent to consider DFW's request and to provide an opportunity for a public hearing upon request. A public meeting was scheduled and several Committee members attended. Following the meeting, DEC issued a second permit, C92-01, authorizing the five modifications. The Committee timely appealed to WRB, challenging DEC's decision to treat the Poultney River.

WRB rejected the Committee's appeal. It reasoned that the Committee was collaterally estopped from challenging DEC's decision to authorize lampricide treatment of the Poultney River because that issue was necessarily decided when the Board approved C90-01A and concluded that the proper scope of an appeal was limited to the five modifications authorized by C92-01. Pursuant to V.R.C.P. 75, the Committee appealed to Rutland Superior Court, which affirmed the Board's decision. The Committee now appeals to this Court.

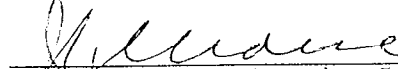
We agree with WRB's order, but conclude that res judicata, not collateral estoppel, bars the Committee's appeal. See Gochey v. Bombardier, Inc., 153 Vt. 607, 613, 572 A.2d 921, 925 (1990) (Supreme Court may affirm on different grounds). Res judicata bars the litigation of a claim if there exists a final judgment in a former litigation in which the "parties, subject matter and causes of action are identical or substantially identical." Berlin Convalescent Ctr. v. Stoneman, 159 Vt. 53, 56, 615 A.2d 141, 143 (1992) (quoting Berisha v. Hardy, 144 Vt. 136, 138, 474 A.2d 90, 91 (1984)). The lampricide treatment of the Poultney River was authorized by C90-01A. The Committee had thirty days to appeal C90-01A, but did not. Therefore, the decision to treat the Poultney River was final and the only issues properly before the Board in 1992 were the merits of the five modifications authorized by C92-01.

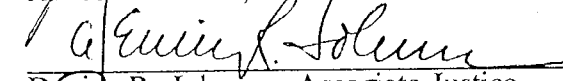
Affirmed.

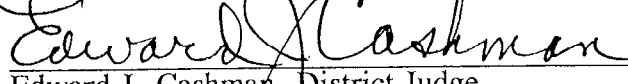
BY THE COURT:


Frederic W. Allen, Chief Justice


Ernest W. Gibson III, Associate Justice


James L. Morse, Associate Justice


Denise R. Johnson, Associate Justice


Edward J. Cashman, District Judge
Specially Assigned

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