

State Supreme Court ruling in lake-level case stirs concern about water protections

Lake Koshkonong dispute leads justices, citing private land rights, to limit public trust doctrine

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July 17, 2013

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Madison — The Wisconsin Supreme Court ruled Tuesday that regulators should have considered more testimony in setting a lake's water level, while dissenters warned that the decision weakens the state constitution's water protections.

The 4-3 decision comes just two years after the Supreme Court unanimously agreed on a [separate case](#) over the state constitution's public trust doctrine, which holds that Wisconsin's lakes, rivers and streams are to be maintained for the general public's benefit.

In [Tuesday's ruling](#), the court found that the doctrine does not apply to areas above a lake's ordinary high water mark.

"If the public trust were extended to cover wetlands that are not navigable, it would create significant questions about ownership of and trespass on private land, and it would be difficult to cabin expansion of the state's new constitutionally based jurisdiction over private land," Justice David Prosser wrote.

The dissenting opinion called the majority view a reversal of a string of cases going back decades.

"Instead of limiting itself to addressing only what must be addressed, the majority seizes this opportunity to limit the public trust doctrine in an unforeseen way, transforming the state's affirmative duty to protect the public trust into a legislative choice," Justice N. Patrick Crooks wrote in dissent. "It needlessly unsettles our precedent and weakens the public trust doctrine that is enshrined in the Wisconsin Constitution. This represents a significant and disturbing shift in Wisconsin law."

Crooks was joined in dissent by Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley.

Filling out Prosser's majority were Justices Michael Gableman, Patience Roggensack and Annette Ziegler.

The 4-3 divide has become a familiar one, surfacing over recent years on some of the most substantive issues the court has taken on.

The case stems from a long-running dispute over the level of Lake Koshkonong, a large, shallow lake situated primarily in Jefferson County that extends into Rock County.

A dam on the lake was repaired in 2002, and the water was put at a level that the state Department of Natural Resources had long sought. The change put the lake at its lowest level in decades.

The Rock-Koshkonong Lake District and others in 2003 asked the DNR to raise the water levels. The DNR rejected the request and the district appealed — first to an administrative law judge, then to Rock County Circuit Court and the Court of Appeals. At all levels, the judges sided with the DNR.

The case then went to the Supreme Court, and on Tuesday it sent the case back to Circuit Court with directions to consider testimony on the economic impact of the water levels that was originally excluded.

In its ruling, the high court also made its findings on the scope of the public trust doctrine.

Prosser wrote that the DNR inappropriately relied on the public trust doctrine to regulate land and non-navigable water above the ordinary high water mark. But Prosser went on to say the DNR has the authority to regulate those areas under state law.

That determination cuts two ways for conservationists — the DNR does have the authority to regulate such lands and waters, but that power comes from state law, which is much easier to change than the state constitution.

The ability to regulate the lands and water at issue comes from the state's police power, Prosser wrote.

"...The state may have statutory authority to weigh in on scenic beauty beyond its public trust jurisdiction, but giving the state constitutional trust power to regulate 'scenic beauty' would arguably give the state authority to regulate any private land that could be seen from navigable waters," Prosser wrote.

But Crooks contended the finding "untethers our constitutional jurisprudence from its foundation and attempts to transform 165 years of constitutional precedent into a mere legislative exercise of the state's police power."

"The citizens of Wisconsin may rightly wonder why the majority is limiting the protection of Wisconsin's waters and reaching a constitutional question that is not essential to its holding," he wrote.

But William O'Connor, an attorney for the lake district that won in Tuesday's case, said he did not believe the court had restricted the public trust doctrine. Rather, it simply made clear that wetlands on private lands near the lake were not subject to the doctrine.

"It does not clothe with constitutional status private land that happens to be near by navigable water," O'Connor said of the ruling.

The case was closely watched, with environmental groups and the state's largest business lobbying group, Wisconsin Manufacturers & Commerce, filing friend-of-the-court briefs.

Scott Manley, WMC's vice president of government relations, said the decision creates a bright line that makes clear the public trust doctrine applies only to navigable waterways.

"It really, I think, clarifies and takes away a lot of ambiguity that has resulted over the years in case law," he said.

That ruling is a welcome change from the unanimous 2011 decision that the DNR had to consider the impact on the state's groundwater when considering issuing a permit for a high-capacity well, he said.

Elizabeth Wheeler, an attorney with Clean Wisconsin, said Tuesday's decision appeared to contradict past rulings without overturning them.

The ruling has implications for future public trust doctrine cases, Wheeler said, and that raises concerns for those [contemplating lawsuits](#) over a [proposed massive open-pit iron mine](#) in northern Wisconsin.

"We're definitely concerned about that," she said. "We don't want to backtrack on our strong history on our water as a public resource."

The ruling means the dispute over the Lake Koshkonong's levels — already more than a decade old — will continue. **The Circuit Court will now have to consider testimony on economic impacts,** but that does not mean the court's final ruling will change, said Wheeler and Buck Sweeney, an attorney for groups that intervened in the case.