



Divided Wisconsin Supreme Court limits DNR power

5 HOURS AGO • ASSOCIATED PRESS

A divided Wisconsin Supreme Court on Tuesday ruled against the state Department of Natural Resources in a case that could set a precedent for how much power the DNR has over setting water levels on lakes affected by dams.

The court, in its 4-3 decision, said the DNR does not have the authority under the public trust doctrine, contained in the state constitution, to consider the impact of water levels on private wetlands above the ordinary high water mark. Instead, the court said the DNR has broad authority to protect those areas under other state laws, not under the constitution.

Extending the doctrine to non-navigable wetlands would eliminate the very rationale for the doctrine, which was to protect, preserve, and promote Wisconsin's waters, Justice David Prosser wrote for the majority.

"The ramifications for private property owners could be very significant," he said.

Justice Patrick Crooks, writing the dissent, said the ruling attempts to undermine the public trust doctrine.

"This represents a significant and disturbing shift in Wisconsin law," Crooks said.

The case began in 2005 when the DNR rejected a request from the Rock-Koshkonong Lake District to raise water levels 7.2 inches on Lake Koshkonong, a 10,500 acre lake about 5 miles southwest of Fort Atkinson. It is the sixth largest inland lake in Wisconsin, with 27 miles of shoreline, but it has an average depth of just seven feet.

The lake district wants to raise water levels during low periods in the summer, which supporters argued would help bolster tourism, lake access, and the value of property around the lake.

But the DNR argued that raising the levels would worsen shore erosion and cause a loss of wetland habitat at the lake. There are 12.4 miles of wetland shoreline at the lake containing diverse species of wildlife and vegetation. The lake district said the DNR was overstepping its legal powers in setting the water limits, and did not properly consider the economic effect of its decision.

The Supreme Court agreed with the lake district and said the DNR wrongly excluded most testimony on the economic impact of lower water levels for residents, businesses and tax bases at and near the lake.

"The DNR's exclusion of most economic evidence was inconsistent with its acceptance of competing economic evidence that helped sustain its water level decision," Prosser wrote for the court.

The high court sent the case back to the Rock County Circuit Court with orders that the previously excluded testimony be considered when deciding whether the lake levels should be raised.

Brian Christianson, chairman of the lake district, praised the court's decision and said he believed consideration of the economic data will lead to the court allowing the water level to go up.

"You need to take that into account," said University of Wisconsin-Whitewater economics professor Russ Kashian, who presented some of the economic data that was rejected. "You just can't say it's good for the

ducks. Ducks are important too, but you have to weigh all of the consequences."

Attorney Charles "Buck" Sweeney said he expects the lower court will uphold the DNR's original decision even with the additional economic evidence. Sweeney represented the Lake Koshkonong Wetland Association and the Thiebeau Hunting Club, which supported the DNR's ruling because they believed it would protect wetlands adjacent to the lake.

Sweeney also predicted the case, which is already eight years old, will drag on for years more as appeals are filed to the next decision by the circuit court. Bill O'Connor, the attorney for the lake district, said it was too soon to tell what would happen next in the case, but he agreed that resolution could still be years away.

DNR spokesman Bill Cosh said the opinion was being reviewed and that the agency will work with the attorney general's office on the next steps when the case goes back to circuit court.

Several environmental groups, including Clean Wisconsin, Wisconsin Wetlands Association and Wisconsin Lakes, supported the DNR's process for protecting wetlands when making decisions about lake water levels.

Elizabeth Wheeler, the attorney for those groups, said the ruling unnecessarily narrowed the DNR's authority to regulate non-navigable waters through the public trust doctrine, but it also bolstered it by saying the agency can regulate those areas using other laws.

"It's not a clear cut win or loss," she said.

Crooks was joined his dissent by Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley. Prosser was joined in the majority by Justices Pat Roggensack, Michael Gableman and Annette Ziegler.