

Lake Koshkonong ruling could set precedent

By NEIL JOHNSON

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MADISON — The court fight over water levels at Lake Koshkonong took the stage for its final act Wednesday when oral arguments kicked off in front of the Wisconsin Supreme Court.

A decision by the seven-justice panel is pending, and it likely will mark the end of the road for the case, which has been mired since 2005 in a legal battle between the Rock-Koshkonong Lake District and the Wisconsin Department of Natural Resources.

Some statewide groups believe the Supreme Court's decision could set a precedent for how much power the DNR will have over water levels at hundreds of impounded lakes statewide.

The DNR points to more than 120 findings in a study that show how the lake district raising water levels at Lake Koshkonong could worsen shore erosion, harm water quality and submerge and damage sensitive wetlands surrounding the 10,000 acre impounded lake east of Edgerton.

That's got state environmental groups concerned.

"The health of about 2,000 Wisconsin lakes rests on this Supreme Court decision," Elizabeth Wheeler, an attorney for environmental group Clean Wisconsin, told The Gazette Wednesday.

The DNR wants no changes to a 1991 requirement that the lake district adhere to a standard for water levels at Lake Koshkonong using the Indianford Dam.

The lake district argues the DNR should allow it to use the dam to raise the lake 8 inches during low water periods.

The lake district wants the Supreme Court to force the DNR to consider the economic impact water levels have on property owners and businesses along impounded lakes.

"(For the DNR) to not even consider economic impact is an error," said Arthur Harrington, an attorney for Rock River-Koshkonong Association, a party to the lake district's case against the DNR.

The DNR has long held that it's not required to consider how water levels affect commerce, tourism and property values on impounded lakes.

"Do we really want the DNR to be arbiter of property values?" said Assistant Attorney General Cynthia Hirsch, who represented the DNR at Wednesday's hearing. "I don't know how the DNR could consider in a speculative way the value of real estate."

Clean Wisconsin, Wisconsin Wetlands Association and Wisconsin Lakes filed papers with the Supreme Court in support of the DNR using constitutional authority to shield wetlands.

The lake district, however, argues the DNR is overreaching its authority.

The Great Lakes Legal Foundation filed papers in support of the lake district's fight to raise water levels.

The group argues the state constitution normally protects only "navigable waters," not adjacent, private wetlands, and that the DNR's actions set a dangerous precedent.

"If allowed to stand, the Court of Appeals decision will greatly expand the authority of DNR bureaucrats to impose onerous regulations on landowners," Great Lakes Legal Foundation Attorney Andrew Cook wrote in a statement.

Lake district Chairman Brian Christianson took the argument a step further.

"Under DNR interpretation, this state agency could theoretically drain every man-made lake in Wisconsin to create more wetlands," Christianson wrote in a statement. "Think about the billions of dollars of lost property valuation."

Rock-Koshkonong Lake District attorney William O'Connor argued Wednesday that the lake district simply wants to take steps toward a status quo of higher water, which he said the lake had in decades before the DNR regulation.

There's one problem with that, argued Charles "Buck" Sweeney, an attorney for the Lake Koshkonong Wetland Association, an environmental group that supports the DNR.

"Things have changed since 1915, when people just filled in wetlands," Sweeney said.

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