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Lake Koshkonong level before Supreme Court

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MADISON - Property owners seeking higher levels for Lake Koshkonong finally got their case before the Wisconsin State Supreme Court Wednesday.

At each step in the litigation that began in 2004, the Rock-Koshkonong Lake District has not been able to convince the courts that the state Department of Natural Resources needs to consider the economic impacts on property owners and property values in its lake level decisions.

An attorney for the lake district noted that from 1987-2001, the lake routinely had higher levels than it does today because two of the gates on the Indianford Dam were rusted shut or the dam was not operated according to the DNR's order.

The 4,000 members of the lake district get more enjoyment from the deeper levels of the shallow 25,000-acre lake that averages about seven feet deep, said attorney William O'Connor.

Contrary to their wishes, the lake's levels have been closer to the DNR's governing order since the district restored the dam and eventually took title of it in 2004. After monitoring water quality, assessing wetlands and wildlife habitat, the district petitioned the DNR in 2003 to return to the lake levels established in 1991 that would increase the depth by several inches over the DNR's existing order and eliminate the winter drawdown.

The DNR agreed to raise the winter drawdown level by six inches, but concluded that changes in the lake's summer level would have adverse effects on the 4,000 acres of wetlands surrounding the lake.

The Rock-Koshkonong Lake District challenged the decision before an administrative law judge, who agreed ultimately with the DNR. Subsequent appeals to Rock County Circuit Court and the District 4 Court of Appeals also upheld the DNR's new order.

On Wednesday, attorneys for the lake district argued that while the DNR needs to consider protecting habitat when it issues orders for the 2,000 impounded lakes in the state, it also must protect the surrounding property.

"It was improper to exclude the economic evidence of its decisions on property owners," O'Connor said.

However, Justice Patrick Crooks asked if there was a difference between protecting property and enhancing the value of property.

O'Connor replied that protecting property means protecting its value. Construction of the Indianford dam in 1915 transformed the Rock River, created Lake Koshkonong and created economic development. Property surrounding the lake is now valued at a total of about \$500 million.

"The purpose of the dam was general economic development ... early (court decisions) recognized this ... but the DNR's lower water level would diminish property value," O'Connor said.

Unfortunately, "a lot of water has gone over the dam," since those cases Assistant Attorney General Cynthia Hirsch argued on behalf of the DNR. Since 1972, the Wisconsin Supreme Court has held that the public has an interest in the lands adjacent to navigable waters because, "you can't protect water quality without protecting the wetlands from which that water flows."

Justice Patience Roggensack asked how water quality was affected by the higher lake levels that occurred before the dam was fixed.

Evidence indicated that the quality of the lake and wetlands deteriorated during the period of higher levels, Hirsch replied, a point O'Connor later disputed.

The DNR's responsibility is to protect water quality and the habitat used by fish and waterfowl, Hirsch said, and no court has required the DNR to consider the economic impact when determining lake levels.

Hirsch agreed with Roggensack that the DNR studies the environmental impact of power plants before they are built. However, becoming "an arbitrator of real estate values," as required by the Lake District's request, "is a big leap," she said.

Charles Sweeney, attorney for the Lake Koshkonong Wetland Association and the Thiebeau Hunting Club, said he grew up on the marshy shores of the lake, and raising the lake level would destroy the hunting value of the club's land.

"Raising the lake level also takes away rights enjoyed by fishermen, hunters and birdwatchers," said Sweeney, who was asking for the status quo.

Sweeney argued against the court ordering the DNR to consider the effects that higher lake levels would have on economic development away from the lake, including the "gas station in Milton ... as there's no ending point."

This summer's drought actually helped the marsh's quality because typically higher lake levels mean more silt, phosphorous and algae, he said.

O'Connor got in the last word, arguing that the DNR improperly considered the impact of higher lake levels on public and private wetlands, which results in an unwarranted expansion of public interference in private property.

The court took the case under advisement. It is not expected to determine for several months whether the DNR should reconsider its decision not to include the effects of lake levels on property owners in its decisionmaking process.

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