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## Landmark case tests DNR's Public Trust authority

*WMC, others accuse state of trying to expand DNR regulatory authority beyond ordinary high water mark*



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*Investigative Reporter*

It hasn't come up much in recent years, but once again the state Department of Natural Resources is in court over how much regulatory authority the state's Public Trust Doctrine gives it.

Now the matter is in the state Supreme Court, which heard oral arguments last week in Rock-Koshkonong Lake District v. DNR, a case in which both sides said critical issues were at stake.

On the one side are the lake district, Wisconsin Manufacturers & Commerce, the Midwest Food Processors Association and others who contend the DNR is for the first time trying to expand its Public Trust authority beyond the ordinary high water mark to regulate privately owned, nonnavigable wetlands.

On the other side are the DNR, the state Department of Justice, and organizations such as the Wisconsin Wetland Association, Clean Wisconsin and Wisconsin Lakes, which say a favorable outcome for the DNR is critical for protecting water quality.

The case stems from a petition filed by the Rock-Koshkonong Lake District to raise water levels on Lake Koshkonong. According to the lake district, property owners and business owners believe low water levels on the lake have hurt property values and business income.

The DNR denied the petition, and a lawsuit ensued.

So far, the lake district has not fared any better in the courts than it did with the DNR. Among other things, say officials with the Great Lakes Legal Foundation, which filed a brief siding with the lake district on behalf of Wisconsin Manufacturers and Commerce and Midwest Food Processors Association, the Court of Appeals held that the DNR was not required to consider property values or business income of property owners located on the lake when setting lake levels.

## **A big step further**

That's one thing, the foundation said, but the appeals court took a huge and unprecedented leap, saying the DNR, under the state constitution's public trust doctrine, could consider what impacts raising water levels might have on adjacent private wetlands.

By raising water levels on Lake Koshkonong, the court determined, it could possibly harm wetlands on the adjacent property, the foundation stated in its brief. That, it suggested, could open Pandora's box by endowing the agency with the ability to regulate all sorts of activities based on perceived impacts to private, nonnavigable wetlands.

"If allowed to stand, the Court of Appeals decision will greatly expand the authority of DNR bureaucrats to impose onerous regulations on landowners based on the public trust doctrine," Andrew Cook, attorney for the Great Lakes Legal Foundation, said. "The public trust doctrine historically has only applied to navigable waters, not private wetlands on adjacent, upland property."

The GLLF contends it's a clear mistake to interpret the law to expand the Public Trust doctrine to private non-navigable wetlands.

"Property owners and businesses with property near wetlands should be concerned with the Court of Appeals decision," Cook said. "Unless overturned by the Wisconsin Supreme Court, DNR bureaucrats will have virtually unlimited authority to impose regulations based on this newly found authority as determined by the courts."

## **The analysis**

In its brief for WMC and MFPA, the foundation says the case goes to the heart of the proper scope of the Public Trust Doctrine, as well as to whether the Legislature has ever delegated to the DNR the authority to regulate private, non-navigable waters above the ordinary high water mark.

And, clearly, the brief asserts, neither the plain language of the doctrine itself nor the Legislature have done so.

"The public trust doctrine, incorporated into Wisconsin Constitution art. IX, § 1, holds navigable waters in trust for the public up to the ordinary high mark," the brief states. "The Legislature has neither expressly nor impliedly delegated DNR the authority under the public trust doctrine to regulate wetlands above the ordinary high water mark, nor could it ever do so given the limitations of the doctrine."

What's more, the brief continued, the DNR exceeded its authority by applying wetland water quality standards under Chapter 281 to a Chapter 31 water level order, even though Chapter 281 explicitly precludes anything in that chapter from affecting Chapter 31.

“The court of appeals ignored the plain language of Wis. Stat. § 281.92 and instead held that DNR had broad authority to apply regulations promulgated under Chapter 281 to non-navigable private wetlands,” the brief stated. “Such an expansive interpretation of the public trust doctrine and disregard for statutory construction is unacceptable.”

While the WMC and MFPA agree the DNR may set water level orders to protect the public's interest in navigable waters, or to protect property, presumably including private wetlands, nothing in that statutory language gives the DNR any authority under the trust doctrine to regulate anything above the high water mark, the brief asserts.

The statute reads: “The department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained and which will affect the level and flow of navigable waters; and may by order fix a level for any body of navigable water below which the same shall not be lowered except as provided in this chapter; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.”

### **Standing cases on their heads**

In addition to clear statutory language limiting the DNR's authority to navigable waters, the brief suggested, intervenors for the DNR stood case law on its head when, in their arguments, they repeatedly cited two landmark Supreme Court decisions as reasons for supporting the DNR – Lake Beulah Mgmt. Dist. v. DNR and Just v. Marinette.

For example, the brief stated, the Lake Koshkonong Wetland Association and Thibeau Hunting Club (Intervenors) pointed to the Lake Beulah decision to support the proposition that the public trust doctrine applies to non-navigable private wetlands above the ordinary high water mark.

However, the GLLF argued, that was not the case. Rather, the Lake Beulah case was about the state's public trust duties in regulating high-capacity wells and, specifically,

the potential effect those wells might have on navigable waters. In that case, the brief asserted, the court found that the Legislature expressly limited the application of wetland regulations.

In the current case, GLLF argued, just the opposite was the situation – the DNR’s water-level decision was based on impacts to the wetlands and not the other way around.

“Unlike Lake Beulah, this case does not involve potential impacts on navigable waters,” the brief stated. “Instead, DOJ is attempting to expand the public trust doctrine beyond the ordinary high water mark to protect private, non-navigable wetlands.”

Likewise, the brief continues, the DOJ relied heavily on *Just v. Marinette County* for the proposition that the public trust doctrine applies to all wetlands, even private wetlands above the ordinary high water mark.

Again, the brief asserted, that was not correct.

“In *Just*, this Court held that local jurisdictions had authority under their police powers to regulate land uses in a defined area within the shoreland to protect navigable waters under Wis. Stat. § 59.69,” the brief stated. “According to this Court, the purpose of the shoreland zoning ordinances was to protect navigable waters ‘from the degradation and deterioration which results from uncontrolled use and developed shorelands.’”

While the Court noted the importance of wetlands and discussed the public trust doctrine, the GLLF argued, it did not go so far as to say that all wetlands were held in trust by the state.

“The central holding in *Just* was that the county’s police powers allowed it to enact shoreland zoning ordinances to protect navigable waters,” the brief stated. “The state’s public trust duties served as a justification for use of the state’s sovereign police powers, not as the authority for the legislature’s enactments.”

### **The other side**

But the DOJ, the DNR and their allies in the Wisconsin Wetland Association and Clean Wisconsin saw it differently.

For one thing, they argued, the case was in fact all about protecting water quality and the ability of the DNR to consider that factor when setting water levels.

“The outcome of this case will affect the DNR’s ability to protect the quality of our

lakes,” said Elizabeth Wheeler, staff attorney at Clean Wisconsin. “The health of thousands of Wisconsin lakes rests on this decision.”

The DNR had to consider the impact of raising water levels on adjacent private wetlands, she argued, because raising lake levels would flood valuable wetlands, which help absorb floodwater, improve water quality and prevent harmful algae blooms.

Thus the issue was indeed water quality protection, she said. Erin O’Brien, policy director at Wisconsin Wetlands Association, agreed.

“Protecting water quality in lakes is clearly within the authority of the DNR,” O’Brien said. “We’re confident that the Supreme Court will uphold the statutes which require the DNR to consider how wetlands keep Wisconsin’s lakes healthy and protect adjacent property from floods. Any other outcome would be devastating to Wisconsin’s lakes and citizens.”

Clean Wisconsin, Wisconsin Wetlands Association and Wisconsin Lakes filed an amicus brief in support of the DNR’s authority to consider wetland impacts and water quality under state statute and the constitutionally protected Public Trust Doctrine.

“Wetlands play a critical role in cleaning up our waters and preventing the smelly, green algae blooms that plague so many Wisconsin lakes,” Wheeler said. “The irony is that if the wetlands are flooded and the water becomes polluted, few people will want to boat on Lake Koshkonong.”

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