

Supreme Court hands victory to lake district

By Jeff Brown
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The Wisconsin Supreme Court ruled on Tuesday that the state Department of Natural Resources should have considered economic impact evidence when setting the water level on Lake Koshkonong in 2005.

The ruling represents a major victory for the Rock-Koshkonong Lake District, which challenged the DNR's decision to set the water level on the lake at 776.33 feet above mean sea level. The lake district also challenged the DNR's refusal to allow the district to raise the water level by 7.2 inches by letting more water through the Indianford Dam during summer months, when the water level is typically lower.

The DNR's decision was based on a determination that a higher water level would make it harder for hunters, fisherman, trappers, and birdwatchers to enjoy the wetlands, and would cause wetland waters to become turbid and choked with algae, which would harm wildlife.

The lake district argued that a higher water level would make it easier for boaters to use the lake and would benefit businesses on the lake; it argued that a lower water level would hinder boating and reduce property values around the lake.

The Jefferson County Farm Drainage Board, one of several interested parties that intervened in the DNR's decision-making process, argued a higher water level would cause backups in drainage systems, which would cause fields to stay flooded longer each spring and reduce crop yields by \$200 to \$300 per acre.

The lake district appealed the DNR's determination to Rock

County circuit court, which upheld the determination. The lake district appealed that decision to the state court of appeals, which upheld the circuit court's decision in 2011.

In a decision written by Justice David T. Prosser, the Supreme Court reversed the court of appeal's decision, holding that the DNR incorrectly interpreted the statute authorizing it to set water levels as prohibiting it from considering evidence about the economic impact a lower water level would have on shoreline property owners and businesses. The Court also held that the DNR exceeded its constitutional authority by considering the impact a higher water level would have on private wetlands that sit above the ordinary high water mark. Joining Prosser in the majority opinion were Justices Patience D. Roggensack, Annette Kingsland Ziegler, and Michael J. Gabelman.

In a strongly worded dissent, Justice N. Patrick Crooks wrote that the majority's decision overreached by limiting the public trust doctrine, the constitutional principle that authorizes the state to protect inland waterways. He also wrote that the decision undermined previous Supreme Court decisions, rewrote history, and represented "a disturbing shift in Wisconsin law." Chief Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley joined the dissent.

In a written statement, lake district chairman Brian Christianson called the decision "epic," and said if the decision had gone the other way and upheld the DNR's interpretation of the public trust doctrine, "it would give the DNR unlimited authority to regulate private property adjacent to public waters."

The decision wasn't a complete victory for the lake district. The court

upheld the DNR's consideration of wetland water quality standards when setting the water level. It also declined to answer whether the DNR's refusal to allow the lake district to let more water through the Indianford Dam was permissible under state law.

More importantly, the Supreme Court remanded the case to Rock County circuit court. That means the lake district's long legal fight might be far from over.

The circuit court could issue a new ruling on the DNR's determination after considering the economic impact evidence, or pass the matter back to the DNR for a new determination, including the economic impact evidence, either of which could mean starting the appeals process all over.

That would require the lake district to spend more in legal fees and court costs. The lake district has already spent more than \$500,000 in the eight years it's been fighting the DNR.

Christianson told the Janesville Gazette the lake district's board would probably place the issue of funding future appeals in the case on the agenda for the lake district's annual meeting on August 10, which begins at 8:30 a.m. in the Fort Atkinson High School auditorium, located at 925 Lexington Boulevard in Fort Atkinson.

At the 2006 annual meeting, the lake district's electors voted overwhelmingly to increase the per-parcel special charge the district charges them each year from \$40 to \$100 to pay for an appeal of the circuit court's decision. The lake district's proposed 2014 budget is based on a \$45 special charge.



The view looking northwest across Lake Koshkonong from the boat landing at Dallman Park in Milton township, between the Buckhorn Supper Club and Thibeau Marsh. On Tuesday the Wisconsin Supreme Court ruled that the DNR improperly failed to consider economic impact evidence when setting the water level on the lake in 2005, a decision that was appealed by the Rock-Koshkonong Lake District.

(Edgerton Reporter photo/Jeff Brown)