

Supreme Court reverses Lake Koshkonong ruling

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NEWVILLE — The Wisconsin Supreme Court has reversed an earlier court decision on water levels at Lake Koshkonong, but the reversal hasn't solved a years-long battle over inches of water between the Rock-Koshkonong Lake District and the Wisconsin Department of Natural Resources.

In an opinion issued Tuesday, the Supreme Court "reversed and remanded" an earlier appellate court decision on water levels at Lake Koshkonong, essentially kicking the case back down to circuit court for any further legal proceedings.

At the same time, the court Tuesday ruled the DNR was wrong in ignoring the economic impact of water levels the DNR has set on Lake Koshkonong for more than a decade.

The court in its decision wrote that the DNR has "erroneously excluded most (lake district) testimony on the economic impact of lower water levels in Lake Koshkonong on the residents, businesses, and tax bases adjacent to and near Lake Koshkonong." It further wrote that "economic impact" is an issue "relevant" to the DNR's decision making on water level mandates under state statute.

The Supreme Court also ruled that the DNR used a wrongheaded read of the state constitution's public-trust doctrine to try to protect wetlands around Lake Koshkonong, which is a shallow, 10,500-acre impoundment of the Rock River.

The public-trust doctrine serves in part to protect and preserve waterways in the state. The Supreme Court ruled the state has a slew of laws the DNR should use instead to protect wetlands along impounded lakes.

In a dissenting opinion—one of three registered by justices in the 4-3 decision—Justice Patrick Crooks decried the court's read on the DNR's use of the public trust doctrine.

He called that part of the court's ruling disturbing and wrote that it "undermines" the intent of the public trust doctrine to protect state waterways.

In a written statement Tuesday, The Rock-Koshkonong Lake District called the Supreme Court's decision "epic," and a "victory" for the lake district and other local governing bodies of impounded lakes statewide.

Still, the court's decision is silent on a major issue at stake at Lake Koshkonong—whether the DNR can continue to bar the lake district from using the Indianford dam to increase water levels on Lake Koshkonong during certain times of the year.

An appellate court decision in 2011 upheld an earlier decision by the DNR to deny a 2003 request by the lake district to raise water levels about 7.2 inches during low-water months of the summer. Raising the lake level would give lake users and lake businesses increased access to the lake, the lake district has argued.

The DNR has set standing orders on how the Indianford dam can be used to manipulate water levels in large part to protect the lake against erosion and loss of wetland habitat adjacent to the lake, according to court documents.

The DNR's water level standards are at the heart of the legal fight spanning a decade and call into question the property rights of residents and businesses around the lake, whose livelihood and property values could be impacted by water levels on the lake, the lake district has argued in court.

The DNR has said it doesn't have to consider the economic impact of water levels, although its decisions on water levels at the lake serve to protect wetlands used by local waterfowl hunting clubs.

The Supreme Court's decision Tuesday served to poke legal holes in that notion, and it ruled that in further court proceedings on DNR-mandated

lake levels at Lake Koshkonong, the DNR would have to consider "economic impacts" of the water levels it sets.

"The DNR could still reject a petition for higher water levels on Lake Koshkonong even after considering the economic impacts of lower water levels on property. However, it's clear that the DNR must consider the economic impacts in the first place," the court wrote.

The court's decision does not give guidance for how deeply the DNR would have to dive into the issue, and it stops short of rolling back the DNR's earlier decision to bar the district from setting its own lake levels during certain times of the year.

Lake district officials had trumpeted for months that a decision by the Supreme Court would be the last stop for the Koshkonong case, which has wrangled up and down the state's court hierarchy since 2005.

Yet the ruling Tuesday appears to have hit a reset button on the legal fight.

The underlying question is whether the lake district would want to dive back into a court fight to settle the issue the Supreme Court's ruling did not touch—whether the lake district can use the Indianford dam to raise the lake 7.2 inches in low-water months of the summer.

The Rock-Koshkonong Lake District, a quasi-governmental body whose spending is approved annually by residents, has spent about \$500,000 on fighting the DNR's earlier decision to limit water levels.

Lake district Chairman Brian Christianson said he was on the phone all morning with the lake district's attorneys.

He said the lake district "never had the expectation of a decision by the Supreme Court that says, 'Give them (the district) their water levels.' It wasn't the role of the court."

But Christianson called the ruling that the DNR ignored potential economic impacts and misconstrued the public trust doctrine a "one-two combination punch" by the Supreme Court. He said the ruling should give lake district

officials confidence that a legal challenge for water level changes could now hold up in a lower court.

The lake district likely will place the issue of continuing the court fight on the agenda for the annual meeting in August, when lake district residents vote on the annual budget.

Christianson said he thinks residents will want to see the water level issue resolved.

"I really believe that an overwhelming majority not only see this (Supreme Court ruling) as a victory, win, lose or draw, it's the end of the line. But now, are we really at the end of the line? Shouldn't it behoove us to submit the economic impact piece (to the court), and see it through?" Christianson said.

"I believe electors had every intention through the years, they've voted to tax themselves to fund the lawyers and the environmental experts to see this process through to the end," he said.

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