

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

ROCK-KOSHKONONG LAKE DISTRICT,
ROCK RIVER-KOSHKONONG ASSOCIATION, INC. and
LAKE KOSHKONONG RECREATIONAL
ASSOCIATION, INC.,

Petitioners-Appellants,

Case No. 08-AP-1523

v.

STATE OF WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Respondent,

LAKE KOSHKONONG WETLAND ASSOCIATION, INC. and
THIEBEAU HUNTING CLUB,

Intervenors-Respondents.

JOINT REPLY BRIEF OF PETITIONERS-APPELLANTS

On Appeal from a Judgment and Order of the Rock County
Circuit Court, Honorable Daniel T. Dillon Presiding,
Case No. 06-CV-1846, Dated May 9, 2008

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ARGUMENT

I. **THERE IS NO CONSTITUTIONAL MANDATE OR LEGISLATIVE DELEGATION OF AUTHORITY FOR THE DEPARTMENT TO INCLUDE NON-NAVIGABLE WETLANDS AS PART OF THE "PUBLIC RIGHTS IN NAVIGABLE WATER."**

Section 31.02(1) directs WDNR to consider “public rights in navigable waters” in establishing a water level order. The record in this case demonstrates that a broad emphasis on “wetlands” drove the Department’s water level determination, which DNR explains by asserting: “public rights in navigable waters’ have long included *wetlands in and adjacent to* navigable waters because of their *special relationship to navigable waters.*” Response Brief, at 17. (emphasis added).

Contrary to WDNR’s assertion, Petitioners do not claim that public rights in navigable waters are different or more limited in the case of impounded waters. Response Brief, at 17. The dispute is not over which public rights exist in navigable waters, but rather, the boundaries within which these rights exist. If accepted by this Court, the Department’s argument would constitute a startling expansion of Wisconsin’s public trust doctrine and an unprecedented projection of agency power into private uplands.

The foundation of the trust doctrine is the State’s ownership of navigable waters and lake beds. “[I]n Wisconsin when it is said that a water is navigable, it is merely a different way of saying that it is public – public not only for navigation, but for hunting, fishing, recreation, and for any other lawful purpose.” *Muench v. PSC*, 261 Wis. 492, 506, 53 N.W. 2d 514 (1952). The determination that a water body is navigable is the basis of WDNR’s regulatory jurisdiction under Chapters 30 and 31. See *Bleck v. State*, 115 Wis. 2d 454, 338 N.W.2d 492 (1983). (“Once that fact [that a water body is navigable in fact] is established, the lake must then be considered a navigable and public water under sec. 30.10. The state therefore established its regulatory and enforcement jurisdiction under [Chapter 30].”

The Department’s “plain language” argument declares that “public rights in navigable waters’ have long included wetlands in and adjacent to navigable waters.” Response Brief, at 17. In

effect, the agency urges the Court to read sec. 31.02(1) as though it states:

(1) The department, in the interest of public rights in navigable waters, *and in wetlands adjacent to 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

This revised version of sec. 31.02(1) has no basis in plain statutory language and is unsupported by the case law cited in WDNR's brief.

The Department also relies on the landmark decision in *Just v. Marinette County*, 56 Wis. 2d 1, 201 N.W. 2d 761 (1972). Fundamentally, however, *Just* applied a takings analysis that would be equally applicable to property regulations *unrelated* to public water resources. The *Just* court indeed recognized "that lands adjacent to navigable waters exist in a special relationship to the state, subject to special taxation and state public trust powers." 56 Wis. 2d at 18. That relationship prompted the Legislature, acting in its capacity as trustee of the public waters, to delegate authority to counties to establish special zoning regulations affecting statutorily defined "shorelands." But neither that special relationship nor the trust doctrine automatically confers jurisdiction on counties or on the Department.

The primary authority to administer the trust for the protection of the public's rights rests with the Legislature, which has the power of regulation to effectuate the purposes of the trust. *Ashwaubenon v. PSC*, 22 Wis. 2d 38, 49, 125 N.W.2d 647 (1963). In *Hixon v. PSC*, 32 Wis. 2d 608, 620, 146 N.W.2d 577 (1966), the supreme court stated that in legislative authorizations of fill or structures on the beds of navigable waters, such as those permitted under sec. 30.12, Stats., it is the legislature's function to weigh all relevant policy factors to obtain the fullest public use of such waters and to provide for the convenience of riparian owners.

As the *Just* decision makes clear, the only wetlands subject to shoreland zoning were those located within the “shorelands” designated by statute. By contrast, neither Chapter 30 nor sec. 31.02(1) authorizes WDNR to exercise its navigable waters jurisdiction in lands beyond the boundaries of navigable waters.¹ In the absence of such statutory authority, the Department’s authority to consider “public rights in navigable waters” is limited to the public rights that exist within the boundaries of navigable waters as established by case law.

That “public rights in navigable waters” are geographically limited to lands below the OHWM is confirmed in numerous cases addressing conflicts between upland property owners and the State. For example, in *Houslet v. State*, 110 Wis. 2d 280, 329 N.W.2d 219 (1982), the State successfully defended DNR’s determination that wetlands *below the OHWM* were subject to protection as public rights in navigable waters in the context of dredging. Once its ch. 30 jurisdiction over these wetlands was established, WDNR could properly apply wetland standards under sec. NR 1.95, Wis. Admin. Code, in denying *Houslet*’s dredging application. *Id.* at 281. In *State v. Trudeau*, 139 Wis. 2d 91, 408 N.W.2d 337 (1987), the defendant had constructed condominium units on the bed on a non-navigable portion of the lake. Recognizing that Lake Superior (like Lake Koshkonong) is a navigable water body, the court concluded: “if the non-navigable site is part of the lake, then the land below the OHWM is held in trust for the public.” *Trudeau*, 139 Wis. 2d at 104. Under *Trudeau*, the public trust also extends to non-navigable areas, as long as they are below the OHWM of navigable waters.

The effect of DNR’s argument would be to expand the scope of the public trust to lands beyond the bounds of navigable waters. Perhaps recognizing the gravity of such an action on private property rights, the Wisconsin Supreme Court has been cautious of previous efforts to expand the geography of the public trust. In *DeGayner v. DNR*, 70 Wis. 2d 936, 236 N.W. 2d 217 (1974), the court reviewed a decision as to whether Five Mile Creek, a tributary the Namekagon River, was navigable in fact. The Sierra Club, as *amicus curiae*, urged the *DeGayner* court to adopt a

¹ There are exceptions to this general rule. For example, Wis. Stat. § 30.19 expressly authorizes WDNR to regulate grading and other activities on the “banks” of navigable waterways (with a specific delegation of authority to the Department to determine by rule what constitutes a “bank”).

revised test of navigability under which it would consider the creek “as a navigable water, because it is a tributary of a natural and valuable navigable resource, the Namekagon River.” *Id.* at 948. The court rejected this proposal, stating:

That test . . . has not been recognized by the statutes or by the common law; and, as the trial judge pointed out, that test, in its simplistic form, can be carried to ridiculous extremes, for it would mean that all tributaries, since they eventually run into some navigable body of water, must be held navigable.

Here, DNR proposes a similar redefinition of the boundaries of public rights in navigable waters which has no basis in the statutes or common law.

Without legislative authority, the agency may consider non-jurisdictional wetlands as “property” under sec. 31.02(1), just as it must consider riparian lands developed for residential, commercial or other purposes. But it may not blur the line between property and “public rights in navigable waters” on the basis of a “special relationship” to navigable waters. Rather, all property interests must be accorded the same dignity and the impact of water level orders on uplands must be considered using the same economic yardstick.

II. THE “PROTECTION OF PROPERTY” STANDARD IN SECTION 31.02(1) MEANS THE PROTECTION OF THE ECONOMIC VALUE OF PROPERTY AND PUBLIC REVENUES THAT ARE DIRECTLY AFFECTED BY A CHANGE IN WATER LEVEL.

WDNR asserts that it reasonably interpreted its authority under sec. 31.02(1) when it excluded evidence of impacts on property values and public revenues in establishing its water level order. But the Department sets up a straw man when it argues: “To seek higher lake levels to use shorter piers and different [water]craft so as too *maximize the value* of property is not to protect that property.” Response Brief, at 37 (emphasis added). This is not the Petitioners’ argument, nor was it the substance of the evidence excluded by the hearing examiner.

Petitioners' argument is that economic value is the only objective basis to determine whether or not, or to what extent, a water level order "protects property." In response, WDNR argues that the plain language of the statute limits its review to "direct, hydrological impacts." Response Brief, at 30. The Department devoted much of its consideration under the "protect property" standard to property damage from *too much* water, in terms of flooding and erosion. But protecting property extends also to problems created by *too little* water. See WNDR Waterway and Wetlands Handbook (R.10D: Ex. 139), at 3.

As the Department acknowledges, too little water can result in problems with "access and piers." Response Brief, at 30. But the exclusion of evidence detailing the economic impact of restricted access and overly long piers allowed the hearing examiner to minimize these effects as merely an issue of personal preference or convenience. See R.16B:28-29. The excluded evidence illustrated the real and substantial impacts of the water level on the recreation-based economy of the Lake Koshkonong area. Although certainly not as dramatic as the video footage of a house sliding down the crumbling embankment of Lake Delton, these impacts are no less direct and measurable. Indeed, the news coverage of the catastrophic failure of the Lake Delton dam routinely referred to the tragedy in terms of the value of lost revenues from tourism. Business owners and residents of the Dells area would surely be surprised to learn that the Department does not need to consider such "attenuated" impacts when the water level is lowered by government order rather than an act of God.

The Department criticizes that the comparison between Petitioners' evidence of lost commercial revenues and the crop loss evidence proffered by the drainage district, arguing the latter was concerned with "direct harm to agricultural property" rather than evidence of "riparian property values" or "riparian business income." Response Brief, at 38. In fact, the hearing examiner's findings based on the Drainage District's evidence are findings of the economic impact of a water level order. See R.16B: Findings of Fact, ¶¶ 86-91 (A-App. 19-20).

As the hearing examiner found, higher water levels cause a “backwater effect” that impedes drainage on farmland. In other words, the District’s proposed water level was determined not to *flood* agricultural property, but rather to *retard drainage* of those lands, causing lower crop yields due to delays in planting. *Id.* The evidence of lower crop yields is an economic loss no different than the economic loss to lakeside restaurants and taverns whose pier slips are rendered inaccessible by lower water levels. In each case, the physical impacts of a particular water level directly result in a business loss.

WDNR asserts that early case law and agency decisions dating from the enactment of the Water Powers Act support its interpretation that the statute is limited to protecting “intact physical property and riparian rights of access.” The Department argues that *Smith v. Youmans* was decided exclusively on the basis of the plaintiffs’ prescriptive rights, but what it fails to grasp is the court’s recognition of the extent of plaintiff’s damages based on their economic investment. This is the legal backdrop against which the Water Powers Act became law, and the statutory language should be construed to reflect that understanding.

The Department contends that the Railroad Commission’s decision in *In re: Town of Bear Lake*, 16 W.R.C.R. 710 (1915) doesn’t do anything to expand the concept of protection of property beyond direct physical impacts. Response Brief, at 34. But the entire point of the Commission’s analysis was to distinguish individual, physical property damage caused by flooding from the broader “protection of property” intended by the statute. The Commission’s discussion of the substantial investment and value of summer resort property makes it clear that it is these economic considerations that create a property interest “of a sufficient magnitude and importance to the community or the state” to warrant protection under the Water Powers Act. The Department fails to explain why lake-dependent economic activity and public revenues are not matters of “public concern” in the sense meant by the Railroad Commission in the *Bear Lake* and *Rest Lake* cases.

The Department also argues that the scope of property interests the Legislature intended to protect can be ascertained by looking at statutes enacted many decades later which specifically refer to economic impacts. As examples, the agency cites Wis. Stat. § 30.195(2)(c)2., enacted in ch. 454, 1961 Laws of Wisconsin (permit standards for stream diversions), and Wis. Stat. § 285.01(12), enacted in ch. 34, § 978n, 1979 Laws of Wisconsin (definition of “best available control technology” in the regulation of air pollution). The Department argues that different legislation on unrelated subject matters, enacted by subsequent legislatures, is somehow indicative of the legislative intent underlying sec. 31.02. There is no authority cited for this sort of “hindsight” rule of statutory construction, and Wisconsin courts have rejected similar efforts. *Cf. Maus v. Bloss*, 265 Wis. 627, 634, 62 N.W.2d 708 (1954).

Finally, the Department questions why the Joint Petitioners didn’t bring a takings claim, and assert that this action is being used as a vehicle to make such a case. This is simply nonsense. In *Zealy v. City of Waukesha*, 201 Wis. 2d at 374, the court recited the standard in a regulatory takings case that “the regulation must deny the landowner all or substantially all practical uses of the property in order to be considered a taking for which compensation is required.” While the valuation evidence offered by the Petitioners is significant, it has never been contended, and it would be ridiculous to argue, that the Department’s water level order deprives businesses and property owners of substantially all of the use of their property.

III. THE DEPARTMENT’S ARGUMENT FOR GREAT WEIGHT DEFERENCE DOES NOT WITHSTAND SCRUTINY.

This appeal presents a question of law. “The appropriate level of scrutiny a court should use in reviewing an agency’s decision on questions of law depends on the comparative institutional capabilities and qualifications of the court and the agency to make a legal determination on a particular issue.” *Brown v. LIRC*, 12003 WI 142, PP 11-13.

WDNR’s argument for “great weight” deference relies on a recharacterization of the issue on appeal. It asserts that the interpretation of the statute does not implicate the extent of the

Department's delegated authority, but rather involves "questions as to the weighing of the different factors within the reach of the statute." Response Brief, at 11.

WDNR contends that the Court should grant great weight deference to its interpretation for two reasons. First, the Department claims to have a longstanding and consistent history of uniformly applying the statute, and second, that it applies its expertise and technical knowledge to the interpretation of the statute. Neither of these arguments withstands scrutiny.

True, the Department and its predecessors have been exercising authority under sec. 31.02(1) since the amendment of the Water Powers Act in 1915 that granted such authority. But none of the case law cited actually tested the bounds of the agency's jurisdiction. These cases merely affirmed the agency's authority to decide which activities below the OHWM are in the "public interest." As such, they stand for nothing more than the undisputed proposition that the agency has great discretion, *once its jurisdiction is established* under ch. 30 or 31.

In addition, the Department's rote recitation that it "applies its expertise and technical knowledge" fails to explain how such expertise informs its construction of the statute. The record indicates that the Department offered more than a dozen expert witnesses on a range of subjects, chiefly concerning wetland hydrology, wetland plant and animal habitat, and the historic loss of Wisconsin's wetlands. But the foundational decision to include non-navigable wetlands in this fact-finding exercise involved a legal conclusion, not technical expertise.²

WDNR is not entitled to great deference simply because its delegated *authority* to administer sec. 31.02(1) is of longstanding. The agency has not shown that its *interpretation* of the statute, in the two respects at issue here, has been consistent and longstanding. Further, the Department has not shown that these issues of statutory interpretation implicate the agency's technical expertise, so much as its institutional belief in the extent of its jurisdiction. And precisely because these questions implicate the

² Indeed, the Department failed to use its technical expertise to determine the location of the OHWM in the wetlands surrounding Lake Koshkonong, which establishes the boundaries of navigable water for purposes of weighing "the public interest" under the statute.

extent of its jurisdiction, Wisconsin courts have consistently held that the agency's conclusions are not binding. *Wisconsin Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40.

As the State's brief emphasizes, the legal conclusion as to whether "public rights in navigable waters" allows DNR to consider non-navigable wetlands implicates the public trust doctrine in Wis. Const., Art. IX, sec. 1. The development of public trust law is particularly the province of the courts under separation of powers principles. The courts do not defer to an agency's conclusions on issues of constitutional magnitude. *See Dunn County v. WERC*, 2006 WI App 120, P7.

CONCLUSION

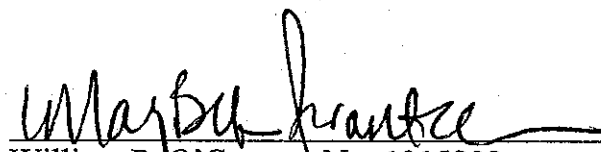
For the reasons presented in their original brief and this reply brief, the Appellants respectfully request that the Court reverse the Department's December 6, 2006 Order in this matter, determine the scope of the interests protected under sec. 31.02(1), and remand for further proceedings consistent with that determination.

Dated: October 24, 2008.

Respectfully submitted,

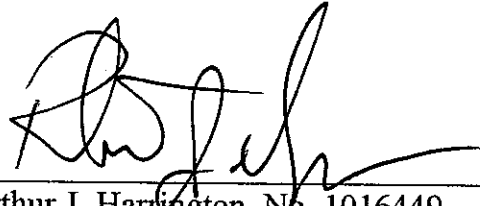
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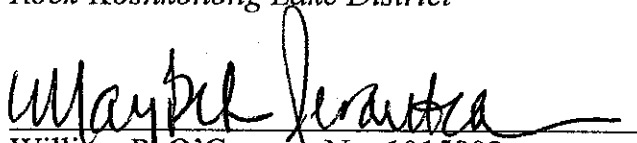
CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 2,967 words.

Dated: October 24, 2008.

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