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**STATE OF WISCONSIN  
SUPREME COURT**

**APPEAL No. 08-AP-1523**

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

Petitioner-Appellants-Petitioners,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

LAKE KOSHKONONG WETLAND ASSOCIATION, INC. AND  
THEIBEAU HUNTING CLUB

Intervenors-Respondents.

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***AMICUS CURIAE* BRIEF OF THE  
WISCONSIN REALTORS® ASSOCIATION**

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On Appeal from a Decision of the Court of Appeals, District IV,  
Dated July 21, 2011 and 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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## OVERVIEW

Wisconsin has thousands of homes and businesses located on over 5,000 lakes with water levels controlled by dams. *See Wisconsin Lakes*, Wis. Dep't. of Nat. Res., PUB-FH-800 (2009) at 11; *see also*, Statewide Dams spreadsheet posted on DNR's Dam Safety Section webpage at <http://dnr.wi.gov/org/water/wm/dsfm/dams/datacentral.html> (updated as of December 2010). Many of these riparians purchased their homes because the property was located adjacent to the waterway with direct access to the water. Because of the location, they can enjoy swimming, fishing and boating on the water directly adjacent to their property. Many of these homeowners have invested thousands of dollars on piers, boats and other recreational vehicles with the expectation that they will be able to use them to aid them in their use and enjoyment of their property.

Many business owners purchase waterfront property with the expectation that their customers will be able to access their businesses directly from the water. In fact, some businesses such as restaurants, marinas and gas stations rely exclusively on customers who access their businesses by boat. Businesses invest thousands of dollars on piers, decks, retaining walls, and other improvements to their property to attract these boating customers to their businesses.

Changes to water levels can directly impact the ability of riparian homeowners and businesses to use their shorelines and access the water. For

example, a lowering of the water level in a lake could result in the following: (a) a loss in the functional use of piers for activities such as swimming, fishing and boating; (b) the inability to access the shoreline by boats; (c) a degradation of the shoreline's appearance and the exposure of large, muddy areas; (d) a reduction in the ability of larger boats to access certain areas; and (e) the exposure of rocks, stumps and other obstacles which create a safety hazard for boaters. *See* Dr. Russell Kashian, *Lake Drawdown: A Debate on the Value of 2 Inches of Water*, Working Paper 06-02, University of Wisconsin-Whitewater (February 18, 2007), at 3-4.

The court of appeals' decision in this case allows the Wisconsin Department of Natural Resources (DNR) to disregard the impact on riparian property values when deciding whether to lower water levels controlled by a dam. *See Rock-Koshkonong Lake District v. DNR*, 2011 WI APP 115, ¶ 46, 336 Wis.2d 677, 696, 803 N.W.2d 853 (2009). If this decision is allowed to stand, owners of riparian property located next to waterways with water levels controlled by dams will face tremendous uncertainty as to whether property that has access to water today, will have similar access to water tomorrow.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE DNR IS NOT REQUIRED TO CONSIDER THE IMPACT ON PROPERTY VALUES WHEN ESTABLISHING A WATER LEVEL UNDER WIS. STAT. § 31.02(1)

One of the central issues in this case is whether the DNR must consider the impact on property values when setting water levels under Wis. Stat. § 31.02. More specifically, the issue is whether the clause “protect property” found in Wis. Stat. § 31.02(1) requires the DNR to consider the impact on property values when setting water levels.

The court of appeals concluded that the meaning of “protect property” is ambiguous and, based upon its review of other statutes and case law, the Wisconsin legislature did not intend for the DNR to consider the impact on property values when raising or lowering the levels of waterways directly adjacent to these properties. *Rock-Koshkonong Lake District*, 2011 WI APP at ¶ 46. In doing so, the court declared that “when the legislature wants the DNR to take into account property values . . . in its decision-making, it does so in clear, unambiguous language.” *Id.* at ¶ 43. In addition, the court relied upon *City of Lisbon v. Harebo*, 224 Wis. 66, 73, 271 N.W. 659 (1937) in concluding that “protect property” is limited to “protection of real property from hydrological events like flooding and does not include the protection of property values.” *Id.* at ¶ 45.



This issue involves statutory interpretation which is a question of law that this Court reviews *de novo*. *Harnischfeger Corp. v. Labor and Industry Review Com'm*, 196 Wis.2d 650, 659, 539 N.W.2d 98 (1995).

A. Property Includes A Bundle of Rights

The DNR's authority to establish water levels related to dams is set forth in Chapter 31 of the Wisconsin Statutes. Specifically, Wis. Stat. § 31.02(1) directs the DNR to set water levels "to promote safety and protect life, health and property." The meaning of the word "property" is central to the determination of the DNR's responsibilities under this statute.

As stated by this Court, statutory interpretation begins with the plain language of the statute. *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is clear based upon the language, the court ends its inquiry. *Id.* However, if a statute is ambiguous, the court may consult extrinsic sources of information to determine the meaning. *Id.* at ¶ 50. When interpreting an ambiguous statute, the cannons of statutory construction dictate that courts should not construe a statute in a manner that changes any common law rule unless the meaning is so clearly expressed as to leave no doubt of the legislature's intent. *Wis. Banker's Ass'n Inc. v. Mutual Sav. and Loan Ass'n of Wis.*, 96 Wis. 2d 438, 453, 291 N.W. 2d 869 (1980). In other words, ambiguous legislation must be interpreted in light of the common law in place at the time the legislation was enacted. *See In re Custody of*

*D.M.M. F.P.R. v. J.M.*, 137 Wis. 2d 375, 389-90, 404 N.W.2d 530 (1987).

Since the first published cases, Wisconsin courts have interpreted the term “property” to mean land and all improvements and rights attached to it. *See e.g.*, *Newcomb v. Smith*, 2 Pin 131 (1849) ; *Jones v. Pettibone*, 2 Wis. 308, 316 (1853); *Ford v. Chicago & N.W.R. Co.*, 14 Wis. 609 (1861); *Diana Shooting Club v. Lamoreaux*, 114 Wis. 44, 89 N.W. 880 (1902); *Roberts v. Fullerton*, 117 Wis. 222, 65 L.R.A. 953 (1903); *Nekoosa Edwards Paper Co. v. Railroad Commission*, 201 Wis. 40, 43-46, 228 N.W. 144 (1930); *Mayer v. Grueber*, 29 Wis. 168, 202, 138 N.W.2d 197 (1965). The rights associated with property ownership are commonly referred to as the “bundle of rights” and are generally considered to include, among others, the right to possess, use, and exclude others from entering the property. *See R.W. Docks & Slips v. State*, 244 Wis. 2d 497, 512, 628 N.W.2d 781 (2001); *Loreto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Each individual right or a combination of rights in the bundle has potential value and may constitute property. *See Mitchell Aero, Inc. v. Milwaukee*, 42 Wis.2d 656, 662, 168 N.W.2d 183 (1969); *U.S. v. Craft*, 535 U.S. 274, 291, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002).

B. Maintaining Adjacency To The Water Is The Fundamental Right Of Riparian Owners

Waterfront property and the rights attached thereto are unique because of the proximity of the property to the water. A riparian owner is defined as “one

who holds title to land abutting a body of water.” *Stoesser v. Shore Drive P’ship*, 172 Wis. 2d 660, 665, 494 N.W.2d 204 (1993) (citations omitted); *see also Ellingsworth v. Swiggum*, 195 Wis. 2d 142, 148, 536 N.W.2d 112 (Ct. App. 1995). In fact, the rights of riparian owners, known as “riparian rights,” are based upon the ownership of property adjacent to the water. *Stoesser*, 172 Wis. 2d at 666; *Colson v. Salzman*, 272 Wis. 397, 400, 75 N.W.2d 421 (1956). Riparian owners enjoy the inherent right to maintain adjacency to the water, “profit by this advantage, and . . . preserve and improve the connection of [their] property with the water.” *See Doemel v. Jantz*, 180 Wis. 225, 230-31, 193 N.W. 393 (1923). In other words, the essence of riparian property is the fact the land is “contiguous to and attingent on the water.” *Id.*

Contiguity to and connection with the water is arguably the most important stick in the bundle of riparian rights. Because of its importance, this stick is in and of itself property and is deserving of protection under Wis. Stat. § 31.02(1). *See Craft*, 535 U.S. at 291.

### C. Lowering Of Water Levels Directly Impacts The Adjacency Of Riparian Property To The Water

For all practical purposes, the ordinary high water mark (OHWM) is the boundary line between riparian rights and public rights. The property above the OHWM is private and owned by the riparian, while the land below the OHWM is owned by the state in public trust. *See Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N.W. 855 (1901). While a riparian owner has certain rights in the land between

the actual water level and the OHWM, these rights are qualified. *State v. McFarren*, 62 Wis. 2d 492, 498-99, 215 N.W.2d 459 (1974). Because the riparian owner doesn't own the property below the OHWM, the riparian owner does not have the same rights on this land that he does on the land above the OHWM.<sup>1</sup> For example, a riparian owner may not place a permanent structure or perform grading or other land disturbing activities on land below the OHWM without first obtaining a permit from the DNR. *See* Wis. Stat. §§ 30.12 and 30.19.

While sometimes used synonymously, the OHWM and the water's edge are vastly different points of demarcation. The OHWM is defined as "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 176, 118 N.W.2d 152 (1962) (citations omitted). When determining the location of the OHWM, the characteristics of the water are irrelevant; it is immaterial whether the water is "deep or shallow, clear or covered with vegetation." *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914). In fact, an area does not need to be navigable to be considered lake bed. *State v. Trudeau*, 139 Wis. 2d 91, 103, 408 N.W.2d 337 (1987). "If the land is part of the navigable lake, then the fact that the specific area cannot be navigated

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<sup>1</sup> Riparian rights "include the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or similar structures in aid of navigation." *Sea View Estates Beach Club, Inc. v. State Dept. of Nat. Res.*, 223 Wis. 2d 138, 157, 588 N.W.2d 667 (Ct. App. 1998) (citations omitted).

is irrelevant to the state's claim. Lakebed can be heavily vegetated by plants rising far above the water." *Id.*

Because the OHWM and water's edge have different meanings and are often different lines of demarcation, the lowering of the water level in a lake or river does not necessarily lower the OHWM. Thus, when the water levels in a lake are lowered and the OHWM remains in place, the distance between the riparian property and the water's edge is often increased. This distance can have a direct impact on the property's contiguity with and connection to the water and, at some distance, riparian property, by definition, is no longer "riparian." *See Doemel*, 180 Wis. at 230-31.

While water levels fluctuate naturally and riparian property will experience natural accretions and relictions over time, lowering of the water levels by the DNR is not an act of nature. Because the lowering of water levels by the DNR can have a significant and immediate impact upon and, in some cases, change the essence of riparian property, the Wisconsin legislature directed the DNR to "protect property" when both lowering and raising water levels under Wis. Stat. § 31.02(1).<sup>2</sup>

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<sup>2</sup> According to the State's brief and case record, the DNR considered only the potential impact on riparian property relating to raising water levels. *See* Resp. Br. at 8-10. The DNR did not consider potential impacts on riparian rights resulting from maintaining the current water levels, which would keep the water levels approximately six inches lower than the average summer water levels maintained during most of the past 40 years. *See* Pet. Br. at 24.

D. Lowering Of Water Levels Can Negatively Impact Property Values

Waterfront property is among the most valuable types of property in Wisconsin. People choose to own waterfront property for a variety of reasons including the scenic views, recreational opportunities and the investment potential. *See Selecting Lakefront Property*, Wisconsin Association of Lakes Website, <http://www.wisconsinlakes.org/lakeliving.html>; *see also*, Forrest A. Westin, *On the Waterfront: A 25 Year Study of the Relative Risk & Reward of Florida Single-Family Waterfront and Inland Homes (1977-2002)*, (September 2003), at 75. In addition to supply factors, people pay higher prices for waterfront property because of the unique locational attributes and the characteristics of the waterbody. *See Westin, id.* at 74.

Among the most important factors contributing to the value of riparian property is the proximity of riparian property to the water and the depth of the water body. *See Kashian*, at 4. In a study conducted on Lake Koshkonong, the value of property adjacent to the water experienced a significant reduction due to a two-inch reduction in the lake's water levels. *Id.* at 2. Specifically, this study concluded that a two-inch reduction in water depth would increase the distance between homes and the shoreline and reduce the rate of value of appreciation, resulting in average loss of wealth of \$13,435 per household. *Id.* at 13. Other similar studies from around the country reached the same conclusion – the value

of a waterfront home decreases the further the property is located from the water.  
*Id.* at 7.

The proximity to the water and the depth of the water body affect both the rights of the riparian and the value of the property. Accordingly, it is inconceivable as to how the DNR can adequately “protect property” without considering the impact of lower water levels on riparian property values.

E. The Court Of Appeals’ Interpretation Of “Protect Property”  
Would Lead To Absurd Results

Citing Wis. Stat. § 31.06 and *City of Lisbon v. Harebo*, 224 Wis. 66, 271 N.W. 659 (1937), the court of appeals narrowly interprets “protect property” to be synonymous with “endanger property” and thus requires the DNR only to prevent water levels from flooding or physically occupying riparian property. *See Rock-Koshkonong Lake District*, 2011 WI APP at ¶¶ 44-45. In other words, the DNR must consider the impact on riparian property only when the water levels will be increased.

As another canon of statutory construction, courts are not to interpret statutes in such a manner that will lead to absurd results. *Walton v. Hegerty*, 2008 WI 74, ¶¶ 28, 39, 311 Wis.2d 52, 80 751 N.W.2d 369. An absurd result is created if the interpretation would defy common sense or if it “would be contrary to the clearly stated purpose of the statute.” *State v. Dunn*, 213 Wis. 2d 363, 370, 570 N.W.2d 614 (Ct. App. 1997); *State v. Grunke*, 311 Wis. 2d 439, 457, 752 N.W.2d 769 (2008).

Under this interpretation, the DNR would have no duty to consider the impacts of lowering water levels on riparian property regardless of the levels to which the water was lowered so long as the water was still navigable. For example, if the DNR sought to lower lake levels from a depth of twenty feet to a depth of one foot (whatever minimum water depth necessary to maintain navigability), the DNR would not be required to consider the impact on riparian property adjacent to the waterway. This would be true even if the distance from the edge of the riparian property (the OHWM) to the water's edge was now over one hundred yards.

#### CONCLUSION

This case is about protecting property and the most fundamental right of riparian owners – maintaining the connection between riparian property and the water. As this Court said over a century ago, riparian rights are private rights “incident to the ownership of the shore, . . . connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress.” *Delaplaine v. Chicago & N.W. Ry. Co.*, 42 Wis. 214 (1877).

Because the “protect property” clause in Wis. Stat. § 31.02(1) should apply to both lowering and raising of water levels controlled by dams, we respectfully request that this Court overturn the court of appeals’ decision in this case.



Dated this 14<sup>th</sup> day of May, 2012.

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2820 words.

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Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 14th day of May, 2012.

---

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## CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Joint *Amicus Curiae* Brief in Support of the Petition for Review By the Rock-Koshkonong Lake District to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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