



Rock-Koshkonong Lake District Supreme Court Decision Relating to DNR's Water Level Determination

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In 2013, the Wisconsin Supreme Court issued an important decision interpreting the public trust doctrine. Specifically, the court in *Rock-Koshkonong Lake Dist. v. Dept. of Natural Resources*¹ (DNR) held that the DNR did not have the authority to use the public trust doctrine under the Wisconsin Constitution to protect non-navigable land and non-navigable water above the ordinary high water mark.

This was a significant decision that prevented the DNR from greatly expanding the scope of the public trust doctrine beyond what was ever contemplated under the Wisconsin Constitution.

Another important aspect of the decision was the court's determination that the DNR inappropriately excluded testimony of the economic impact of lower water levels on the property owners, businesses, and tax bases adjacent to and near the lake.

Although the *Rock-Koshkonong Lake Dist.* decision was a victory in many respects for property owners and businesses, the case was remanded back to the DNR to reconsider Rock-Koshkonong Lake District's water level petition based on the Wisconsin Supreme Court's opinion.

The concern is that the DNR will once again deny RKLD's petition seeking higher water levels using different legal authorities. For example, while the Supreme Court held that the DNR may not use the public trust doctrine to regulate adjacent non-navigable wetlands above the ordinary high water mark, the court held that the DNR still has authority to consider the impacts that higher water levels could have on the surrounding wetlands.

In addition, although the Supreme Court held that the DNR erroneously excluded economic impacts on surrounding property owners and businesses, the court held that the DNR is only required to consider that evidence. Ultimately, the DNR could reach the same conclusion after stating that it "considered" the economic impacts and yet still more heavily weigh the environmental impacts when making its final decision.

RKLD is seeking reasonable higher water levels on Lake Koshkonong. While this case affects those property owners on Lake Koshkonong, this is important precedent for all Wisconsin

¹ 350 Wis.2d 45, 833 N.W.2d 800, 2013 WI 74 (2013).

property owners and businesses. If DNR is allowed to consider only minor environmental impacts without also properly considering economic effects, Wisconsin businesses and property owners throughout the state could be harmed.

Rock-Koshkonong Lake District v. DNR

Contested Case – Facts and Decision by Administrative Law Judge

- This case involves a dispute about the water levels on Lake Koshkonong.
- Wis. Stat. § 31.02(1) authorizes the DNR to regulate water level and flow of water in the navigable waters of Wisconsin.
- Specifically, Wis. Stat. § 31.02(1) provides that the DNR may order benchmarks designating “the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam.” In addition, the statute provides that the DNR may regulate water levels “in the interest of public rights in navigable waters or to promote safety and protect life, health, and property.”
- The Indianford Dam, which was originally constructed in 1851, affects the water levels on the Rock River and Lake Koshkonong. The dam was reconstructed in 1917, which raised water levels on Lake Koshkonong.
- The Rock-Koshkonong Lake District (hereinafter “RKLD” or “District”) took ownership and operation of the dam from Rock County in 2004.
- The dam fell into disrepair during the 1960s and as a result it failed to regulate water levels as prescribed by the DNR until 2002 when the dam was rehabilitated.
- In 2002, after the rehabilitation of the Indianford Dam, the water levels on Lake Koshkonong began to reflect more closely the levels set in 1991, and water levels dropped below recorded levels since the 1930s.
- In 2002, RKLD petitioned the DNR to amend the 1991 order.
 - The District requested DNR to allow increased water levels throughout the year, and to include the elimination of the winter draw down.
 - Specifically, RKLD requested the following changes:

May – October

Target: increase of 7.2 inches (1991 Order: 776.2/2002 Petition: 776.8)

Maximum (all gates open): increase of 8 inches

Minimum: 8 inches

November – April

Maximum (all gates open): 14.8 inches

Minimum: 16.8 inches

- RKLD argued that the 1991 order was not consistent with the public interest because lower water levels on Lake Koshkonong led to severe restrictions on recreational boating

and in many cases “piers must be extended far from shore to reach navigable water depths.”

- DNR decided not to change authorized water levels for May – October (summer months).

- DNR authorized water levels to be raised in winter months:
 - Raised the minimum lake level by 6 inches (775.50 msl)
 - Raised maximum lake level by 2.8 inches (776 msl)
 - Established a November – April “target lake elevation” of 775.75 msl – instead of 775.00 msl in 1991 Order)
- As a result of DNR’s order, RKL D filed contested case hearing.
- RKL D presented evidence at the contested case hearing on modeling data to predict water levels under the Petition, along with the probable effect of the District’s water level order on navigation, water quality, and fish and wildlife.
- RKL D also presented evidence of the economic impact resulting from the lower levels on the lake.
- Two experts testified that lower lake levels would negatively affect property values and commercial activity related to the lake.
- The experts determined that taverns and restaurants that depend on boaters and tourists would be negatively affected.
- During the contested case hearing, DNR objected to admitting evidence related to the effect of water levels on real estate values, business income, and public revenues.
- The ALJ judge struck all of the economic evidence, even though Wis. Stat. § 31.02(1) requires DNR to “protect...property,” which includes economic impacts to property rights.
- The ALJ judge ruled that “the DNR’s decision to reject the District’s proposed high water level ... is necessary to protect the public rights in navigable waters and reasonably balances and accommodates public and private rights, the promotion of safety, and the protection of life, health, and property.”

Supreme Court Decision

- The case was appealed to the district court, then to the court of appeals, and then to the Wisconsin Supreme Court. On appeal, DNR argued that the public trust doctrine under the Wisconsin Constitution protects adjacent, non-navigable wetlands. The DNR also argued that it properly excluded the economic impacts relating to the lower water levels contained in the DNR’s order. Below is a summary of the issues in the case and the Supreme Court’s decision. Before discussing the case, it’s important to begin with the

actual text of the statute providing DNR's authority to regulate water levels on impounded lakes.

Wis. Stat. § 31.02(1):

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.

Issue 1: DNR's Authority to Consider the Public Trust Doctrine for Non-navigable Wetlands and Authority to Consider Impacts on Adjacent Non-Navigable Waters

- The DNR argued that the public trust doctrine in the Wisconsin Constitution required the DNR to consider impacts on private wetlands adjacent to Lake Koshkonong that are above the ordinary high water mark.
- RKLD and the *amici* (Wisconsin Manufacturers & Commerce and Midwest Food Processors Association) argued that the public trust doctrine does not give the DNR the authority to consider private non-navigable wetlands above the ordinary high water mark.
- The Supreme Court agreed with RKLD and the *amici* and rejected DNR's position seeking to greatly expand the public trust doctrine.
- According to the court, "applying the public trust doctrine to non-navigable land above the [ordinary high water mark] would eliminate the rationale for the doctrine. The ramifications for private property owners would be very significant."
- The court held that "the DNR inappropriately relied on the public trust doctrine for its authority to protect non-navigable land and non-navigable water above the ordinary high water mark."
- However, the court held that the DNR has broad authority grounded in the state's police power to protect non-navigable wetlands and other non-navigable water resources. The DNR may consider the water level impact on all adjacent property under Wis. Stat. § 31.02(1).
- In addition, the court held that the DNR had the authority to consider the water quality standards in Wis. Admin. Code § NR 103, promulgated under Wis. Stat. ch. 281, when making a water level determination under Wis. Stat. § 31.02(1).

Issue 2: Whether DNR Erroneously Excluded Testimony on the Economic Impact of Lower Water Levels in Lake Koshkonong for Property Owners and Businesses

- DNR argued that testimony on the economic impact of lower water levels in Lake Koshkonong should have been excluded, which the administrative law judge agreed.
- RKLK argued that the language in Wis. Stat. § 31.02(1) dealing with “protect... property” should be interpreted to require DNR to consider the economic impacts of lower levels would have on property owners and businesses.
- The Supreme Court sided with RKLK and held that the DNR erroneously excluded the testimony of the economic impacts of lower water levels on property owners.
- According to the court, “the DNR has discretion as to which impacts are too attenuated to consider, and it can refute any economic evidence. Moreover, evidence of economic impacts is not dispositive in a water level determination; hypothetically, on remand 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 is clear that DNR *must* consider the economic impacts in the first places.” (emphasis in original)

Summary of the Supreme Court decision:

- The DNR properly considered the impact of the Petitioner’s proposed water levels on public and private wetlands in and adjacent to Lake Koshkonong.
- However, the DNR inappropriately relied on the public trust doctrine for its authority to protect non-navigable land and non-navigable water above the ordinary high water mark.
- The DNR was entitled to consider the water quality standards in Wis. Admin. Code § 103, promulgated under Wis. Stat. ch. 281, when making a water level determination under Wis. Stat. § 31.02(1). However, DNR is not *required* to apply these standards when making a water level determination.
- The DNR erroneously excluded most 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.
- The DNR’s exclusion of most economic evidence was inconsistent with its acceptance of competing economic evidence that helped sustain its water level decision.