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## Change to Established Water Level of Lake of the Woods v. Ralston, 748 N.E.2d 396 (Ind. 2001)

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## INDIANA

**Change to Established Water Level of Lake of the Woods v. Ralston, 748 N.E.2d 396 (Ind. 2001)** (interpreting Indiana Code § 14-26-8 as affording appellant procedural due process and instructing the trial court to (1) vacate its order dismissing appellant's petition; (2) allow all interested parties reasonable time to present written evidence; and (3) schedule a hearing, if appellant so requested it, to voice any objections).

Appellants are the members of Lake of the Woods Property Owners Association ("Association"). They own real property abutting or within Lake of the Woods, a natural public freshwater lake in Marshall County, Indiana. As a result of a settlement agreement in 1992, the court ordered the lake's water level to remain at 803.85' mean sea level datum ("MSLD") from May 15 to September 15 and to be drawn a foot from September 15 through May 15. In 1999, the Association, under Indiana Code § 14-26-8 ("Code"), filed a petition requesting a change in the lake's present water level. The petition alleged significant changes had occurred since the 1992 settlement, which no longer justified the periodical lowering of the water level.

Various landowners and other individuals with agricultural interests filed a remonstrance in opposition to the petition. The trial court then appointed two government viewers and two citizen viewers (collectively, "Viewers") to inspect the lake and adjoining property and prepare a report of their findings. The Viewers concluded that maintaining a permanent water level of 803.85' MSLD would not only injure farmers and other area landowners, but also would negatively affect nearby roads. The Viewers could not determine if maintaining the higher water level throughout the year would have positive ecological benefits because they lacked adequate information. Based on the Viewers' report, the trial court dismissed the petition. The Association appealed arguing the trial court's procedure denied it due process of law because it failed to provide an opportunity to present written evidence in support of its petition, cross-examine adverse witnesses, or voice any objections.

The issue in this case was whether the Association was entitled to procedural due process under Indiana Code § 14-26-8 prior to the trial court's dismissal of the petition. The court of appeals held the Code did not explicitly deprive the Association of its due process right, and ordered the trial court to vacate its order dismissing the Association's petition, allow all interested parties reasonable time to present written evidence, and schedule a hearing, if the Association so requested it, where it could voice its objections to the viewers.

The law requires a plaintiff claiming a violation of due process to show (1) there was a state action, i.e., government involvement in the alleged deprivation; and (2) the action caused the deprivation of a

protected interest. The Association showed there was “state action” insofar as the trial court appointed two government representatives to act as viewers. In addition, the riparian Association members had a “protected interest” arising from their ownership of land; the Code afforded riparian owners the statutory right to file a petition to stabilize, raise, or establish and maintain the level of the lake by various means. The court concluded such a recognized protected right could not be impinged upon absent procedural due process.

After establishing that the Association had shown a violation of due process, the court then examined the Code’s general procedure to determine if it caused the alleged deprivation. The court outlined the procedure as follows: after the landowners filed their petition, the clerk was to schedule a hearing and designate the government and citizen viewers; the trial court would dismiss the petition if defective. If not, the viewers were to inspect the project and file a final written report. If the viewers found the proposed work was not practicable and of public need, the trial court would dismiss the petition. Otherwise, the county surveyor would draft the requisite plans and submit a preliminary report. Before submitting the final report, the surveyor was to hear all objections at a hearing scheduled by the trial court.

Based on its examination of the Code, the court concluded the procedure did not explicitly deprive the Association of its due process right to present written evidence or to have a hearing on its petition. However, the question remained as to what process was due to the Association. To establish the dictates of due process, the court needed to balance three factors: (1) the private interest that would be affected by the official action; (2) the risk of erroneously depriving an interest through the procedures used, along with the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens the additional or substitute procedural requirements would entail.

Applying the balancing test to the facts before it, the court made the following findings. First, the Association members had an interest in the court’s determination concerning the petition, changing the water level could potentially benefit their real property. Second, because the Code’s procedure provided for reliance upon the findings of viewers who may or may not have an expertise in water level matters, there was great risk of arriving at an erroneous decision, which could cause the deprivation of the Association’s property interests. In fact, the trial court’s denial of the petition did deprive the Association of such interests, as the court had relied solely on the Viewers’ findings. Third, the government’s interest was to protect the riparian owner’s rights, as well as the public’s right, to use the lake. The government also had an interest to insure the state exercised its public trust duty to maintain all public freshwater lakes.

The court concluded that the final report was incomplete in that it lacked information necessary to establish the ecological benefits of

maintaining a higher water level year-around. The court reasoned that a more appropriate procedure would be one that insured the viewers were well informed by allowing all concerned parties to submit written evidence before the viewers' investigation. This would satisfy the government's interests and increase the accuracy of the report. Thus, the court proposed additional procedural safeguards giving petitioners the opportunity to request a hearing and object to the report before its dismissal. After such a hearing, the viewers could either request that the trial court dismiss the petition, or simply file an amended petition.

Because the Association did not have the opportunity to present evidence in support of its petition, cross-examine adverse witnesses, nor voice its objections before the dismissal of its petition, the appellate court remanded with instructions that the trial court vacate its order of dismissal, allow reasonable time to provide written evidence, and schedule a hearing if the Association desired to voice any objections.

*Gloria M. Soto*

## MISSISSIPPI

**Mississippi Sierra Club, Inc. v. Mississippi Dep't of Env'tl. Quality, No. 1999-SA-02035-SCT, 2001 Miss. LEXIS 97 (Miss. Apr. 19, 2001)**

(holding that a state agency, when approving a project, must make adequate findings of fact and explain how it evaluated the competing interests before it so as not to usurp courts of their power of review).

The Mississippi Sierra Club and Green Baggett ("Sierra Club") filed this action in the Mississippi Supreme Court to appeal a decision by the Board of Mississippi Levee Commissioners ("Commission") approving the Big Sunflower Maintenance Project.

The Big Sunflower Maintenance Project ("Project") was a channeling project proposed by the Army Corps of Engineers ("Corps") to alleviate seasonal flooding in the Yazoo-Mississippi Delta. The project included the dredging of approximately 104.8 miles of stream, as well as the clearing and snagging of an additional 28.3 miles of the Big Sunflower River and several tributaries and bayous. The project would render approximately 443 acres completely unfit for current use. Further, the project would negatively impact both plant and animal life. The project was expected to cost \$62,485,000 and take between seven and eight years to complete.

When the Corps presented the project to the Commission, the Commission was also reviewing an environmentally friendly alternative. This alternative was non-structural and included the acquisition of flowage easements in combination with the traditional excavation of critical reaches. Several government agencies endorsed the alternative project, including the Environmental Protection