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Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800 (Wis. 2013)

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to Ecology under the OCPI Exception to reallocate water. The Court held that the OCPI Exception was a narrow one requiring Ecology to identify extraordinary circumstances, not merely an alternative beneficial use, before impairing established minimum flow rights. The Court determined that Ecology's Amended Rule establishing reservations of water for certain future beneficial uses was not consistent with the plain language of the OCPI Exception, the statutory context, or with the overall statutory scheme. Therefore, the Court reversed the trial court's order and held the Amended Rule was in excess of Ecology's authority and was thus invalid.

Dissenting in part, Justice Wiggins argued that in the Water Resources Act of 1971 the legislature clarified its intent to give equal treatment to minimum flows and competing water interests. Further, referencing the Court's prior determination that Ecology had the authority to interfere with an existing water right to set minimum flows, Justice Wiggins contended that, considering equal treatment of water appropriations, Ecology could similarly interfere with an existing minimum flow right under certain circumstances. Thus, Justice Wiggins concluded that a vested minimum flow appropriation did not serve to make the water right irreversible.

Next, Justice Wiggins examined the language of the OCPI Exception. Justice Wiggins disagreed with the Court's determination that Ecology could not rely on a cost-benefit analysis to decide whether a certain reservation met the requirements of the OCPI Exception. Applying Ecology's cost-benefit analysis, Justice Wiggins conceded that the majority of the Amended Rule's reservations did not constitute overriding considerations of the public interest. However, with respect to the rural public water systems and permit-exempt wells exception, Justice Wiggins argued the record provided a clear indication this particular reservation would provide substantial value to underserved users at a negligible cost to the stream system. A reservation of 1.5 cubic feet per second in this case would provide water to individuals who otherwise might be without water for up to twenty days during some months. Accordingly, Justice Wiggins argued that if such overwhelming benefits failed to justify a valid exception, it would be difficult to determine whether there ever could be a legitimate application of the OCPI Exception. Further, Wiggins argued that, due to its hydrological expertise, Ecology was in a better position than the Court to determine the impact of the proposed reservation.

Holly Taylor

WISCONSIN

Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800 (Wis. 2013) (holding the Wisconsin Department of Natural Resources ("DNR") (i) lacked constitutional authority under the public trust doctrine, but possessed statutory authority, to consider the impact of proposed water levels on adjacent wetlands above the ordinary high water mark, (ii) may consider wetland water quality standards, and (iii) must consider economic impacts when setting lake levels).

Lake Koshkonong (“Lake”) is the sixth largest lake in Wisconsin and is located at a natural widening of the Rock River. The Lake has a large surface area, but it is quite shallow, with a maximum depth of seven feet. It contains twenty-seven miles of shoreline, ten of which support residential and commercial lake communities. Additionally, the Lake contains 12.4 miles of wetland shoreline that is replete with diverse wildlife and vegetation. The Indianford Dam affects the water levels on the Rock River and the Lake, but due to nearly forty years of disrepair the dam had failed to regulate water levels. As a result, water levels on the Lake were higher than the target levels DNR set in 1991. Wisconsin rehabilitated the dam in 2002, resulting lower lake levels more consistent with DNR’s 1991 targets.

In response to these lower water levels, in 2003 the Rock-Koshkonong Lake District, Rock River-Koshkonong Association, Inc., and Lake Koshkonong Recreational Association, Inc. (collectively, “the District”) petitioned DNR to raise the target levels on the lake. The District contended that the lower levels had an adverse impact on water recreation, and that DNR’s mandated winter drawdown negatively impacted shore erosion, plant life, and animal species. After conducting an environmental assessment, DNR denied the District’s petition (“DNR’s denial”) but resolved to raise the winter drawdown minimum by half of an inch. The District then sought a contested case hearing with the Department of Administration, Division of Hearings and Appeals, which affirmed the DNR’s decision to reject the District’s petition based largely on DNR’s showing that granting the District’s petition and thereby raising the lake level would adversely impact adjacent wetlands and water quality in the Lake and the Rock River.

Next, the District petitioned for review in the Rock County Circuit Court (“Circuit Court”), raising three issues with DNR’s denial. Specifically, the District argued that DNR (i) improperly interpreted the public trust doctrine to allow consideration of impacts on private, non-navigable wetlands; (ii) improperly considered water quality standards when making its water level determinations; and (iii) incorrectly excluded evidence of economic effects on property by misinterpreting the mandate in Wis. Stat. § 31.02(1) that DNR “protect . . . property” when managing water levels and flow rates on navigable waters. The Circuit Court affirmed the Decision, concluding that the evidence was sufficient and that the DNR’s interpretation of the statute was reasonable.

The District then appealed to the Wisconsin Court of Appeals (“Court of Appeals”), which affirmed DNR’s denial and held that the language of section 31.02(1) was unambiguous. Additionally, the Court of Appeals found that DNR’s consideration of the impact of water levels on wetlands adjacent to the Lake and water quality standards under Wis. Admin. Code § NR 103 was reasonable. The District then petitioned the Wisconsin Supreme Court (“Court”) for review, which the Court granted.

The Court considered the following five issues on review: (i) whether the Court should give deference to DNR’s conclusions of law pertaining to its own statutory authority, (ii) whether DNR had constitutional authority under the public trust doctrine to consider the impacts of higher lake levels on adjacent wetlands above the Ordinary High Water Mark (“OHWM”), (iii) whether DNR

exceeded its statutory authority in making water level determinations under section 31.02(1) when it considered impacts on private wetlands adjacent to the Lake that are above the OHWM, (iv) whether Wis. Stat. § 281.92 expressly prohibits applying wetland water quality standards in a water level determination, and (v) whether DNR erred as a matter of law when it excluded most of the evidence of economic impacts at the contested case hearing.

Regarding the first issue, the Court held that DNR's conclusions of law were subject to *de novo* review because DNR made legal interpretations regarding its authority under the Wisconsin Constitution and state statutes, disregarded previous decisions of the Court, and acted inconsistently with long-standing DNR positions.

Next, the Court considered whether DNR exceeded its constitutional authority under the public trust doctrine by considering the impact of proposed higher water levels on non-navigable wetlands above the OHWM. In reviewing DNR's denial, the Court looked to Article IX, section 1 of the Wisconsin Constitution, which states that Wisconsin holds navigable waters in trust for the public. In previous decisions, the Court broadly interpreted the public trust doctrine to recognize not only commercial navigability rights, but also protection of recreational uses and preservation of scenic beauty.

However, DNR sought to extend its jurisdiction under the public trust doctrine beyond navigable waters to consideration of non-navigable waters, specifically the wetlands adjacent to the Lake that lay above the OHWM. The Court stated that DNR's jurisdiction does not extend to non-navigable waters because navigability is an essential element of the public trust doctrine. Furthermore, although prior cases extended the public trust doctrine to the protection of scenic beauty, the Court held that the Wisconsin Constitution does not give the state the authority to provide this protection by regulating non-navigable land bordering lakes and rivers. To do so, the Court warned, could expand the state's public trust authority to all private land in view of navigable waters. Thus, the Court concluded that there was no constitutional basis for extending the public trust doctrine to include non-navigable wetlands. Therefore, the Court held that DNR exceeded its authority under the public trust doctrine when it considered the impacts of higher water levels on adjacent wetlands above the OHWM.

Despite the inapplicability of the public trust doctrine to non-navigable wetlands above the OHWM, the Court held that section 31.02(1) gave DNR the authority to regulate and control the flow of water in all navigable waters "to promote safety and protect life, health and property." This includes the authority to regulate interests that navigable waters may affect, such as non-navigable property adjacent to navigable waters. Therefore, DNR had explicit statutory authority to consider the impact of the Lake's water levels on public and private wetlands adjacent to the lake. As the Court noted, Wisconsin derives this statutory authority from its state police power to protect property. The Court analyzed the legislative history and application of the statute and found no evidence that the legislature intended to exclude riparian rights from consideration of "property" in section 31.02(1).

Next, the Court turned to whether section 281.92 prohibited DNR's consideration of wetland water quality standards when setting lake levels under section 31.02(1). The Court began its analysis by reiterating the fact that, under section 31.02(1), DNR has the authority to regulate and control the flow of water in all navigable waters. The language in section 281.92 does not explicitly direct DNR to apply wetland water quality standards when making water level determinations, but the Court pointed out that the statute also does not prohibit DNR from doing so. Therefore, the Court interpreted the two statutes in harmony, upholding the Court of Appeals finding that nothing should limit the DNR when setting water levels. Furthermore, the Court found that DNR did not actually apply the Wis. Admin. Code § NR 103 wetland water quality standards. Instead, DNR merely evaluated the proposed water level increase against regulatory standards, including section NR 103. Thus, the Court concluded that DNR may consider wetland water quality standards when making water level determinations under section 31.02(1).

Finally, the Court examined whether DNR improperly excluded at the contested case hearing most of the evidence of the economic impacts of its water level determination. Because the meaning of "protect . . . property" in section 31.02(1) was ambiguous as to whether it included consideration of economic impact, the Court looked to precedent to interpret the phrase. Wisconsin's legislature has long recognized that water levels and dams played an important role in the state's economic development. The Court had also previously recognized the economic impacts of dams and the resulting water levels in its jurisprudence. Additionally, the Court noted DNR's past consideration of property interests in its shoreland zoning ordinance. The Court also emphasized that DNR considered economic impacts in an environmental assessment for the proposed water level order in 1982. While DNR did consider the direct impact of lowering the Lake's water levels on riparian properties in denying the District's petition to raise lake levels, the Court held that DNR wrongly excluded the cumulative economic effect of lower water levels on these properties. However, the Court tempered its holding and stressed that DNR only needed to consider reasonably identifiable economic impacts. Thus, DNR could still reject the District's petition for higher water levels even after considering the economic impacts of lower water levels on property.

Accordingly, the Court reversed the Court of Appeals's holding and remanded the case to the Circuit Court for further proceedings.

A three-justice dissent mainly disagreed with the Court's narrow reading of the public trust doctrine to not include the wetlands adjacent to the Lake. The dissent argued that the Court unnecessarily addressed the public trust doctrine when the case could have instead turned simply on a statutory construction of section 31.02(1). The dissent feared that, as a result, the Court significantly and unnecessarily weakened the public trust doctrine, representing a shift in state law that substantially hindered promotion of the public trust. Finally, the dissent disagreed that DNR must consider economic impacts when making water level determinations because section 31.02(1) does not require DNR to consider secondary or indirect economic impacts.

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