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Wisconsin Supreme Court Limits DNR's Regulatory Authority under the Public Trust Doctrine

Decision is a Significant Victory for Property Owners and Businesses

Madison – The Wisconsin Supreme Court today issued a decision limiting the Department of Natural Resources' (DNR) regulatory authority under the public trust doctrine. The case is *Rock-Koshkonong Lake District v. DNR*, 2013 WI 74.¹

The Supreme Court held that the DNR improperly relied upon the public trust doctrine for its authority to regulate non-navigable land or non-navigable water (e.g. wetlands) above the ordinary high water mark of Lake Koshkonong.

“The Court’s decision reining in the DNR’s attempt to greatly expand its regulatory authority under the public trust doctrine beyond navigable waters is a significant victory for businesses and property owners throughout the state,” said Andrew Cook, an attorney for the Great Lakes Legal Foundation, which filed an *amicus curiae* brief on behalf of the Wisconsin Manufacturers & Commerce and Midwest Food Processors Association.

“Had the Court adopted DNR’s legal arguments in this case, DNR’s authority to regulate private property beyond navigable water would have been virtually unlimited,” said Cook. “The Court correctly recognized that there are limitations on DNR’s regulatory authority under the public trust doctrine.”

The case involved a petition by the Rock-Koshkonong Lake District seeking to raise the water levels on Lake Koshkonong. The DNR denied the Lake District’s petition arguing that raising water levels would harm nearby private wetlands. The DNR argued it had authority to protect the nearby private wetlands under the public trust doctrine, which provides that navigable waters are held in trust for the public.

The public trust doctrine historically protected commercial navigation and only applied to navigable waters up to the “ordinary high water mark.” DNR argued in this case that it had the

¹ <http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=99472>.

authority under the public trust doctrine to regulate land use above and beyond the ordinary high water mark, including adjacent private property.

The majority opinion, authored by Justice David Prosser, rejected DNR's argument:

“Eliminating the element of ‘navigability’ from the public trust doctrine would remove one of the prerequisites for the DNR's constitutional basis for regulating and controlling water and land. 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 could be very significant.”

The Great Lakes Legal Foundation filed an amicus brief with the Supreme Court focusing on the public trust doctrine issue. Specifically, GLLF's brief argued:

“The public trust doctrine, incorporated in the Wisconsin Constitution, art. IX, § 1, holds navigable waters in trust for the public up to the ordinary high water mark. The legislature has neither expressly nor implicitly delegated DNR the authority under the public trust doctrine to regulate wetlands above the high ordinary water mark, nor could it ever do so given the limitations of the doctrine.”

According to Cook, the Supreme Court's decision, which agreed with GLLF's legal analysis on the public trust doctrine issue, is an important precedent for future cases.

“The Court's decision is a significant first step in curtailing efforts to expand DNR's regulatory authority under the public trust doctrine,” concluded Cook. “The Great Lakes Legal Foundation will continue to fight unlawful expansion of agency authority be it via the public trust doctrine or by other means.”

Click [here](#) to view the Supreme Court's decision and [here to read GLLF's amicus brief](#).

The Great Lakes Legal Foundation filed an amicus curiae brief in Rock-Koshkonong Lake Dist. v. DNR on behalf of the Wisconsin Manufacturers & Commerce and Midwest Food Processors Association. The Great Lakes Legal Foundation is a non-profit, 501(c)(3) legal foundation whose mission is to advance economic growth and increase job opportunities in the upper Midwest. For more information about GLLF, visit <http://greatlakeslegalfoundation.org>.

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