STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP1523

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.

AMICUS CURIAE BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE AND MIDWEST FOOD PROCESSORS ASSOCIATION

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,
The Honorable Daniel T. Dillon, Presiding,
Case No. 06-CV-1846, Dated May 9, 2008

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INTRODUCTION

This case involves the proper scope of the public trust doctrine and whether the legislature has delegated to the Department of Natural Resources (DNR) authority to regulate private, non-navigable waters above the ordinary high water mark.

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

Furthermore, DNR exceeded its authority by applying wetland water quality standards under Chapter 281 to a Chapter 31 water level order despite the fact that Wis. Stat. § 281.92 explicitly states that nothing in that chapter affects Chapter 31. The court of appeals ignored the plain language of Wis. Stat. § 281.92 and instead held that DNR had broad authority to apply regulations promulgated under Chapter 281 to non-navigable private wetlands.

Such an expansive interpretation of the public trust doctrine and disregard for statutory construction is unacceptable. Therefore, Wisconsin Manufacturers and Commerce (WMC) and the Midwest Food Processors Association (MWFPA) urge this Court to reverse the court of appeals' decision and remand to the lower court.

ARGUMENT

I. DNR DOES NOT HAVE PLENARY PUBLIC TRUST AUTHORITY TO PROTECT NON-NAVIGABLE PRIVATE WETLANDS ABOVE THE ORDINARY HIGH WATER MARK

WMC and MWPFA agree with Petitioners that under Wis. Stat. § 31.02(1) private wetlands may be protected as "property" in establishing a water level order. However, WMC and MWPFA disagree with the Department of Justice (DOJ), DNR, Intervenors, and the court of appeals that the legislature has delegated to DNR public trust duties to regulate non-navigable private wetlands above the ordinary high water mark.[1]

A. Wisconsin's Public Trust Doctrine

The United States Supreme Court has held that the state is directed to act as trustee of the waters within its borders and to protect the public's right to use the waters. *Illinois Cent. R.R. Co. v. Illinois,* 146 U.S. 387, 435, 13 S.Ct. 110 (1892).

Wisconsin's public trust doctrine is derived from the Northwest Ordinance of 1787. *Diana Shooting Club v. Husting*, 156 Wis. 261, 266-67, 145 N.W. 816 (1914). Building on the common law and the Northwest Ordinance, the Wisconsin Constitution provides in relevant part:

[1] If DNR does not have applicable public trust authorities under Wis. Stat. §31.02(1) or authority under Chapter 281 to regulate water level orders, as WMC and MWFPA argue, this case turns on the only relevant factor remaining under Wis. Stat. § 31.02(1) – the legislative directive to "protect… property" when setting water levels. WMC and MWFPA find it illogical that the Department of Justice would seek to extricate the concept of "property value" from a legislative provision meant to protect private property. If water levels set by DNR diminish the value of private property, it only logically follows that DNR has in fact failed to protect the individual's property.

> Jurisdiction on rivers and lakes; navigable waters. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well as to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

Wis. Const. art. IX, § 1.

Wisconsin courts have interpreted this to mean "[t]he title to the beds of all lakes and ponds, and of rivers navigable in fact as well, *up to the* line of ordinary high-water mark, within the boundaries of the state, became vested in [the state] at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law." *State v. Trudeau*, 139 Wis. 2d. 91, 101, 408 N.W.2d 337 (1987) (emphasis in original).

The doctrine has been expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty. *State v. Bleck*, 114 Wis. 2d 454, 457, 338 N.W.2d 492 (1983).

In Wisconsin, "[t]he legislature has the primary authority to administer the public trust for the protection of the public's rights, and to effectuate the purposes of the trust." *Hilton v. Dep't Natural Res.*, 2006 WI 84, ¶ 19, 293 Wis. 2d 1, 717 N.W.2d 166, s*ee also Bleck*, 114 Wis. 2d at 498.

B. The Scope of the Public Trust Doctrine Extends Only to the Ordinary High Water Mark of Navigable Waters

The public trust doctrine originally existed to protect commercial navigation and a determination of navigability is still essential to the doctrine's application. Once a body of water is deemed navigable, the state has the duty to hold those waters in trust for the public, and it accomplishes that by authorizing the DNR to regulate that body of water up to the ordinary high water mark.

Navigable waters, under Wisconsin law, include all lakes, streams, sloughs, bayous, and marsh outlets that are navigable in fact, for any purpose whatsoever. Wis. Stat. § 30.10. Expanding upon this definition, this Court has held that the test for navigability considers both commercial uses and recreational uses. *See DeGayner & Co., Inc. v. Dep't Natural Res.*, 70 Wis. 2d 936, 945, 236 N.W.2d 217 (1975).

The seminal case limiting the state's public trust duties is *Diana Shooting Club v. Husting*, 156 Wis. at 272. This Court placed boundaries around the public trust doctrine by limiting its scope to land below the ordinary high water mark. *Id.* ("By ordinary high-water mark is meant 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.").

DOJ and Intervenors rely on two cases to advocate for an expanded interpretation of the public trust doctrine, *Just v. Marinette County* and *Lake*

Beulah Mgmt. Dist. v. Dep't of Natural Res. However, as discussed below, those cases do not extend the public trust doctrine to non-navigable private wetlands above the ordinary water mark, nor could they given the doctrine's tie to navigability.

DOJ fails to discuss (or even cite) *State v. Trudeau* where this Court specifically limited the scope of the public trust doctrine to the ordinary high water mark. *See Trudeau*, 139 Wis. 2d at 104. In *Trudeau*, this Court explained that where a navigable body of water is identified the court must then determine the "boundaries of the public trust associated with the bed of that body of water." *Id.* According to this Court, "if the non-navigable site is a part of the lake, then the land below the OHWM is held in trust for the public." *Id.*

Nor does DOJ make mention of *Houslet v. Dep't of Natural Res.* where the court of appeals explained that the public trust doctrine "extends to areas covered with aquatic vegetation," but "only within the ordinary high water mark of the body of water in question." 110 Wis. 2d 280, 287, 329 N.W.2d 219 (1982), *citing Diana Shooting Club*, 156 Wis. at 272.

Trudeau and *Houslet*, which were both decided after this Court's decision in *Just*, limit DNR's regulatory authority under the public trust doctrine by expressly defining the geographical scope to include only those wetlands below the ordinary high water mark of navigable waters.

This Court has an opportunity to reaffirm that the public trust doctrine does not extend to diffused surface water or wetlands above the ordinary high water

mark. By doing so, the Court would help end the confusion caused by DOJ's attempts to broadly apply the public trust doctrine beyond the original scope of the Wisconsin Constitution.

C. *Lake Beulah Mgmt. Dist. v. DNR* is Distinguishable from this Case

Lake Koshkonong Wetland Association and Thibeau Hunting Club (Intervenors), cite at length to this Court's decision, *Lake Beulah Mgmt. Dist.* for the proposition that the public trust doctrine applies to non-navigable private wetlands above the ordinary high water mark. *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. However, the facts and this Court's holding in *Lake Beulah* differ from this case.

First, this Court in *Lake Beulah* concluded that "through Wis. Stat. § 281.11 and § 281.12, the legislature has delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters…" *Id.* at ¶ 34. In this case there is no such delegation. In fact, legislature expressly limited the application of Chapter 281's wetland regulations by statutorily stating that "nothing in this chapter affects … ch.31." Wis. Stat. § 281.92.

Second, this Court in *Lake Beulah* was concerned with the "potential effect" high capacity wells could have "on navigable waters." *Lake Beulah* at ¶ 34. Unlike *Lake Beulah*, this case does not involve potential impacts on

navigable waters. Instead, DOJ is attempting to expand the public trust doctrine beyond the ordinary high water mark to protect private, non-navigable wetlands.

The issues and facts in *Lake Beulah* are decidedly different from those in this case, and therefore that decision is irrelevant to this case.

D. *Just v. Marinette County* is Distinguishable From this Case and Therefore Does Not Bolster DNR's Argument That the Public Trust Doctrine Applies to Private, Non-Navigable Wetlands Above the Ordinary High Water Mark

DOJ's brief relies heavily on *Just v. Marinette County* for the proposition that the public trust doctrine applies to all wetlands, even private wetlands above the ordinary high water mark. 56 Wis. 2d 7, 201 N.W.2d 761 (1972); Resp't Br. at 15-19, 28. However, *Just* is distinguishable from this case.

In *Just*, this Court held that local jurisdictions had authority under their police powers to regulate land uses in a defined area within the shoreland to protect navigable waters under Wis. Stat. § 59.69. According to this Court, the purpose of the shoreland zoning ordinances was to protect navigable waters "from the degradation and deterioration which results from uncontrolled use and developed shorelands." *Just*, 56 Wis. 2d at 11.

This Court noted in passing the importance of wetlands and briefly discusses the public trust doctrine, but it does not go so far as to say that all wetlands are held in trust by the state. *Id*. at 18-19. The central holding in *Just* was

that the county's police powers allowed it to enact shoreland zoning ordinances to protect navigable waters.[2] *Id.* at 18. The state's public trust duties served as a justification for use of the state's sovereign police powers, not as the authority for the legislature's enactments. *See State v. Deetz*, 66 Wis. 2d 1, 11-12, 224 N.W.2d 407 (1974). Therefore, it is not necessary to overturn *Just* and the state's shoreland zoning law, as argued by DOJ, but instead clearly distinguish them as police power actions occurring mostly on non-trust lands.

Moreover, the shoreland zoning ordinances in *Just* regulated private land above the ordinary high water mark to protect navigable waters. Here, DOJ and Intervenors are attempting to extend the public trust doctrine to non-navigable wetlands above the ordinary high water mark by regulating navigable waters. This is a completely inverse (and incorrect) application of the doctrine.

E. Private, Non-navigable Waters Are Beyond Reach of DNR's Public Trust Authority

The legislature has chosen to delegate some of its power to administer the public trust doctrine to DNR. However, the public trust doctrine is not self-executing and the power to administer is delegated by statute. *Deetz*, 66 Wis. 2d at 11-13. When the state legislature is delegating authority based on the public trust doctrine, "such delegation of authority should be in clear and unmistakable

[2] *Just's* reliance on *Wis. P. & L. Co. v. Public Service Comm.* for its statement about the public trust doctrine is itself questionable. *Just*, 56 Wis. 2d at 19 (citing *Wis. P. & L.*, 5 Wis. 2d 167, 92 N.W.2d 241 (1958)).

language and cannot be implied from the language of a general statute…" *City of Madison v. Tolzman*, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

DNR's authority to implement the public trust doctrine therefore comes from specific statutory grants of power. Wis. Stat. § 31.02(1) provides DNR such a grant of authority through the phrase "in the interest of public rights in navigable waters" as a factor in setting water levels and flow. However, this delegation cannot exceed the constitutional reach of the underlying public trust doctrine, which does not extend to non-navigable private wetlands above the ordinary high water mark. Therefore, the court of appeals decision should be reversed and remanded in order to determine the ordinary high water mark.

II. THE COURT OF APPEALS IGNORED THE PLAIN LANGUAGE OF CHAPTER 281

The court of appeals held that the plain meaning of Wis. Stat. § 281.92 did not apply in this case and, therefore, granted DNR the authority to apply wetland regulations in setting the water levels on Lake Koshkonong. The court of appeals erred by looking to legislative history despite the fact that Wis. Stat. § 281.92 is unambiguous and can lead to only one meaning – nothing in Chapter 281 affects Chapter 31.

The Court "assume[s] that the legislature's intent is expressed in the statutory language," therefore "statutory interpretation begins with the language of the statute." *Sheboygan County Dep't of Health & Human Servs. v. Tanya M.B.*, 2010 WI 55, ¶ 27, 325 Wis. 2d 524, 785 N.W.2d 369

(*citing State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44-45, 271 Wis. 2d 633, 681 N.W.2d 110).

Although "extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances," it "is not the primary focus of inquiry," *Kalal* at ¶ 44. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id*. at 45; *see also Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659.

This Court has further explained that context is important too, therefore "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably to avoid absurd or unreasonable results." *Kalal* at ¶ 46. However, "where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id*.

Ultimately, as this Court explained:

> [T]he test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonable well-informed persons in two or more senses." *Id.* at ¶ 47. Thus, "it is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute to determine whether well-informed persons should have become confused, that is whether the statutory…language reasonably gives rise to different meanings.

Id. at ¶ 47.

Finally, this Court has "repeatedly emphasized that traditionally, resort to legislative history is not appropriate in the absence of a finding of ambiguity." *Id.* at ¶ 51 (internal quotations and citations omitted).

The court of appeals purportedly applied a plain meaning analysis by stating "under a plain meaning interpretation of the statutes… § 281.92 does not restrict DNR's consideration of wetland quality standards derived from ch. 281, including Wis. Admin. Code § NR 103, when setting water levels under § 31.02(1)." *Rock-Koshkonong Lake Dist. et al. v. Dep't Natural Res.*, 2011 WI APP 115 at ¶ 55.

The problem here is that the court of appeals did not in fact apply a plain meaning analysis to the statutes. Had it, the court of appeals would have been bound by the plain language of Wis. Stat. § 281.92, which states "Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31."

Nothing in Wis. Stat. § 281.92 leads "well-informed persons" to become confused as to its meaning, nor does the language give rise to different meanings. Instead, Wis. Stat. § 281.92 simply states that nothing in that Chapter 281 affects Chapter 31.

Therefore, this Court should reverse the lower court and find that the legislature's language unambiguously provides that the wetland regulations promulgated under Chapter 281 do not apply to a Chapter 31 order water level order.

CONCLUSION

WMC and MWFPA urge this Court to reverse the lower court's expansive reading of the public trust doctrine. Moreover, this Court should apply the plain meaning of Wis. Stat. § 281.92 and hold that nothing in Chapter 281 affects water level orders under Chapter 31.

DATED this 24th day of May, 2012.

Respectfully submitted,
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(7), (8)(b) and (c) for a brief and appendix produced with Times New Roman, 13 point font. The length of this brief is 2,854 words.

Dated this 24th day of May, 2012.

s/Andrew C. Cook
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 80.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of May, 2012.

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CERTIFICATE OF SERVICE

I, Andrew Cook, hereby certify that I caused three true and correct copies of this Joint Amicus Curiae Brief of Wisconsin Manufacturers & Commerce, Inc. and Midwest Food Processors Association, Inc. in Support of the Rock-Koshkonong Lake District's Petition for Review to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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