

# Court of appeals rules against lake

By Jason Francis  
Reporter Staff

The Rock-Koshkonong Lake District has hit another barrier on its longtime mission to have water levels raised on Lake Koshkonong, Wisconsin's sixth-largest inland lake.

The State of Wisconsin's District 4 Court of Appeals ruled Thursday, July 21, to affirm a previous ruling in Rock County Circuit Court that upheld a Department of Natural Resources decision to deny the district's request

to increase the depth of the shallow lake during the summer and to eliminate the winter drawdown of its waters. The lake features an average depth of about five feet and a maximum depth of about seven feet.

The ruling was not surprising given the high level of deference the court of appeals has traditionally provided decisions made by state agencies such as the DNR, William O'Connor, attorney for the lake district, said Monday.

The district intends to appeal the case to the state's Supreme Court, Lake District Board Chairman Brian

Christianson said Tuesday.

Information on Thursday's court decision and the planned appeal will be presented to lake district members during the district's annual meeting Saturday, July 30, Christianson said. No vote will be taken Saturday specifically on the move to appeal because when the decision was made by the district in 2008 to appeal the Rock County Circuit Court ruling, the district assumed the case would ultimately be decided by the Supreme Court (whether by appeal from the district or by the DNR had the district been successful at the court of appeals level), he added.

The district is proposing that the \$50-per-parcel lake district fee levied on the district's property owners in 2011 will remain at the same level in 2012, Christianson said. The fee will be large enough to fund the estimated \$10,000 to \$15,000 in legal costs required to appeal to the Supreme Court, he said. The cost to appeal per parcel is estimated to total \$3 to \$4, he added.

The Supreme Court is not obligated to take the case

## district

on appeal.

In the court of appeals, the district was joined by the Rock River-Koshkonong Association and Lake Koshkonong Recreational Association as petitioners seeking to have the DNR ruling overruled. The DNR's decision was also previously affirmed by an administrative law judge with the Wisconsin Department of Administration's Division of Hearings and Appeals.

The Lake Koshkonong Wetland Association and the Thiebeau Hunting Club supported the DNR's decision in the appeal to the court of appeals.

### History of lake district's request

The current battle over lake depths dates back to 2003, when the district petitioned the DNR to have summer water levels raised by 7.2 inches and have the winter drawdown of the lake eliminated, moves that would violate the DNR's 1991 order regarding lake depths.

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# Lake district appeal denied

Lake district officials contend the DNR's ruling is flawed and that the amended lake levels would improve safety, navigation, fishing and wetland restoration of the lake and Rock River. But according to the DNR's environmental assessment regarding the district's request, higher water levels would hinder the lake's aquatic plant community, increase wave erosion, increase rough fish access to shallow marshes and reduce emergent aquatic life.

In April 2005 the DNR issued an initial order denying the petition, though the agency did authorize that the minimum winter drawdown of water levels could be increased by six inches.

The district and its related associations then sought a contested case hearing on the denial. The hearing was held in 2006 before an administrative law judge with the Wisconsin Department of Administration's Division of Hearings and Appeals. That judge sided with the DNR, prompting the district to appeal to Rock County Circuit Court where, in May 2008, Judge Daniel T. Dillon ruled to uphold the DNR's decision.

At the district's 2008 annual meeting, 600 electors attended and voted unanimously to proceed with a legal challenge to the DNR's decision by approving an increase of \$65 in the district's per-parcel fee, Christianson said. The fee jumped from \$35 per parcel to \$100 per parcel to fund the studies and other work required to mount the legal challenge, he added. The district board then voted unanimously to appeal Dillon's ruling to the court of appeals.

## District's arguments rebuffed

In the 25-page opinion issued Thursday, Court of Appeals Judge Paul Higginbotham details the district's three appeal arguments and sided against each

of them.

According to the opinion, the district argued that the circuit court ruling should be struck down because the DNR:

(1) Did not properly consider "the potential economic effects" its water level decision would have on residential property values, business income and tax revenues.

(2) Exceeded the scope of its authority "when it considered the potential effects of proposed water levels on private, non-navigable wetlands" located above the ordinary high water mark of the lake.

(3) Exceeded the scope of its authority by considering wetland water quality standards in setting the water levels for the lake.

Regarding the first contention, Higginbotham wrote that "if the DNR were required to consider revenues of businesses directly linked to lake recreational activities, like marinas and bait shops, would it also be required to consider revenues of businesses with less direct links to use of navigable waters such as gas stations and convenience stores? The District's interpretation provides no basis for excluding consideration of economic impacts that may be too attenuated to reliably quantify."

Higginbotham added on this point that the DNR's charge to protect property when considering lake depth regulation "plainly does not require the DNR to take into account the economic effect that proposed water levels may have on residential property values, business income and tax revenues."

Regarding the district's second contention, Higginbotham found that the district's interpretation of the legal issue is "unreasonable because it would require the DNR to ignore potential adverse impacts of its own actions on the

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very resources it has been assigned to protect."

Higginbotham continued: "[U]sing the ordinary high water mark to determine the scope of a public rights analysis would artificially divide otherwise contiguous wetlands that are a part of the same ecological system, excluding from consideration pockets of wetlands that are similar in character and provide similar public benefits to those wetlands included in the public rights analysis."

Finally, regarding the district's third point of contention, the opinion also found the district to be erroneous. Higginbotham wrote that the district's interpretation of the correlating Wisconsin statute would lead to an "absurd result." That interpretation "would prevent the agency charged with protecting wetland water quality from considering the statutes and rules related to wetland water quality when setting water levels," the opinion adds.

O'Connor believes the court of appeals erred in its interpretation of a Wisconsin statute that requires the DNR to "protect ... property." The court subscribes to a definition of that phrase that does not require the DNR to consider the potential economic effects of its water level rulings on property owners, he said.

"We think that is legally wrong," he said.

According to the court's "extremely narrow" interpretation, the DNR must only consider if its orders would lead to the flooding of private property and the district believes that "protecting property" must mean more than that, O'Connor said.

### Repercussions of higher water

The court of appeals decision also details the various repercussions higher water levels would allegedly have on the lake and its surrounding wetlands.

Among his findings:

- Water quality in the lake – which has already been declared an impaired body of water under the Clean Water Act – would suffer because “an increase in water level would likely cause increased sedimentation.”

- Higher year-round water levels “would accelerate and deepen the erosion of wetlands.”

- Higher depths would cause continued loss of submergent and emergent wetland habitat, leading to decreased reptile and amphibian populations and decreased habitat suitable for a variety of birds, including several species listed as “threatened” or of “special concern.”

- Elimination of the winter drawdown would likely increase shoreline erosion.

- Higher water levels would adversely affect parts of a drainage system utilized by some Jefferson County farmers, which could delay planting and reduce crop yields.

The decision also plays down the positive impact the higher water levels would have on public access of the lake. Boat launching conditions would be only “marginally” better with the requested higher lake level, the opinion states.

Higginbotham noted that a majority of residential and business owners on the lake support the district’s quest to raise water levels to improve lake access and the lake’s scenic beauty, pointing to the district’s survey of lake property owners that showed 81 percent of respondents reported that low water levels adversely impacted their enjoyment of the lake at least somewhat significantly.

Positives of higher water levels include that piers could be shortened by as much as 100 feet or more, according to the district, and swimming could occur closer to the shoreline, Higginbotham wrote. Also, increased depths would “improve the ability of rescue personnel to respond to some emergencies.”

### Long wait for court ruling

O’Connor said he is puzzled by the fact the court of appeals took nearly three years to issue a ruling, as all the legal briefs were filed for the case in 2008. Typically, court of appeals rulings can be expected within four to eight months, he said.

Last July, the court of appeals actually asked the Supreme Court to take the case because the appeal raised significant issues that had never been adjudicated by the courts, O’Connor said, but the Supreme Court declined the request and forced the court of appeals to make a ruling.

On June 30, 2011, O’Connor penned a letter to the court of appeals urging it to render a decision prior to the district’s July 30 annual meeting so the district could “reasonably plan its program and budget” for the next year.

### Next step in process

Provided the district appeals the case to the Supreme Court (the district has 30 days to do so), the court can choose not to take the case.

What are the chances of the appeal being picked up by the highest of state courts?

“It’s hard to say. Statistically, the Supreme Court takes a relatively low percentage of cases, but this is an unusual case,” O’Connor said, adding that he believes the case has a “better chance than the vast majority of cases” to be okayed for review.

Given the complexity of the issues, the statewide implications they present, and the fact that the court of appeals took nearly three years to rule, Christianson believes the Supreme Court will take the case.

“We feel like the amount of time it has taken (at the circuit court level) is a factor that works in the lake district’s favor as we move to the Supreme Court,” Christianson said.

Either way, the lake level controversy will reach its final end at its next stop.

“Win, lose or draw, we will have finality to the DNR’s operating orders,” Christianson said.