

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1761**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**PATRICIA S. VANDER BLOEMEN,  
JAN L. VANDER BLOEMEN,  
JANE A. VANDER BLOEMEN and  
ALBERT L. VANDER BLOEMEN,**

**Petitioners-Appellants,**

**v.**

**STATE OF WISCONSIN  
DEPARTMENT OF NATURAL  
RESOURCES,**

**Respondent-Respondent.**

APPEAL from an order of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Patricia, Jan, Jane and Albert Vander Bloemen appeal pro se from an order affirming the decision of the Division of Hearings and Appeals (DHA) setting a new water level for Little Cedar Lake. We

conclude that the DHA decision is supported by credible evidence and a reasonable basis. We affirm the order.

In 1931, the Public Service Commission (PSC) authorized the construction of a dam on the Little Cedar Lake and set the lake level at 1013.42 National Geodesic Vertical Datum (NGVD). At that time the Washington County Fish and Game Protection Society constructed and operated the dam. In 1958, a steel I-beam and stoplog were installed on the dam without authority. In 1971, there was the addition of a carp grate, also without authority. These modifications had the effect of raising the water level above that established in the 1931 PSC order.

The Vander Bloemens own approximately 800 feet of lake front property. Over the years they made various complaints about the high water level on the lake, the illegal dam modifications and the resulting shoreline erosion. They requested that the Department of Natural Resources (DNR) order the abatement of the two illegal dam modifications and maintain the lake at the 1931 level. It became apparent that ownership of the dam was in question because the Washington County Fish and Game Protection Society no longer existed. A hearing was held before the DHA, upon the application of the Little Cedar Lake Advancement Association, to transfer dam ownership, for an order establishing the lake water level and on an order of the DNR for removal of the unlawful carp grate. The decision of DHA transferred dam ownership to Little Cedar Lake Protection and Rehabilitation District, required removal of the carp grate and set the maximum water level at 1014.15 NGVD.

The Vander Bloemens contend that the appeal involves the application of a statute to undisputed facts and therefore presents a question of law which we review de novo. Ours is not a de novo standard of review.

The decision involves the DNR's and DHA's authority to act on contested case matters involving navigable waters. See §§ 31.02 and 227.43(1)(b), (2), STATS. The actual choice of water level is discretionary. We must accord due weight to the discretionary authority conferred on an agency. *Doersching v. Funeral Directors*, 138 Wis.2d 312, 328, 405 N.W.2d 781, 788 (Ct. App. 1987). We look to whether the decisionmaker examined the relevant facts, applied a proper standard of law and reached a reasonable conclusion. *Id.*

Under § 227.57(6), STATS., we are prohibited from substituting our judgment for that of the agency as to the weight of the evidence, nor may we set aside agency action unless the findings on which the action depends are not supported by substantial evidence. *City of Oak Creek v. DNR*, 185 Wis.2d 424, 446, 518 N.W.2d 276, 283 (Ct. App. 1994).

The Vander Bloemens argue that the DNR has acted in excess of its authority by "taking" by prescription their "flowage rights." Their argument centers around a belief that the water level was determined solely on the ground that it had been at that level for twenty years without objection. They characterize the action as confirming a water level acquired by prescription. They devote a portion of their brief to demonstrating that objections were made to the higher level during the relevant twenty-year period and in arguing that the increased level was not "open, visible and notorious for a continuous and uninterrupted period of 20 years." They also attempt to make much of the fact that during the twenty-year period there was no known dam owner.

We conclude that whether a prescriptive right to a higher water level was acquired by either riparian owners or the DNR is irrelevant. It is unfortunate that the DNR drew an analogy to prescriptive rights in its proposed order because the Vander Bloemens have seized on that concept and followed it down a dead-end path.

Indeed, no party acquires a prescriptive right to a particular water level. The Vander Bloemens do not have a prescriptive right to the 1931 water level. Under § 31.02, STATS., and the public trust doctrine which the statute codifies, the public is the owner of the water. The water level is always subject to the agencies' actions as public trustees. The agencies act with statutory authority to regulate the water level and do not need to acquire the right to change the level by prescription. The DHA decision is based on the present circumstances and a present-day determination of the public interest. Thus, as long as the decision is within the public interest, we must affirm it.

The Vander Bloemens' claim that the higher lake water level was attained by illegal dam modifications and by illegal trespass is similarly without consequence. Past illegalities do not matter if the lake level set by the DHA decision is within the current public interest.

Thus, we turn to the only issue this appeal properly presents: whether there is a reasonable basis for the DHA decision setting the water level on the lake. The decision reflects consideration of the competing interests for higher and lower water levels. It recognizes that the higher level is consistent with the best public use of the lake and will support the natural environment that has now developed around the lake. It also notes the Vander Bloemens' claim that the higher water level damages their property. The decision has the effect of modestly reducing the water level from its all-time high. As a result, the Vander Bloemen property will be subjected to less erosion.

There is no direct claim that the facts on which the decision is based are not supported by substantial evidence. There is substantial evidence to support the DHA's assessment of the circumstances necessitating a higher water level. We conclude that the decision has a reasonable basis and is the proper balance between protecting the property of riparian owners and protecting the resources and rights of the public.

*By the Court.* – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.