



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Application of the Town of  
Oakland to Discontinue Kulbeck Park, a Public  
Access to Devils Lake, Located in the Albert  
Kulbeck Subdivision, Town of Oakland, Burnett  
County, Wisconsin

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Case No. IH-09-06

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to due notice, hearing was held at Siren, Wisconsin, on Nov. 3, 2009, Jeffrey D. Boldt, administrative law judge presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh  
DNR  
P. O. Box 7921  
Madison, WI 53707-7921

Town of Oakland

Harm Weber, Town Chairman  
6849 Sondrall Road  
Danbury, WI 54830

Jeff and Connie Bump  
27625 Gables Road  
Webster, WI 54830

FINDINGS OF FACT

1. The Town of Oakland filed an application with the Department of Natural Resources for a permit under Wis. Stat. § 66.1006 to vacate a public access to Devils Lake specifically, Kulbeck Park, located in the Albert Kulbeck Subdivision. Kulbeck Park is an

undeveloped public park in section 27, Township 40 North, Range 16 West in the Town of Oakland, Burnett County, Wisconsin.

2. The Department of Natural Resources issued Notice of a Proposal to Vacate a Way to Water which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. A timely objection was received from Jeff and Connie Bump. On September 4, 2009, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

3. Devil's Lake is a navigable water of the state, approximately 1001 acres in size.

4. The Town of Oakland passed a Resolution for the abandonment of Kulbeck Park on July 10, 2008. (Ex. 5) The Town proposal does not include providing any replacement access to Devil's Lake. Rather, the Town is proposing to increase the signage and provide a picnic table at another public access site, at Colter's subdivision. The Colter's subdivision site has a level and sandy beach area and gets some usage for swimming. (Ex. 10)

5. The Bumps are hoping to put in a bid for the Kulbeck Park access if it is abandoned. They own a resort next door to the public access parcel.

6. The Town set forth numerous reasons for seeking the abandonment:

- The site has never been developed and gets little or no public use;
- There is no parking and the roadway is curved and narrow at the site;
- The bank is relatively steep;
- There are developed trails in the area for snowmobilers;
- The site has a gravel and muck bottom, and is thus a poor choice for swimmers—especially given the sandy beaches at other public access areas or the Lake. (Ex. 5)

7. DNR Environmental Grants Specialist Jane Malischke coordinated the Department review of the abandonment proposal. Malischke testified that the site did contribute to the quantity and quality of public access on Devil's Lake. Devil's Lake is over 1000 acres in size and has only three public access locations. "Two is less than three" and the loss of one site at this end of the lake would be a loss of both quantity and quality of public access. (Malischke)

The site represents a quiet and secluded area for the public to gain access to the lake, primarily for enjoyment of natural scenic beauty. The relatively steep bank does not make it a great site for boating access, but the DNR considers all uses equal when considering the quality of the site. The bank can easily be negotiated by most people who are in good physical condition. The site is available and well-suited for bicyclists or people on foot who just want a quick and quiet access to the lake. The Department considers not just existing uses but potential

public uses over time. The DNR fish manager also expressed concerns about giving up this wild and secluded access without providing a replacement access. (Malischke) Further, while there is no specific parking available, other than the curve area, parking on the side of the road is not particularly difficult.

8. The Town has proposed providing increased signage relating to the Colter's Subdivision public access and installing a picnic table at that site. However, this would not represent providing "equivalent or superior replacement public access" if the Kulbech subdivision access is abandoned. (Malischke) Ms. Malischke testified that she discussed this proposal with other DNR staff, and that the consensus was the signage and picnic table would not make up for the loss of this site. (Ex.18)

9. The Town has not carried its burden of proof in demonstrating that the access proposed to be abandoned does not contribute to the quality or quantity of public access on the body of water.

## DISCUSSION

The Department of Natural Resources may grant a municipal petition to abandon or discontinue a public access only if: (a) Any access sites or part thereof proposed to be abandoned or discontinued is replaced prior to granting the petition; or (b) The department finds that the access proposed to be abandoned does not contribute to the quality or quantity of public access on the body of water. The Town has not met its burden on either sub (a) or sub (b) above, and approval of the abandonment must therefore be denied.

The Town has not proposed providing "equivalent or superior replacement public access" as contemplated by NR 1.92(3). Accordingly, the sole question becomes whether the access proposed to be abandoned contributes to "the quality or quantity" of public access on Devil's Lake. Ms. Malischke put the matter succinctly when she said that "two is less than three" and that the loss of one site at this end of the lake would be a loss of both quantity and quality of public access.

When looked at from the long-term perspective of future users of Devil's Lake, two public access sites and a picnic table are also considerably less than three public access sites. The DNR's determination denying the public access abandonment must be affirmed under these circumstances.

## CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to review Department of Natural Resources approval of a discontinuance of a public access site pursuant to Wis. Stat. §§ 227.43 and 66.1006.

2. The Department of Natural Resources has authority to approve or disapprove of any discontinuance of a public access to public water. No resolution, ordinance, order, or similar

action of a town board or county board, or of a committee of a town board or county board, discontinuing any highway, street, alley, or right-of-way that provides public access to any navigable lake or stream shall be effective until such resolution, ordinance, order, or similar action is approved by the department of natural resources. Wis. Stat. § 66.1006

3. NR 1.92(2) provides that the department may grant the petition to abandon or discontinue the public access only if: (a) Any access sites or part thereof proposed to be abandoned or discontinued is replaced prior to granting the petition; or (b) The department finds that the access proposed to be abandoned does not contribute to the quality or quantity of public access on the body of water. The Town has not met its burden on either sub (a) or sub (b) above, and approval of the abandonment must therefore be denied.

4. There was no evidence that the public access sites caused environmental degradation as a result of existing use as a public access and that “abandonment of the access would reduce or eliminate the degradation without reducing public access to that body of water” within the meaning of Wis. Admin. Code NR 1.92(4).

#### ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the DNR’s determination denying the public access abandonment be AFFIRMED.

Dated at Madison, Wisconsin on December 3, 2009.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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Madison, Wisconsin 53705-5400  
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By: \_\_\_\_\_

Jeffrey D. Boldt  
Administrative Law Judge

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.