

1-1-2005

## Lake Bistineau Pres. Soc'y, Inc. v. Wildlife & Fisheries Comm'n., 895 So. 2d 821 (La. Ct. App. 2005)

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James E. Downing, Court Report, Lake Bistineau Pres. Soc'y, Inc. v. Wildlife & Fisheries Comm'n., 895 So. 2d 821 (La. Ct. App. 2005), 8 U. Denv. Water L. Rev. 690 (2005).

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Lake Bistineau Pres. Soc'y, Inc. v. Wildlife & Fisheries Comm'n., 895 So. 2d 821  
(La. Ct. App. 2005)

**Lake Bistineau Pres. Soc'y, Inc. v. Wildlife & Fisheries Comm'n., 895 So. 2d 821 (La. Ct. App. 2005)** (holding the Wildlife and Fisheries Commission of the State of Louisiana did not abuse its discretion in implementing an environmental plan to lower the water level of Lake Bistineau since it adequately took into account the environmental, social, economic, and recreational impacts of their decision).

Lake Bistineau Preservation Society ("LBPS"), composed of homeowners, business owners, and persons who use the lake for recreational purposes, contested an environmental plan recommended by the Department of Wildlife and Fisheries of the State of Louisiana ("DWF"). The plan would lower the water level in Lake Bistineau seven feet below its normal pool stage from July 15 of each year until January 31 of the following year, for three consecutive years. The DWF initiated the plan to improve suitable spawning habitat, control the submerged aquatic vegetation, and reduce the accumulation of organic material on the lakebed. These factors caused a decline in the spawning of sport fish, made parts of the lake impassable to boat traffic, and adversely affected recreational water activities.

LBPS filed suit seeking declaratory and injunctive relief in the 26th Judicial District Court for the Parish of Bossier, Louisiana. LBPS argued the DWF exceeded its powers and authority under the Louisiana Constitution when it approved the plan to lower the lake's water level. Specifically, LBPS claimed the DWF's plan was an arbitrary and capricious abuse of discretion because the DWF failed to balance the benefits of the plan against the economic and recreational costs. LBPS also contended the DWF failed to create a record adequately setting out the basic facts and establishing a rational connection between its findings and the decision made. The governing bodies of the parishes where Lake Bistineau is located filed a petition of intervention, asserting the DWF's proposed plan was reasonable and in the best interest of the lake and nearby property owners. The court denied the request for the preliminary injunction. LBPS appealed to the Louisiana Court of Appeal, Second Circuit.

The court noted Louisiana's Public Trust Doctrine ("Doctrine"), embodied in Article Nine, Section One of the Louisiana Constitution, required the DWF to protect the Louisiana environment. The Doctrine did not establish environmental protection as an exclusive goal, but required a balancing process in which DWF had to give full and careful consideration to environmental costs and benefits, along with economic, social, and other factors. The court held the DWF adequately considered the economic and recreational impacts, and reasoned the long-term adverse effects of no-action would ultimately have a greater negative impact on the environment. The DWF's plan had the greatest chance of success and was the most cost-efficient. Further, the court noted the preliminary injunction on appeal addressed an

action that already occurred: the reduction of the lake's water level. However, the court's ruling did not prevent a trial on the merits that could take place prior to a scheduled lowering the following year. The court denied the application for a preliminary injunction and affirmed the trial court's ruling.

*James E. Downing*

## MAINE

**S.D. Warren Co. v. Bd. of Envtl. Prot., 868 A.2d 210 (Me. 2005)** (holding both the Clean Water Act and state certification rights subjected a paper mill to water quality conditions even though the mill had not polluted any water).

S.D. Warren Company ("Warren") owned and operated hydroelectric dams requiring a permit pursuant to the Federal Power Act ("FPA"). The FPA required permit applicants to comply with the Clean Water Act ("CWA") as a condition to the issuance of a permit. The water that passed through Warren's dams entered turbines and then returned to the river operating in run-of-river mode. The projects, originally licensed between 1979 and 1981, were set to expire in 1990, but modifications allowed the license to continue until 2001. Warren filed applications for certification in 1999, and then refiled his applications in 2000, 2001, and 2002.

In April 2003 the Department of Environmental Protection ("DEP") approved water quality certification for the continued operation of Warren's projects subject to a number of conditions. In May 2003 Warren appealed DEP's decision to the Maine Board of Environmental Protection ("BEP"). The BEP found the water to be a discharge of a pollutant pursuant to the CWA and, thus, subject to certain conditions for water quality. Warren appealed BEP's judgment to the Cumberland County Superior Court, which affirmed BEP's decision and conditioned the approval of Warren's application for water quality certification under the Clean Water Act ("CWA") and state statutes. Warren appealed the superior court's decision to the Maine Supreme Court.

Warren first challenged BEP's certification authority because Warren's operation of its dam did not result in a discharge. The court, with deference to the BEP's decision, held the operation of Warren's dams caused a discharge pursuant to the CWA. Specifically, the court stated water removed from a navigable body of water and then redeposited into that same body of water constituted a discharge pursuant to the CWA. The court also determined certification rights under the CWA vested in a state if an activity resulted in a discharge. Furthermore, once certification rights vested, any conditions the state imposed became conditions on the federal license as well.