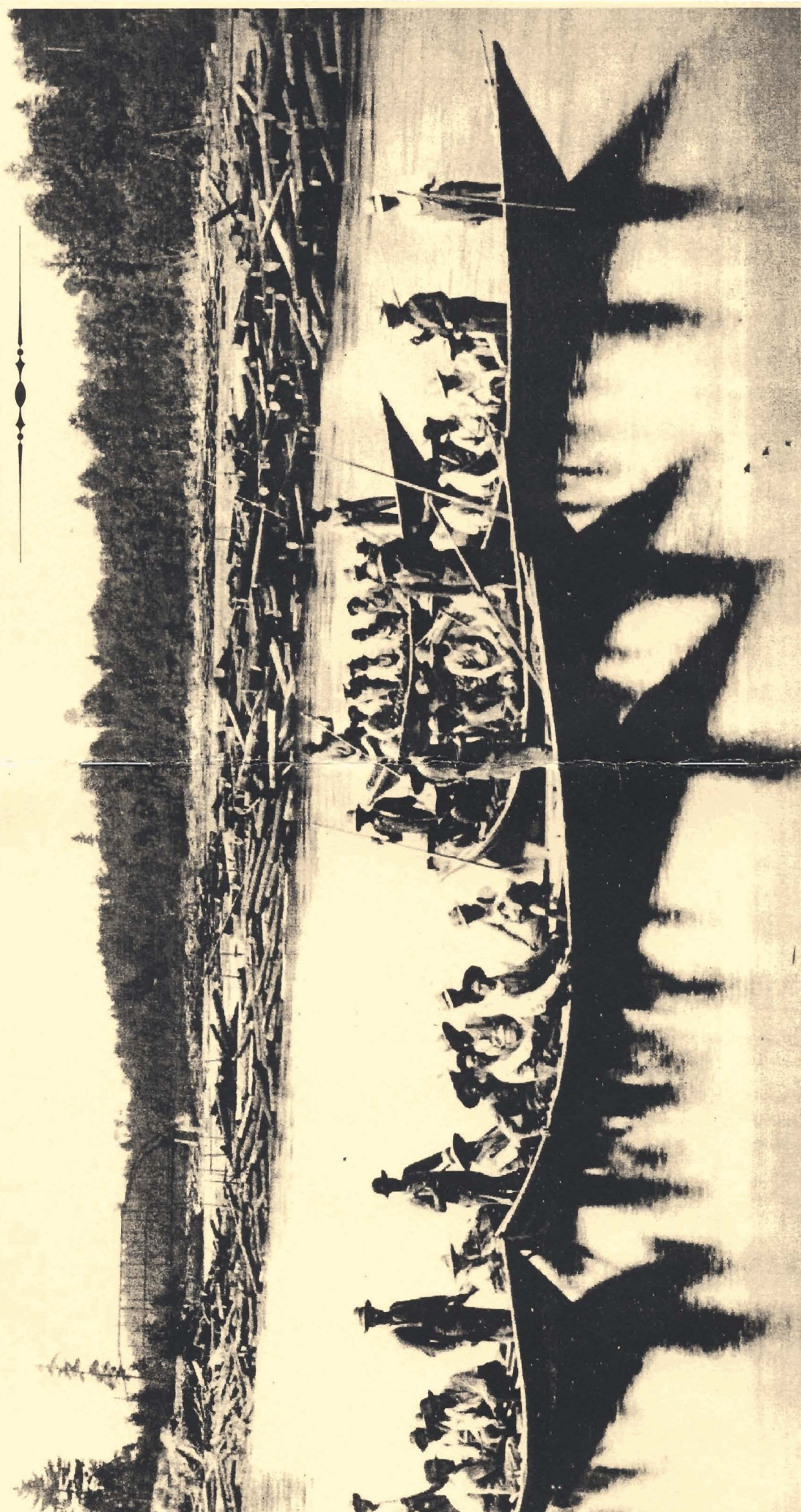


Champions of the Public Trust A History of Water Use in Wisconsin

Accompanying Guide



WZ-030 95




Wisconsin Department of Natural Resources
Bureau of Water Regulation and Zoning



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Photo credits:

Cover: State Historical Society of Wisconsin

Frank Wade: Mr. & Mrs. Roger Fairbanks

Paul Husting: State Historical Society of Wisconsin

Fred Luening: Milwaukee Journal Photo

Virgil Muench: Mrs. Jane Muench Burke

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Pritwe v. Wisconsin State Land and Improvement Co., (1899)

"The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose."

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Just v. Marinette County (1972)

"Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?...An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others..."

BACKGROUND

Water Laws affect all of us. They're important for people who boat, fish, swim, or hike along a scenic riverway. Water laws affect everyone who uses power generated by a hydroelectric dam — for homes or to manufacture products we use every day. Water laws regulate how municipal and residential wastes are disposed of and how much water can be used to irrigate Wisconsin's farmlands.

Like many other states, Wisconsin's surface water laws are based on a concept called the Public Trust Doctrine. In essence, the Doctrine declares that navigable waters are owned by all state citizens and are held "in trust" for them by the State. In each state, historical and political events, as well as the nature of the landscape, have given the Trust Doctrine a unique character.

As described in the video program, *Champions of the Public Trust*, Wisconsin citizens have taken action to clarify or change how the Public Trust Doctrine is interpreted and implemented. Not all acts have been bold or personally risky. By writing letters, circulating petitions, or speaking up in public meetings, many Wisconsin citizens have taken a measure of responsibility for our lakes, rivers, and streams.

WHAT'S AT STAKE?

Water laws are at the heart of critically important decisions ahead, decisions which will test our wisdom, our generosity, and our ability to learn from history. We must ask ourselves questions which may again shift the priorities addressed in Wisconsin's water laws: Can we continue our present policy of essentially unlimited public use of lakes, rivers, and streams? Should we share our abundance of water with water-poor states? Where will we draw the line when economic development and public recreation threaten the environmental stability of our waterways?

In a world of competing social, economic and environmental needs, the laws which govern use of our lakes, streams, and rivers strike a fragile balance. The concern and involvement of state citizens today may be more important than ever before.

Virgil Muench

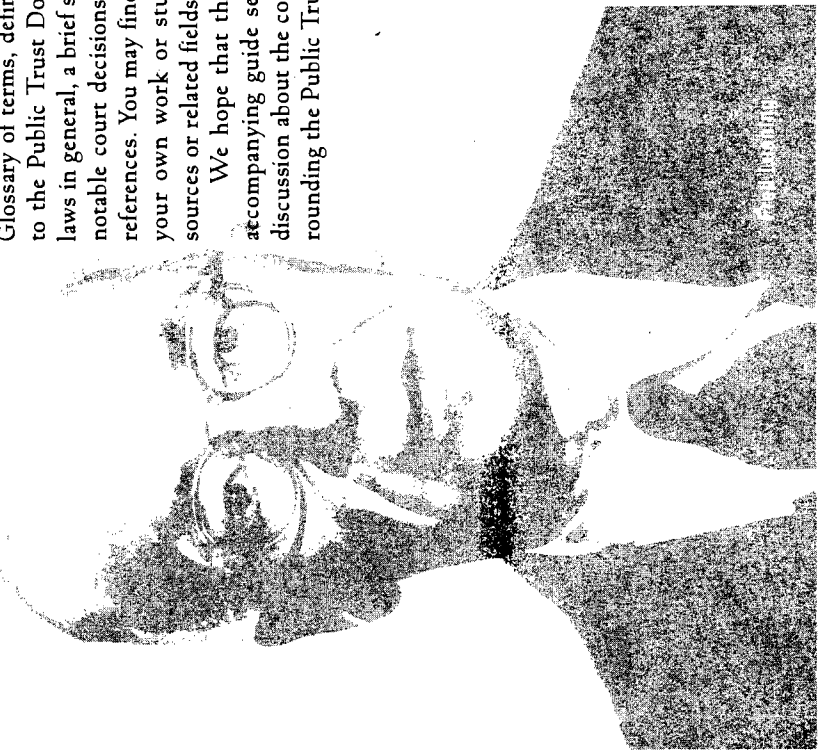
INTRODUCTION

This Guide expands upon the ideas and events presented in the video documentary, "Champions of the Public Trust, A History of Water Use in Wisconsin". It can be used for further individual study of water policy issues. It can also be easily used to aid in the design of classroom or small group discussion of the historical development of water use laws, as well as to provide substantial background necessary for an informed look at contemporary trust doctrine issues and conflicts.

In this Guide can be found a "Fact Sheet" entitled, "Yours, Mine and Ours: The Public Trust in Wisconsin's Water." This document is easily reproducible for distribution to your audience. Please don't hesitate to use it. Also, there are two sections intended to serve as starting points for any group discussion or as part of a curriculum for a presentation or training session: "Suggested Questions for Discussion" and "Suggested Group Exercises."

Finally, at the end of this Guide are a Glossary of terms, defined as they apply to the Public Trust Doctrine and water laws in general, a brief summary of some notable court decisions, and a listing of references. You may find these useful for your own work or study in water resources or related fields.

We hope that this videotape and accompanying guide serve to stimulate discussion about the complex issues surrounding the Public Trust Doctrine.



Virgil Muench

THE TRUST

Wisconsin's Public Trust Doctrine is a body of constitutional, common (court-interpreted), and statutory law establishing public rights, and the State's obligation to protect them, in navigable bodies of water.

The Trust is based on ideas found in the Northwest Ordinance of 1787 and incorporated into the Wisconsin Constitution. Language from Article IV of the Northwest Ordinance was used verbatim in Article IX, Section 1 of the Wisconsin Constitution:

"...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 to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."

In addition, the Wisconsin Supreme Court has declared that the State holds navigable waterways in trust for all citizens. The primary trustee is the State Legislature. The State cannot delegate this responsibility to anyone else, including local governments, without retaining sufficient authority over the resulting decision.

COMMENTARY AND QUOTES ON THE TRUST

Three distinguished scholars provided on-camera commentary for *Champions of the Public Trust*. Their insights far exceeded the time limits of the documentary. Excerpts from their recorded interviews follow.

Dorothy Lagerroos is an Environmental Policy Specialist at Northland College in Ashland, Wisconsin. John Buenker is a Professor of History at the University of Wisconsin-Parkside campus. And William Cronon is the Frederick Jackson Turner Professor of History, Geography, and Environmental Studies at the University of Wisconsin campus in Madison.

What is the Public Trust Doctrine?

The Public Trust Doctrine is the basis, the foundation of Wisconsin's water law. But it's not a law that you can open the books and read word for word. It's a concept which evolves over time as we work out how the waterways in our state are used and protected.

It's also what gives rise to the common understanding in Wisconsin that as long as you have your feet wet, you're on public ground—or rather on public water.

The central notion of the trust doctrine is the trust, that the people of the state own the water of the state. It's very much like when grandparents take a chunk of money and put

it in the bank for a child's education. The money belongs to and should benefit the child. The parents or someone else may be named trustees and as trustee their job is to protect the investment, to perhaps help it to grow, to manage it. Their job is to take care of what is owned by someone else. They can't abandon that duty. They can't say well we're tired of it. They can't say we'll give it to someone else to do. They're legally bound to manage that trust. Similarly the state is the trustee of the waters of the state and the state is not legally able to say well we don't want to do this anymore, we'll let private enterprise do it, we'll let environmentalists do it, we'll let local government do it. They can't turn it over to anyone else. It's the state's job to manage it as the trustee on behalf of the whole state.

Dorothy Lagerroos

In Wisconsin, "public" waterways are protected by the Trust Doctrine. What determines whether a body of water is public?

The essential criteria for a body of water falling into the trust doctrine is that it's navigable. Before this area was settled, water was the only highway, the only means of transportation, the only way of moving goods and services. The notion that water was public was important for keeping commerce rolling, for actually developing this region. So to say that water is navigable is the same thing as saying that it's public.

Dorothy Lagerroos

How has the Public Trust Doctrine been important to Wisconsin?

Well, the waterways of the state have clearly benefitted from an ongoing evolution of regulatory law. But I think in many ways the more significant consequence of the Trust Doctrine is this general sense on the part of the population that this is a public resource, a part of the territory of the state, part of the experience of being a citizen of Wisconsin. Virtually everybody in the state seems to feel that in one way or another. That feeling, that public good will, is one of the things that protects Wisconsin's resources.

William Cronon

The Public Trust Doctrine is based on the notion that the navigable waterways of the State belong to all citizens of the State. How did Wisconsin's Native Americans view natural resources and property ownership at the time of European settlement?

It would be hard to find a greater contrast than the way Native Americans viewed the land and the environment and the way Europeans viewed it. Most Europeans came here either because they were unable to own property or land in the old country or because they were in danger of losing property that they already had. The so-called "American Dream," as interpreted by Euroamericans, seemed to focus on the ownership of land.

The Native Americans had a very different view. To them, the land, the waterways, and all of the resources of nature were com-

mon property. The idea that somebody could actually own part of it and restrict other people's access to it or use of it was a concept they really didn't have.

John Buenker

How has the Public Trust Doctrine affected the balance of public and private property rights?

The United States has always had a very strong belief in private property — probably more so than any other nation on the face of the earth. And in Wisconsin, both courts and legislatures supported private property rights almost to the extreme throughout most of the 19th century.

But at the end of the century, there was a reaction against this by scholars and politicians and various other people. That's what the Wade case dealt with, I think (Willow River Club v. Frank Wade - 1898). Wade represents the general public and the right of anyone to use the river and fish it. It's a good example of this pendulum shift. It's also a strong indication that many progressive ideas were kicking around even before Robert LaFollette was elected in 1900. And by the early 20th century, Wisconsin was, by many counts, the most progressive state in the Union.

John Buenker

How has Wisconsin's Public Trust Doctrine changed over the years?

There's been an interesting progression in the rights protected by the Trust Doctrine.

Initially, it protected transportation on the rivers, especially commercial traffic. Over time other activities have been seen to be in the interest of the people: hunting, fishing, recreation, and finally scenic beauty, just the opportunity to leave the river undisturbed.

Now this doesn't mean that in every case every piece of river will be left undisturbed. There is a balance, but in the balance it's legitimate to weigh such aesthetic and psychological issues as scenic beauty and recreation and even the opportunity to just do nothing along the banks of the river.

Dorothy Lagerroos

What kinds of choices do we face in how we use our waterways?

We're never going to escape the fact that some uses are in conflict with each other and some are singular uses. If you want to go out and explore and enjoy a wild river as a canoeist or fisherman or hunter, inevitably you're going to be in some conflict with people who want to dam up that river and use the flow of its water for electrical power.

Now often those can be reconciled. Sometimes you can build a dam and have a lake and there will still be recreational enjoyment attached to it. But inevitably there will be trade-offs and I think as environmentalism matures, it's going to recognize that kind of trade-off can't be escaped. We simply face hard political choices about the highest use in each and every case.

William Cronon

Many states have a body of law built around the Public Trust Doctrine. Does the Doctrine seem to be particularly important in Wisconsin?

All you have to do to see what a difference the Public Trust Doctrine has made in Wisconsin is to compare the state with others that have not had such a strong tradition. It's an old legal concept, going back to Britain and ancient Rome, but Wisconsin embraced that tradition earlier and more aggressively than many states.

Few people understand how important the Public Trust Doctrine has been in defining the Wisconsin landscape, in shaping the way people experience it, and in building the culture of environmental protection that is so strong in this state today.

William Cronon

What are the most important water-use decisions we'll face in the next 100 years?

Well, historians are always reluctant prophets. We're much happier looking back

a hundred years than looking forward a hundred years. But I think all you have to do is look at how people use water today. Look at the needs of water for industry, for paper milling, for power transmission. Look at the various recreational uses. All of these are in some tension with each other. I think we're just going to see a lot of argument about who gets to do what where.

William Cronon

Why is it important for people to understand the Public Trust Doctrine?

It's important because inherent in the notion of the Public Trust Doctrine is the fact that the people are in charge. The state is the manager of the resources, but the people are in charge, they own it and they need to understand how the law works.

Dorothy Lagerroos

Luna Leopold, Chief Hydraulic Engineer of the US Geological Survey (1958)

"...to preserve any piece of wilderness, we must make this decision before the pressures for exploitation become too great... In this civilized society rivers must continue to serve the important purposes of dilution and transportation of wastes. But if we judge values only in economic terms, eventually no piece of country will remain untouched and no stream unpolluted."

TIMELINE

1783 Virginia Land Cession

1787 Northwest Ordinance: Article IV: "(navigable waters) shall be common highways and forever free."

1836 The Wisconsin Enabling Act, Section 3: Mimicked above language. (Wisconsin admitted as a territory 4/20/1836)

1848 Wisconsin admitted into the Union: Wisconsin Constitution, Article IX, Section 1, incorporated Northwest Ordinance language verbatim

1877 Diedrich v. Northwestern Union Railroad: Beds of navigable lakes owned by the State
Olson v. Merrill: Recognized need for "free" highway for commerce

1898 Willow River Club v. Wade: Supreme Court recognized public right to fish in navigable water

1899 Priewe v. Wisconsin State Land & Improvement Co.: Legislature has active duty to preserve the public trust



1783 1787 1836 1848 1877 1898 1899

1930 Nekoosa-Edwards Paper Co. v. Railroad Commission: Recognized recreational activities such as sailing, canoeing, skating, as public rights

1927 Committee on Water Pollution established Conservation Act

1927-29 Chippewa and Turtle-Flambeau Flowages completed

1925 Park Falls fish kill

1915 Water Power Act: Railroad Commission and Chap. 31, Wisconsin Statutes created; Set framework for reviewing proposed projects to dam, ditch, and drain waterways; construct bridges; build piers & docks

1914 First inventory of dams Diana Shooting Club v. Husting: Public nature of navigable water includes wetlands; State as "Trustee"; public right to hunt

1913 Wisconsin Conservation Commission established

1908 Natural Resources Policy Commission: Purpose and duty to protect state's resources



1930 1929 1927 1925 1915 1914 1913 1908

1931 Public Service Commission (PSC) created: Takes over Ch. 31 duties from Railroad Commission "navigable"

1949 Munninghoff v. Wisconsin Conservation Commission: Beds of navigable streams are property of riparian owner

1950 Last power dams completed at Holcombe, Peterwell, Castle Rock

1952 Muench v. Public Service Commission: Recognized enjoyment of scenic beauty is public right

1955 State v. PSC: Set current criteria for modification of navigable waters.

1957 Madison v. State: The "Civic Center Case". Detailed discussion of type of building which might be allowable on filled lakebed

1966 Hixon v. PSC: Cumulative impacts of construction in navigable waters recognized as valid concern

1968 Department of Natural Resources (DNR) formed from Conservation Department (WCD), Public Service Commission (PSC), Department of Resource Development (DRD), and Board of Health



1931 1933 1949 1950 1952 1956 1957 1966 1968 1968

1987 State v. Trudeau: Development in navigable waterways must be substantially public, not private

1987 M&J Marshall & Ilsley Bank v. Town of Somers: Reiterated Just decision and applied to protection of wetlands in shoreland areas

1982 Urban Shoreland/Wetland Zoning established

1980 County Shoreland/Wetland Zoning established

1973 Ciatlin v. DNR: Specific structures may be determined detrimental to public interest based on impairment of natural beauty

1975 DeGayer & Co. v. DNR: Present-day definition of navigability

1972 Just v. Marinette County: Linked shoreland zoning to state's duty to protect public water rights

1969 Reuter v. DNR: Public has right to clean, unpolluted water

1987 1982 1980 1975 1973 1972 1969

SUGGESTED QUESTIONS FOR DISCUSSION

These questions are not in any particular order. Please use those that you feel are appropriate to your group.

- 1) The State has programs which provide public access to waterways, either by the State itself or, through grants to local governments, by others. How important is access to navigable waters? Should public access be required for all lakes of a certain size, regardless of whether the shoreline is in private ownership?
- 2) The State Constitution contains language about both waterways and "carrying places between" (portages) being "common highways and forever free". State law clearly provides for protection of the navigable waterways, but there is not counterpart protection for portages. Is or isn't this a problem?

*Note: There is public ownership of some access sites and lands along some navigable waters.

- 3) A number of laws restrict what shoreline property owners can do with their land. Should they be compensated for complying? Why or why not?

- 4) Under existing law, the water in lakes and streams belongs to everyone while the water under a parcel of land belongs to the landowner. What problems would you foresee arising from this difference and what would you recommend be done about it?

- 5) Recognizing that some activities in public waters can result in conflicts between users, do you feel that all waterways should be open to all users or should some effort be made to limit either the types of uses or the number of users? What approaches would you suggest?

- 6) At the turn of the century, private sportsmen's clubs claimed that they "protected and preserved" game and natural habitats. Today, citizen conservation groups concern themselves with protection and conservation of wildlife and of natural resources. There exist various programs, such as Streambank Easements, which allow public use on privately-owned lands. What benefits and/or problems do you see with a shared stewardship between government and property owners for recreational access, to maintain environmental quality, and to be responsible to future generations? What role can conservation and environmental organizations play?

- 7) In *Willow River Club v. Wade* in 1898, and in *The Diana Shooting Club v. Husting* in 1914, the Supreme Court of Wisconsin resolved rather straight-forward questions of access to public waters. Discuss the effects of unlimited public access — in both crowded urban areas and in the less populated, usually Northern, areas — on water quality, aquatic habitat,

quality of recreational experience, safety, property values and personal privacy.

- 8) Identify the various public and private entities which may be concerned with how lakes and streams are used (e.g. local zoning board, Nature Conservancy, Trout Unlimited, Depart-

ment of Natural Resources). Which of the ones on your list are likely to be allies and which ones would likely be adversaries? What approaches would you suggest for achieving a consensus on the future of public waters?

Hixon v. Public Service Commission, (1966)

"A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever."

Justice Currie (1952)

"The right of the citizens of the state to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right that is entitled to all the protection which is given to financial rights."

SUGGESTED GROUP EXERCISES

The following exercises include "town meeting" scenarios for large groups and a series of "dilemmas" to be solved by groups of four to six. Please use these as you feel they are appropriate to your group. Modify them as necessary.

Group Exercise #1

Explain that the public trust doctrine protects the public's right to "natural scenic beauty." Ask each of several small groups to spend 5 to 10 minutes developing a working definition of natural scenic beauty to apply to development visible from the water. Then ask each group to report the results. How do the definitions compare?

Group Exercise #2

Describe a setting in which there exists a small inland lake with only several developed housing sites. Have the group develop several approaches to allowing or not allowing some (or all) of the following water uses: wind surfing, water skiing, snowmobiling over the ice, jet skiing, canoeing, muskie fishing.

Group Exercise #3

Have the group debate the merits of allowing encroachments into public waters (filling the lakebed) for A) public purposes, e.g. a public marina or fishing dock and B) private purposes, e.g. a restaurant with a scenic view.

Group Exercise #4

Some lakes, especially in more developed parts of the state, are essentially surrounded by single-family homes and

multi-family condominiums. Most of these property owners place piers, swim rafts, boat hoists, and other structures in the water adjacent to their property. In some cases, owners of "backlots", property that does not front on the water, maintain narrow strips of land which contain additional piers or boat ramps. Discuss the ways in which these types of near-shore structures affect: A) uses of the lake by shore property owners and the public, and B) the ecology of the lake, including fish habitat, water quality, and food organisms.

Public Trust Dilemmas

I. Sailing Lessons

The industrial city of Riverdale owes a lot to the Founder family. The Founders were generous in large ways and small, with donations of money and property to those less fortunate. One small Founders' program, started in the 1960's, was a kids' sailing club, headquartered in the founder family's beautiful old boathouse and designed for children who might not otherwise be able to afford sailing lessons. The program is run by the Riverdale Community Recreation Program.

During the 70's, the cost of boats, equipment, and instruction jumped dramatically. In the 80's, the number of children wishing to enroll in the program multiplied. Now, in the 90's, the cost of insurance has jumped through the roof and the historic boathouse needs repairs.

The Founders Foundation has announced that it can no longer finance the program unassisted. It suggests charging a fee to users.

Riverdale ponders its choices. Charging a fee would offset the cost, but limit access to the club. Repair of the boathouse "in keeping with its historical character" would be an economic burden to the community. Perhaps it would be best to stop the program and tear down the building...

2. Lovely Lake

Lovely Lake was one of those tranquil settings which seemed to invite pink sunsets and V's of Canada geese. Three families settled there in the late 1800's. As they sat out on cool evenings, listening to the calls of loons, owls, and coyotes, they could see each other's lanterns burning. They welcomed each other's companionship as they fished and hunted.

Before too long, clusters of summer cabins joined the year-round homes on Lovely Lake, and fishing became a social affair. The early years of this century saw the first community beaches and public boat launches and Lovely Lake became a popular vacation spot. In the 1940's, power boats began to be heard over the sound of peepers and splashing children. Uncle Ed's Trailer Haven, planned originally as a summer mecca, evolved in time to become a year-round community. Across the lake, a condominium rose on

the shoreline, promising every convenience for the harried nature lover. Today, condo residents quarrel amongst themselves over a local prohibition of jet skis and the nighttime calls of loons, owls, and coyotes are replaced by the blare of boomboxes.

The homes of the original three settlers have long since been abandoned and so has the vision of Lovely Lake as a tranquil refuge. Did something go wrong? What was it? When did it happen?

3. Centerville

The town of Centerville is planning to build a city park and small petting zoo along the shore of one of its two inland lakes. The park would incorporate a public landing and docking area for small boats. Entrance to the park would be free of charge, but there would be an admission fee to the petting zoo as well as for parking in the adjoining lot. This proposal has met with controversy in the town.

Some citizens believe that the park would add to the life of the center of town and provide a gathering place for families and visitors; others see it as an eyesore and inappropriate use of the land along the lake. Is it reasonable to allow land-based public uses along, and to possibly encroach into, navigable waters? Are fees reasonable for access by the public to what was once open water?

GLOSSARY

ACCESS: A legal way for the public to reach waterways. Contrary to common belief, there is usually no strip of public land along public waterways. If the land along a navigable waterway is privately owned, a citizen can be prosecuted for trespassing if he/she crosses the land, without permission, to use the waterway.

BED-stream, lake: The bottom of a waterway or lake below the Ordinary High Water Mark.

CONSERVATION COMMISSION: Former policy-making body for the Conservation Department. Ceased to exist when the Department of Natural Resources Board was created in 1968.

DEFENDANT: The party against whom a legal action is brought.

DELEGATE: In the context of the Muench case, "delegate" means to grant authority to someone else to make a decision without retaining an effective degree of control over that decision. The so-called "county board law" of 1947 not only gave counties the ability to make a decision on an issue of statewide concern, but, more importantly, also precluded the state agency from being able to modify or reverse that decision through legal action.

Another form of "delegation" has, in contrast, been accepted by the Wisconsin Supreme Court. The shoreland zoning program, established by the Legislature in 1966, was determined to

be constitutional by the Supreme Court in two cases, *Just v. Marinette County* (1972) and *M&I Marshall & Ilsley Bank v. Town of Somers* (1987). In contrast to the "county board law," the statutes establishing the shoreland zoning program allow the State to take legal action to block what it considers to be improper decisions by a county.

FLOWAGE: The impounded body of water upstream from a dam.

INCIDENTS OF NAVIGATION: Activities which occur in connection with passing over water, e.g. fishing, hunting, ice skating, swimming, enjoyment of scenic beauty.

NAVIGABLE WATERS: A waterway is determined to be navigable if it has a bed and banks and it is possible to float it in a canoe or other small craft regularly at some time of the year - even if only during the spring thaw. Non-navigable streams may be made navigable by natural obstructions such as beaver dams. Navigability is determined on a case-by-case basis. Navigable lakes and streams are public waterways.

NORTHWEST LAND ORDINANCE of 1787: Set of laws enacted by the Continental Congress under which the territory north of the Ohio River and east of the Mississippi River was organized. Article IV, incorporated verbatim into the Wisconsin Constitution, contains the following: "... 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 to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."

OFFICE OF THE PUBLIC INTERVENTOR: Part of the Department of Justice (Attorney General's office) which is specifically charged with the protection of public rights in navigable waters and authorized to initiate legal action on behalf of the public.

ORDINARY HIGH WATER MARK (OHWM): The point on the bank of a stream or the shore of a lake where the presence or action of water occurs often enough that the lake or stream bed begins to look different from the upland. The mark may be indicated by erosion, destruction of or change in vegetation, or other easily recognizable characteristics. The OHWM forms the boundary between public and private ownership on natural lakes. The people of Wisconsin own the beds of natural lakes (up to the OHWM), which are held in trust for them by the State. On streams, the riparian landowner owns the bed to the center of the stream, but the public has the right to use the water for activities that are incidents of navigation and for navigation itself. The OHWM is determined on a case-by-case basis.

PLAINTIFF: The party that initiates a lawsuit in court.

PUBLIC RIGHTS (in navigable waters): The rights to navigation (boating) and incidents of navigation such as fishing, hunting, ice skating, swimming, and enjoyment of natural scenic beauty.

PUBLIC TRUST DOCTRINE: Body of constitutional, common (court-interpreted), and statutory law establishing public rights in navigable bodies of water. The primary trustee is the State Legislature; day-to-day trust duties are given to the Department of Natural Resources. The Attorney General enforces trust doctrine requirements and provides legal guidance to state and local governments.

PUBLIC WATER: See "navigable waters."

RIPARIAN: A waterfront property owner.

RIPARIAN RIGHTS: Water use rights associated with ownership of land along the shoreline. The land above the ordinary high water mark is the riparian's private domain, except that when water is above the OHWM, the public can use the area for navigation and incidents of navigation. When the water level is below the OHWM, the riparian has the exclusive right to use the exposed bed of the waterway in front of his/her property until the water returns.

SAW LOG TEST: An early test of navigability. If a log or timber could float down a river or stream, even if only once a year during spring floods, the waterway was determined to be navigable.

STATE JUDICIAL SYSTEM: The State system of courts of law.

Circuit Court - The court where most cases are initiated.

Court of Appeals - Intermediate level court handles appeals from circuit court.

State Supreme Court - The highest court in the State.

Attorney General - The chief law officer and legal counsel for state government.

TRUSTEE: An entity that has rights and obligations to manage property in order to administer it for a beneficiary (in reference to the Public Trust Doctrine, the State is the trustee and the beneficiaries are the citizens of Wisconsin). This relationship gives that entity a responsibility to administer the property in the best interests of the beneficiary.

WATERWAY: Any body of water, but usually applied to rivers.

Justice Cassoday (1898)

"The plaintiff [Willow River Club] has no property in the particles of water flowing in the stream, anymore than it has in the air that floats over its land. The fish in the stream were not the property of the plaintiff ... anymore than the birds that flew over its land ... Since the defendant kept within the banks of the river—within the limits of the public highway—his fishing was nothing more than the exercise of a right common to the public."

Justice Oliver Wendell Holmes (1931)

"...a river is more than an amenity, it is a treasure... It offers a necessity of life that must be rationed among those who have power over it."

NOTABLE COURT CASES

Navigability

Jones v. Pettibone, 2 Wis. 225 (1853): The fact that a stream has not been meandered and returned as navigable is not the test of navigability.

Whisler v. Wilkinson et al, 22 Wis. 546 (1868): Rivers that are capable of floating the products of the country were by common law public highways.

Olson v. Merrill, 42 Wis. 203 (1877): Extends "floating logs to market" test for navigability to non-meandered Streams.

Willow River Club v. Wade, 100 Wis. 86 (1898): Not essential that the capacity to float logs to market be continuous throughout the year but it is sufficient that a stream has periods of navigable capacity ordinarily reoccurring from year to year and continuing long enough to make it useful as a highway.

The Falls Manufacturing Co. v. Oconto River Improvement Co., et al., 87 Wis. 134 (1894): "A stream which in its natural state is capable of floating logs to market during the spring freshets ... is a public navigable waterway for the transportation of logs and timber although during the remainder of the year it may not be particularly useful for such purpose without the aid of flooding dams." *Saw Log Test of Navigability*

Nekoosa-Edwards Paper Co. v. Railroad Commission, 201 Wis. 40 (1930) and *Muench v. Public Service Commission, 261 Wis. 492 (1952):* Established recre-

ational use as the test of navigability, replacing the saw log test.

DeGayner & Co., Inc. v. DNR, 70 Wis. 2d 936 (1975):

Re-emphasized that navigability on a regularly recurring basis is the test; also presence of obstructing vegetation does not mean waterway isn't navigable; also bearing dams are a natural feature that can create a navigable condition.

Control of the State of Wisconsin over Navigable Water

Yates v. City of Milwaukee, 77 US (10 Wallace) 497 (1870): This right on the part of the public to regulate and control such navigable streams in the interest of commerce and navigation includes the right on the part of the legislature to prohibit by statute the erection of any dam, bridge or other structure within or over the same, which may operate to impair or obstruct the free navigation thereof, unless the permission of the legislature be expressly obtained for that purpose.

Village of Menominee Falls v. DNR, 140 Wis. 2d 579 (Ct. App., 1987): Navigable waters are under state rather than local jurisdiction because they are a state-wide concern.

Just v. Marinette County, 56 Wis. 2d 7 (1972): Found that the trust doctrine is a valid basis for State protection of lands adjacent to navigable waters through shoreland zoning.

Scenic Beauty

Muench v. Public Service Commission, 261 Wis. 492 (1952): Broadened navigability to include recreational use of water as criterion. Also recognized enjoyment of natural scenic beauty as a public right.

Hixon v. PSC, 32 Wis. 2d 608 (1966): Denied appellant's after-the-fact application for a permit for a breakwater on the bed of a 938-acre lake in Vilas County based in part on cumulative effects of such small incursions.

Clafin v. DNR, 58 Wis. 2d 182 (1973): DNR denied a permit for the construction of a boathouse on Lake Owen in Bayfield County because it would adversely affect natural beauty. This decision has served as the basis for much of the progress made in defining "natural scenic beauty" and aesthetics under the Public Trust Doctrine.

For More Information

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Ordinary High Water Mark

Diana Shooting Club v. Husting, 156 Wis. 261 (1914): Defined the concept of the OHWM.

State v. McDonald Lumber Co., Inc., 18 Wis. 2d 173 (1962): Held that the OHWM could not be established from water level records and that factors listed in the *Diana Shooting Club* case had to be considered.

State v. Trudeau, 139 Wis. 2d 91 (1987): Resulted in the removal of a completed building (6 condominium units) from the bed of Lake Superior adjacent to Madeline Island. Reaffirmed that once the OHWM is established, the wetlands, marshes, and shallow areas which are not "navigable in fact" are still protected as long as they are below the OHWM.



The one that got away —

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