



The Public Trust Doctrine

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The public trust doctrine, as developed and interpreted by the courts, provides that navigable waters are held in trust by the state for the benefit of the public. The doctrine has been interpreted to require the Wisconsin Legislature to serve as trustee for the citizens' rights to navigate and enjoy recreational activities in the waters of the state.

ORIGINS

Legal foundations for the public trust doctrine include the common law of England, as recognized by the U.S. Supreme Court;¹ the Northwest Ordinance of 1787, a federal act that created the Northwest Territory; and the Wisconsin Constitution, article IX, section 1, which provides, in relevant part:

[T]he river Mississippi and the navigable waters leading into [rivers flowing into the state], 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.

That language mirrors language in the Northwest Ordinance. Some other states' constitutions contain similar language.²

LIMITS ON ENCROACHMENTS IN NAVIGABLE WATERS

The Wisconsin Supreme Court has held that the Legislature may grant or allow encroachments in certain portions of navigable waters.³ However, key legal precedents have generally limited such grants and encroachments to situations in which the public interest would be served.⁴

The Wisconsin Supreme Court has analyzed a number of factors in determining whether the filling of portions of navigable waters (or development of filled areas) is permissible, including the following:⁵

- The degree to which governmental entities would control the use of the fill area.
- Whether the area would be devoted to public purposes and open to the public.
- The diminution of lake area from the fill as compared with the size of the water body without the fill.
- Whether any of the public uses of the water body would be destroyed or greatly impaired.
- The disappointment of members of the public who might want to boat, fish, or swim in the area to be filled, as compared to the public benefits related to navigation or public recreation.
- In areas where there is existing fill, whether the riparian owner caused the fill to be placed.

Throughout the state, there are many examples of previously filled lake and river bed areas that have been used for purposes inconsistent with the case law summarized above. In the past, the DNR has often exercised enforcement discretion or worked with property owners to help them obtain submerged land leases to allow established inconsistent uses to remain in place, while prohibiting alteration or expansion of those uses.

Many Wisconsin public trust doctrine cases differentiate lakes from rivers or address only lakes. Interpreting the state's public trust doctrine and early U.S. Supreme Court decisions, the Wisconsin Supreme Court has held that the title to lake beds are vested in the state to be held in trust for the public.⁶ Conversely, riparian owners own "qualified" title to river beds, subject to the rights of navigational use and other recognized forms of public use by others.⁷ That legal distinction may support

an argument for a greater degree of flexibility for the Legislature, as the trustee under the public trust doctrine, to determine the permitted uses of river beds.

DELEGATION OF AUTHORITY

The Legislature is viewed as having generally delegated its trustee obligations to the Department of Natural Resources (DNR), except where statutes state otherwise. That delegation is evident in various statutes that direct the DNR to determine whether various impacts to navigable waters are in the “public interest.” Examples include the bulkhead statute, which allows a municipality to establish a bulkhead line in certain circumstances; the general requirement to obtain an individual permit before placing material in a navigable water; and a statute authorizing the Board of Commissioners of Public Lands to lease rights to fill in beds of lakes and streams.⁸

Evidence of that delegation is also found in ss. 281.11 and 281.12, Stats., which state that the DNR “shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private,” and “shall have general supervision and control over the waters of the state.” In *Lake Beulah Management District v. Department of Natural Resources*, 2011 WI 54, the Wisconsin Supreme Court held that the DNR, when reviewing a proposed high-capacity well, has a “general duty,” grounded in its delegated obligations as trustee under the public trust doctrine and reflected in the department’s general obligations under ss. 281.11 and 281.12, Stats., to investigate or consider potential harm from a proposed high-capacity well (a well with the capacity to withdraw more than 100,000 gallons per day) on the waters of the state. Under the court’s holding, that “general duty” is triggered when the DNR is presented with sufficient concrete, scientific evidence of potential harm to waters of the state that could result from a proposed high-capacity well.

However, the DNR’s authority under ss. 281.11 and 281.12, Stats., was arguably limited by 2011 Wisconsin Act 21, which was enacted after the development of legal arguments in *Lake Beulah*. Among other changes relating to administrative rulemaking, the act specified that a “statutory or non-statutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rulemaking authority on the agency or augment the agency’s rulemaking authority beyond the rulemaking authority that is explicitly conferred on the agency by the Legislature.”⁹ Following an attorney general opinion on this issue in 2016, the DNR limited its scope of review for high-capacity well permits to factors specifically enumerated in the statutes. The Wisconsin Supreme Court will hear oral arguments during its 2019-20 term in two cases that directly address the law in this area.¹⁰

CAUSE OF ACTION

Although rarely used, Wisconsin statutes and case law allow a citizen to bring a legal action, pursuant to the public trust doctrine, directly against a private party for abatement of a public nuisance when the citizen believes that the DNR has inadequately regulated the private party.¹¹

¹ See *Hardin v. Jordan*, 140 U.S. 371 (1891); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

² See, e.g., Minn. Const. art. XI, s. 14.

³ s. 30.10 (1) and (2), Stats.; *Meunch v. Public Service Commission*, 261 Wis. 492, 506 (1952).

⁴ *Angelo v. Railroad Commission*, 194 Wis. 543 (1928); *State v. PSC*, 275 Wis. 112 (1957); but see *City of Milwaukee v. State*, 193 Wis. 423 (1927) (upholding the conveyance of lake bed to a private company as part of a project to construct an outer harbor in the City of Milwaukee).

⁵ The Wisconsin Supreme Court has interpreted navigability relatively broadly, to include any water body that is “capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.” *Madison v. State*, 1 Wis. 2d 252, 259-60 (1952).

⁶ *Illinois Steel Co. v. Bilot*, 109 Wis. 418 (1901).

⁷ See *Ashwaubenon v. Public Service Commission*, 22 Wis. 2d 38 (1963).

⁸ ss. 24.39 (4), 30.11, and 30.12 (3m) (c), Stats.

⁹ s. 227.11 (2) (a) 1., Stats.

¹⁰ The Legislature has taken an interest in those cases, both of which were brought by Clean Wisconsin. See Wisconsin Legislature, Motion to Intervene, filed Apr. 26, 2019.

¹¹ s. 30.294, Stats.; *Gillen v. City of Neenah*, 219 Wis. 2d 806 (1998).