LEGISLATIVE REFERENCE BUREAU

The Public Trust Doctrine

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Wisconsin Constitution, Article IX, Section 1

[T]he 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.

Article IX, section 1, of the Wisconsin Constitution, commonly known as the public trust doctrine, establishes a simple principle: the navigable waters of this state are public and are held in trust by the state to protect the public's rights to those waters. With roots in English common law, the public trust doctrine was enshrined in Wisconsin's constitution and statutory law, and the doctrine has been exhaustively interpreted by the courts.

History of the doctrine

The historical origins of the concept of a public right in navigable waters can be attributed collectively to several sources. The American implementation of the concept comes from English common law,[1] itself an evolution of provisions in the Magna Carta,[2] and Roman law before it.[3] A thorough examination of this history is unnecessary here; suffice it to say that the notion that navigable water belongs, by right, to the public has a long history.[4]

The public trust doctrine in Wisconsin can be traced directly to the Northwest Ordinance of 1787, which provided a framework for the formation of states by the settlers of the Northwest Territory.[5] The Northwest Territory, which was composed of land that would eventually form all or a part of the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota, was established following the American Revolutionary War.[6] The Treaty of Paris (1783), which formally ended the war, established the boundaries between

1. William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J. B. Lippincott Company, 1893), 39–40, noting that it "seems to be unnatural to restrain the use of running water." See also Henry de Bracton, *On the Laws and Customs of England* (Cambridge: Belknap Press, 1968), 2:39, writing that "by natural law these are common to all: running water, air, the sea, and the shores of the sea."

2. Patrick Deveney, "Title, Jus Publicum, and the Public Trust: An Historical Analysis," *Sea Grant Law Journal* 1, no. 1 (1976): 39–41; William Drayton, Jr., "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," *Yale Law Journal* 79, no. 4 (March 1970): 765.

3. Justinian, *Institutes* (Ithaca: Cornell University Press, 1987): 55, writing that "the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore."

4. For a more in-depth exploration of this history, see Deveney, "Title, Jus Publicum, and the Public Trust," 21–52, and Drayton, "The Public Trust in Tidal Areas," 763–74.

5. Richard L. Perry, ed., *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* (Chicago: American Bar Foundation, 1978), 389.

6. Mark Stein, *How the States Got Their Shapes* (New York: Smithsonian Books/Collins, 2008), 1–2.

Great Britain and the United States, which included America gaining control of the lands of the Northwest Territory.[7]

In the Northwest Territory, rivers were the primary highways and served as routes of travel between the Great Lakes and the Mississippi River.[8] There was concern that the new states that would be formed from the Northwest Territory would impose tolls or taxes for the use of these waters.[9] Thus the Northwest Ordinance provided in part:

> 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 said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.[10]

Functionally similar language appeared in the Wisconsin Enabling Act of 1846, which authorized the people of the territory of Wisconsin to form a constitution and state government for the purpose of being admitted into the Union.[11] Subsequently, the Wisconsin Constitution was created, and the adopted language pertaining to navigable waters is almost identical to the language of the Northwest Ordinance.[12]

Early statutory law

In 1840, the territorial legislature authorized the erection and maintenance of watermills and dams upon "any stream that is not navigable."[13] The following year, the territorial legislature enacted the following:

> That all rivers and streams of water in this territory, in all places where the same have been meandered and returned as navigable, by the surveyors employed by the United States Government, are hereby declared navigable to such an extent, that no dam, bridge, or other obstruction may be made in, or over the same, without the permission of the Legislature.[14]

Following statehood, nearly identical language was enacted in the Revised Statutes of 1858:

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7. Treaty of Paris art. 2, U.S.-U.K., Sept. 3, 1783. This is not to be confused with the Treaty of Paris 20 years earlier that ended the French and Indian War/Seven Years' War and in which lands east of the Mississippi, including those lands that became the Northwest Territory, were ceded to Great Britain by France. Treaty of Paris art. VII, U.K.-Fra., Feb. 10, 1763.

8. Adolph Kanneberg, "Wisconsin Law of Waters," *Wisconsin Law Review* 4 (1946): 349.

9. *Id.*

10. Ordinance of 1787: The Northwest Territorial Government, art. IV.

11. Wisconsin Enabling Act of 1846, sess. 1 ch. 89, secs. 1 and 3 (1846).

12. Wis. Const. art. IX, § 1.

13. Act 48, 1840 Wis. Sess. Laws. This authority remains under current law. Wis. Stat. § 31.31.

14. Act 9, 1841 Wis. Sess. Laws. "Meandered" in this context means that a body of water has been surveyed and meander lines that establish the curves of the water body have been established.

> All rivers and streams of water in this state, in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States government, are hereby declared navigable to such an extent, that no dam, bridge, or other obstruction may be made in or over the same, without the permission of the Legislature.[15]

The Revised Statutes of 1858 also prohibited obstruction of the navigation "of any river or stream, which now is, or hereafter may be made, navigable" and provided that public rights to the waters of the state "shall be determined in conformity to the common law."[16]

Early court cases

Though the public trust doctrine protects public rights in navigable waters, the term "navigable water" is not defined within the text of the doctrine. Accordingly, early cases found courts drawing from the common law to determine what exactly is meant by "navigable waters."

In 1868, in *Whisler v. Wilkinson*, the Wisconsin Supreme Court held that rivers capable of floating "the products of the country, such as saw-logs or rafts of lumber" are public highways under common law.[17] The court noted that to conclude otherwise would be harmful to the public interest, particularly in those parts of the state reliant on timber production.[18] The "saw-log" test became the standard by which navigability of a waterway was determined; if a waterway was of "sufficient capacity to float logs," it was a public waterway.[19]

Furthermore, it was not necessary that a waterway be continually navigable throughout the year to be considered navigable. In *Olson v. Merrill*, again citing commercial timber interests, the supreme court held that regularly recurring water levels that "continue a sufficient length of time to make [a waterway] useful as a highway" are enough to render a waterway navigable and subject to public interest.[20]

The *Olson* court also suggested a move away from relying specifically on a waterway's capacity to float logs to determine navigability. The court noted that a waterway that meets the saw-log test is presumably also of sufficient capacity to "float some kind of boat or skiff, in which the owner may follow his logs."[21] This rationale was cited favorably in *Willow River Club v. Wade*, in which the supreme court found a stream to be publicly navigable by noting it was "fitted for useful commerce and transportation of persons and property."[22]

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15. Wis. Rev. Stat. ch. 41 § 2 and ch. 19 § 112 (1858).
16. Wis. Rev. Stat. ch. 19 § 112 and ch. 41 § 3 (1858).
17. Whisler v. Wilkinson, 22 Wis. 572, 576 (1868).
18. *Id.*
19. Sellers v. Union Lumbering Co., 39 Wis. 525, 526 (1876).
20. Olson v. Merrill, 42 Wis. 203, 212 (1877).
21. *Id.* at 213.
22. Willow River Club v. Wade, 100 Wis. 86, 101–2, 76 N.W. 273 (1898).

In turn, courts also found noncommercial uses of waterways sufficient to demonstrate a waterway's navigability. In *Diana Shooting Club v. Husting*, the supreme court held that navigable waters are to provide a public benefit and "should be free to all for commerce, for travel, for recreation, and also for hunting and fishing."[23] The supreme court reaffirmed this position in *Nekoosa-Edwards Paper Co. v. Railroad Commission*, noting that many navigable waters of the state had ceased being used for commercial purposes and were increasingly being used for recreation.[24] The court held that, whatever the origins of a waterway's determination as navigable, once it has been determined to be navigable in its natural state, it is presumed that it continues to be navigable.[25]

This increasingly expansive interpretation of the public rights created by the public trust doctrine is well stated by the supreme court in *Diana Shooting Club*, which held that the doctrine should not be limited, but should be interpreted broadly so that the public may enjoy the intended benefits.[26]

Modern statutory law

The language from the territorial era regarding the navigability of waters had been adopted by the legislature and modified only slightly over the years. In 1911, the legislature added the following language, shown in italics:

> All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States *and all rivers and streams, meandered or non-meandered, which are navigable in fact for any purpose whatsoever* are hereby declared navigable to the extent that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the legislature.[27]

This concept of "navigability in fact" remains the standard by which navigability of a waterway is determined. Section 30.10 of the Wisconsin Statutes is titled "Declarations of navigability" and reads, in part:

> All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.
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> [A]ll streams, sloughs, bayous, and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the state.[28]

23. Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816 (1914).
24. Nekoosa-Edwards Paper Co. v. Railroad Comm'n 201 Wis. 40, 47, 228 N.W. 144 (1930).
25. *Id*. at 46.
26. *Diana Shooting Club*, 156 Wis. at 271.
27. Ch. 652, Laws of 1911.
28. Wis. Stat. § 30.10 (1) and (2) (a), cross-references omitted.

This language originally appeared in Wis. Stat. § 30.01.[29] In 1959, Wis. Stat. ch. 30 was repealed and rewritten, and Wis. Stat. § 30.10 as it appears today was created.[30] Currently, Wis. Stat. § 30.01 contains definitions for Wis. Stat. ch. 30, including the following:

> "Navigable waters" or "navigable waterway" means any body of water which is navigable under the laws of this state.[31]

This definition is so broad that it may be unhelpful to the casual reader. Though many "laws of this state" could be relevant, the foundation of the concept of navigability is found in Wis. Stat. § 30.10.

Muench v. Public Service Commission

The 1952 opinion of the Wisconsin Supreme Court in *Muench v. Public Service Commission* provides a thorough review of the court's application of the public trust doctrine to that point and summarizes the past judicial philosophy that would guide public trust doctrine cases going forward.

Muench involved a dispute over a hydroelectric dam on the Namekagon River, which had been approved by the Public Service Commission (PSC).[32] In granting its approval, the PSC relied on a county board approval of the dam but declined to consider public rights in the waters of the river.[33] Section 31.06 (3) of the Wisconsin Statutes detailed requirements of public hearings to be held by the PSC when considering applications for dam permits and provided, in relevant part:

> [If] it shall appear that the construction, operation or maintenance of the proposed dam will not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, the commission shall so find and a permit is hereby granted to the applicant. The enjoyment of natural scenic beauty is declared to be a public right, to be considered with other factors of economic need of electric power for the full development of agricultural and industrial activity in the state.[34]

Virgil Muench, a private citizen, filed a petition for review, and the attorney general subsequently filed a petition to intervene in the proceedings.[35] The circuit court held that the permit was not subject to review and that Muench was not directly affected by

29. Wis. Stat. § 30.01 (1) and (2) (1941).
30. Ch. 441, Laws of 1959.
31. Wis. Stat. § 30.01 (4m).
32. Muench v. Public Serv. Comm'n, 261 Wis. 492, 496–97, 53 N.W.2d 514 (1952).
33. *Id*. at 497.
34. Wis. Stat. § 31.06 (3) (1949).
35. *Muench*, 261 Wis. at 497.

the PSC's actions and dismissed the petitions.[36] Both Muench and the attorney general appealed to the Wisconsin Supreme Court.[37]

The supreme court reaffirmed long-standing interpretation and application of the public trust doctrine, noting that the state holds the beds beneath navigable waters in trust for the public.[38] Interpreting Wis. Stat. § 30.01 (2)—now Wis. Stat. § 30.10 (2)—the court held that "any stream is 'navigable in fact' which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes."[39]

The supreme court rejected the lower court's reasoning that Muench was not directly affected by the PSC's decision.[40] The court acknowledged that Muench had no pecuniary interest in the water but noted that the public has a right to enjoy navigable waterways for recreational purposes, including enjoying scenic beauty.[41] Citing the *Diana Shooting Club* holding that such rights should not be limited, the court held that such rights would be "severely limited, curtailed, or endangered" if the court were to find that a person is not entitled to petition for a review of a PSC decision finding that public rights in a navigable water will not be violated by the issuance of a permit.[42]

Furthermore, the supreme court held that the state has a duty to appear on behalf of the public to protect public rights in navigable waters.[43] Ultimately, the court held that both Muench and the state had standing to challenge the decision and remanded the issue back to the PSC.[44]

Modern application of the public trust doctrine

The *Muench* court held that the state has a duty to protect public interests in navigable waters.[45] As the public's use of the waters of the state has changed, the extent and application of the public trust doctrine has changed as well.

Navigability and actual uses

A waterway is "navigable in fact" based on the capacity of the waterway to support navigation, not on the actual uses of the waterway.[46] It is unnecessary to establish commercial

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36. *Id.*

37. *Id.* at 498.

38. *Id.* at 501.

39. *Id.* at 506.

40. *Id.* at 511–12.

41. *Id.*

42. *Id.* at 512.

43. *Id.* at 513.

44. *Id.* at 515b.

45. *Id.* at 513.

46. DeGayner v. State Dep't of Natural Res., 70 Wis. 2d 936, 946, 236 N.W.2d 217 (1975); Village of Menomonee Falls v. Wisconsin Dep't Natural Res., 140 Wis. 2d 579, 592–93, 412 N.W.2d 505 (1987); *Muench*, 261 Wis. at 506.

uses, whether current or historical.[47] Nor is it necessary to establish that a waterway is actually used for recreational purposes.[48] The sole measure is whether the waterway is capable of supporting any of those activities.[49]

Navigability and normal conditions

A waterway does not have to be navigable at all times to be considered navigable for public trust doctrine purposes; nor does it matter whether the conditions creating navigability are natural or artificial.[50] If a waterway is navigable on a regularly recurring basis (e.g., during spring thaw) or for a period sufficient to make recreational use of the waterway possible, the waterway is navigable in fact.[51]

Riparian rights

A person owning land that abuts a waterway is a riparian owner and enjoys certain rights incident to owning that land.[52] Under common law, every riparian owner of a waterway has equal right to use the water for any reasonable purpose.[53] The scope of riparian rights has generated a body of case law too substantial to detail here, but riparian owners generally enjoy the right to use the water for domestic consumption and for agriculture and industry;[54] to access the water for recreation;[55] and to place piers and similar structures.[56] Riparian owners also enjoy the right to additions to the owner's land through the natural processes of accretion—where land is created through gradual deposit of soil—and reliction—where land is exposed when a lake or river permanently recedes.[57]

When the rights of riparian owners conflict with the rights of the public, riparian rights are subservient to public rights.[58] To address the potential for such conflicts, the legislature has codified various riparian rights—rights that were already recognized under common law—and granted the Department of Natural Resources (DNR) the authority to regulate the exercise of those rights through permits.[59]

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47. *Muench*, 261 Wis. at 506.

48. *Village of Menomonee Falls*, 140 Wis. 2d at 592–93.

49. *Muench*, 261 Wis. at 506.

50. *DeGayner*, 70 Wis. 2d at 946.

51. *Id*. at 946–47.

52. Hermansen v. City of Lake Geneva, 272 Wis. 293, 302, 75 N.W.2d 439 (1956).

53. State ex rel. Chain O'Lakes Protective Ass'n v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972).

54. Hazeltine v. Case, 46 Wis. 391, 394–395, 1 N.W. 66 (1879); Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 259, 38 N.W.2d 712 (1949); Fox River Flour & Paper Co. v. Kelley, 70 Wis. 287, 293–294, 35 N.W. 744 (1887).

55. Bino v. City of Hurley, 273 Wis. 10, 16, 76 N.W.2d 571 (1956).

56. Doemel v. Jantz, 180 Wis. 225, 231, 193 N.W. 393 (1923).

57. *Id*. at 235. For a more thorough discussion of riparian rights, see Paul G. Kent, *Wisconsin Water Law in the 21st Century* (Madison: Lake Mendota Publishing, 2013), 22–30.

58. State v. Bleck, 114 Wis. 2d 454, 469, 338 N.W.2d 492 (1983).

59. See, e.g., Wis. Stat. § 30.12 (3m) (c), which requires the DNR to issue individual permits to riparian owners authorizing the placement of structures in navigable waters, but only if the DNR finds the structures will not materially obstruct navigation

Ownership of lake beds and streambeds

For natural lakes, the state has title to lake beds below the ordinary high-water mark, which is the point on the bank or shore where the presence and action of water has left a clear mark.[60] However, riparian owners have a qualified right to the area between the ordinary high-water mark and the actual level of the water; the riparian owner may exclude the public from the area for all purposes other than navigation.[61]

For streams, title is held by the riparian owner to the thread, or geographical center, of the stream.[62] If the stream is navigable, this title is qualified by the rights of the public to use the stream for navigation.[63]

Lake bed grants and establishment of bulkheads

The legislature may make grants of lake bed area if the use of the lake bed remains public.[64] It is not necessary that the area remain navigable water, however.[65] The legislature has made numerous grants of lake bed for the express purpose of allowing the lake bed to be filled to provide various public benefits, such as highways and parking areas that improve access to the water and improved shorelines and harbors.[66] The state may not grant lake bed for a purely private purpose or to the extent that the lake is destroyed, but minor changes to the lake's boundaries are consistent with the public trust doctrine.[67]

A municipality may establish a bulkhead line—essentially a legislatively established shoreline[68]—subject to the approval of the DNR.[69] A proposed bulkhead line must be in the public interest and conform as nearly as practicable to the existing shore.[70] Where a bulkhead line is established, riparian owners may place fill or structures up to the line.[71]

Private vs. public waters

By law, waters that are navigable in fact are "declared navigable and public."[72] Even nav-

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or reduce the flood flow capacity of a stream and will not be detrimental to the public interest. See also *Bleck*, 114 Wis. 2d at 467.

60. Diana Shooting Club v. Husting, 156 Wis. 261, 272, 145 N.W. 816 (1914); C. Beck Co. v. City of Milwaukee, 139 Wis. 340, 351, 120 N.W. 293 (1909); Diedrich v. Northwestern Union Railway Co., 42 Wis. 248, 261 (1877).

61. State v. McFarren, 62 Wis. 2d 492, 498–99, 215 N.W.2d 459 (1974).

62. Jones v. Pettibone, 2 Wis. 308, 320 (1853).

63. *Id*.

64. Priewe v. Wisconsin State Land & Improvment Co., 93 Wis. 534, 550, 67 N.W. 918 (1896).

65. State v. Public Serv. Comm'n, 275 Wis. 112, 117, 81 N.W.2d 71 (1957).

66. Ch. 318, Laws of 1937; Ch. 44, Laws of 1963; Ch. 282, Laws of 1953.

67. *Public Serv. Comm'n*, 275 Wis. at 118; In re Crawford County Levee & Drainage Dist., 182 Wis. 404, 412, 196 N.W. 874 (1924).

68. State v. McFarren, 62 Wis. 2d 492, 498, 215 N.W.2d 459 (1974).

69. Wis. Stat. § 30.11 (1).

70. Wis. Stat. § 30.11 (2). But see Town of Ashwaubenon v. Public Serv. Comm'n, 22 Wis. 2d 38, 50–51, 125 N.W.2d 647 (1963), which held that "as nearly as practicable" is not solely a geographic standard.

71. Wis. Stat. § 30.11 (4).

72. Wis. Stat. § 30.10 (1) and (2) (a).

igable lakes and ponds located entirely on private land are public because title to land beneath a natural lake or pond is held by the state.[73] However, the state's jurisdiction over waters generally does not extend to artificial waters created on private land.[74] The exception is an artificial water that is "directly and inseparably connected" to a natural, navigable water, which renders the artificial water public.[75]

Delegation of trust duties

The trustee of the public trust is the state, but the legislature has the primary authority to administer the trust.[76] The legislature may also delegate its public trust duties to executive branch agencies. Though many agencies have some regulatory jurisdiction over the waters of the state, the legislature has delegated its duties most significantly to the DNR, which has broad authority to manage and protect these waters.[77]

The legislature may also delegate its public trust duties to local units of government, provided the delegation is meant to further the trust, rather than impair it.[78] The delegation must be made explicit by the legislature with "clear and unmistakable language."[79] The delegation must also be limited, with standards adequate to protect the public's interest.[80]

Modern case law

R.W. Docks & Slips v. State

R.W. Docks was a riparian owner of a parcel on Lake Superior where the company had developed a marina.[81] Over many years, R.W. Docks sought and received permits from both the DNR and the Army Corps of Engineers for various activities, including construction of a breakwater and the placement of piles, docks, and boat slips.[82] To facilitate the completion of an additional number of boat slips, R.W. Docks applied to the DNR for a permit to dredge 20,000 cubic yards of material from the lake bed.[83] The DNR granted

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73. Mayer v. Gruber, 29 Wis. 2d 168, 173, 138 N.W.2d 197 (1965).

74. State v. Bleck, 114 Wis. 2d 454, 460–62, 338 N.W.2d 492 (1983).

75. Klingeisen v. State Dep't of Natural Res., 163 Wis. 2d 921, 929, 472 N.W.2d 603 (Ct. App. 1991).

76. Gillen v. City of Neenah, 219 Wis. 2d 806, 820–21, 580 N.W.2d 628 (1998).

77. Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res., 2011 WI 54, ¶ 39, 335 Wis. 2d 47, 799 N.W.2d 73.

78. Menzer v. Village of Elkhart Lake, 51 Wis. 2d 70, 82–83, 186 N.W.2d 290 (1971).

79. City of Madison v. Tolzmann, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

80. Town of Ashwaubenon v. Public Serv. Comm'n, 22 Wis. 2d 38, 50, 125 N.W.2d 647 (1963). See, e.g., Wis. Stat. § 30.77, authorizing the adoption of local boating ordinances in the interest of public health, safety, or welfare. The court held that this section did not conflict with the public trust doctrine. *Menzer*, 51 Wis. 2d at 82.

81. R.W. Docks & Slips v. State, 2001 WI 73, ¶ 5, 244 Wis. 2d 497, 628 N.W.2d 781.

82. *Id.* ¶ 5–6. The DNR issues permits for the placement of structures in navigable waters under Wis. Stat. § 30.12. Additionally, Lake Superior is a "water of the United States" under 40 CFR § 120.2 and placement of structures on its bed requires federal permits under 33 U.S.C. § 403.

83. *Id.* ¶ 8.

a permit for the removal of the first 5,000 cubic yards but denied a permit for the remaining 15,000 cubic yards, in part because of a weed bed that had emerged near the shore.[84] R.W. Docks sued the DNR, claiming an unconstitutional taking without compensation, and the matter eventually came before the Wisconsin Supreme Court.[85]

The supreme court acknowledged that both the U.S. Constitution and the Wisconsin Constitution prohibit the taking of private property without just compensation.[86] The court also noted that a "taking" does not require physical occupation of land; a "taking" also results when all economically beneficial uses of a property have been foreclosed by regulatory restrictions.[87] In this case, the court held that, when taken as a whole, the denial of the permit by the DNR did not deprive R.W. Docks of all the economically beneficial uses of its land.[88]

Furthermore, the supreme court noted that the DNR was acting to protect both an environmentally sensitive resource and the rights of neighboring riparian owners.[89] The court held that, as title to the lake bed is held by the state, the riparian rights enjoyed by R.W. Docks are qualified and subservient to the rights of the public, rights that must be "jealously guarded."[90]

ABKA Limited Partnership v. Wisconsin Department of Natural Resources

ABKA Limited Partnership (ABKA) owned a marina on Geneva Lake, where it rented boat slips to the public on an annual basis.[91] ABKA wanted to convert the boat slips to a form of condominium-style ownership commonly referred to as "dockominiums."[92] In short, a dockominium is a number of boat slips available for individual purchase in the same manner as a traditional condominium.[93] In addition to exclusive use of a designated boat slip, a dockominium owner also has rights to use common areas and amenities owned by the condominium association.[94]

To convert the marina to a dockominium, DNR maintained that ABKA would need a new permit under Wis. Stat. § 30.12.[95] ABKA disputed this requirement but sought the

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84. *Id.* ¶ 8–9.

85. *Id.* ¶ 10–11.

86. *Id.* ¶ 13. See U.S. Const. amends. V and XIV and Wis. Const. art. I § 13.

87. *Id.* ¶ 14 (citing Eberle v. Dane County Bd. of Adjust., 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999) and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 1015, 120 L. Ed. 2d 798 (1992)).

88. *R.W. Docks & Slips*, 2001 WI 73, ¶ 16.

89. *Id.* ¶ 28.

90. *Id.* ¶¶ 24, 28.

91. ABKA P'ship v. Wis. Dep't of Natural Res., 2002 WI 106, ¶4, 255 Wis. 2d 486, 648 N.W.2d 854.

92. *Id.* ¶ 5.

93. Karin J. Wagner, "Geneva Lake Dockominiums: An Exercise of Riparian Rights in Violation of the Public Trust Doctrine," *Wisconsin Environmental Law Journal* 4, no. 2 (1997): 246.

94. *Id.*

95. ABKA P'Ship v. Wis. Dep't of Natural Res., 2001 WI App 223, ¶ 11, 247 Wis. 2d 793, 635 N.W.2d 168. The DNR issues permits for the placement of structures in navigable waters under Wis. Stat. § 30.12.

permit.[96] The DNR received an objection to the permit, which resulted in a contested case hearing in which the project was approved subject to the requirement that ABKA maintain a number of boat slips for public rental.[97] ABKA appealed this decision, and the case ultimately reached the Wisconsin Supreme Court.[98]

The supreme court first considered Wisconsin's condominium laws, concluding that ABKA's dockominiums did not meet the legal requirements of a condominium and were therefore not a conveyance of real property.[99] The court went on to hold that, absent a valid condominium unit, ABKA was attempting to transfer riparian rights in violation of Wis. Stat. § 30.133.[100] Thus, the court invalidated the entire project, holding that the conversion of the marina to dockominiums was a violation of the public trust doctrine.[101]

Lake Beulah Management District v. State Department of Natural Resources

The Village of East Troy applied to the DNR and was approved for a permit to construct a municipal well.[102] Two conservancies, the Lake Beulah Management District and the Lake Beulah Protective and Improvement Association, challenged the DNR's decision, citing concerns about the impact of the well on Lake Beulah, which is located 1,200 feet from the well.[103]

The issue eventually came before the Wisconsin Supreme Court, which affirmed that the DNR has not only the authority but also a duty to preserve the state's navigable waters for public use.[104] The court held that this duty extends to considering whether navigable waters may be harmed by a proposed high capacity well.[105] Whether this duty is triggered depends on facts specific to each situation, but the court held that the DNR must consider the impact of a high capacity well if "sufficient concrete, scientific evidence" demonstrates potential harm to waters of the state.[106]

The outcome in this case ultimately hinged on whether the DNR was required to consider evidence submitted by the conservancies that the well would negatively impact Lake Beulah.[107] This evidence was submitted two years after the initial permit approval,

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96. *ABKA*, 2001 WI App 223, ¶ 11.

97. *ABKA*, 2002 WI 106 ¶¶ 6–8.

98. *Id.* ¶¶ 9–10.

99. *Id.* ¶ 55.

100. *Id.* ¶ 56. Wis. Stat. § 30.133 (1) provides that "no owner of riparian land that abuts a navigable water may grant by an easement or by a similar conveyance any riparian right in the land to another person."

101. *ABKA*, 2002 WI 106 ¶ 2.

102. Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res., 2011 WI 54, ¶ 1, 335 Wis. 2d 47, 799 N.W.2d 73. The DNR issues permits for the construction of high-capacity wells under Wis. Stat. § 281.34 (2).

103. *Lake Beulah*, 2011 WI 54, ¶¶ 1, 12.

104. *Id.* ¶ 62.

105. *Id.*

106. *Id.* ¶¶ 62–63.

107. *Id.* ¶¶ 48–50.

during the time when the DNR was considering whether to grant a permit extension.[108] The DNR argued that this new evidence was not part of the record on review, which is the information that the DNR had at the time it made its permitting decision.[109] After extensive discussion of the administrative and judicial options that exist to make evidence part of the record on review, the supreme court held that the evidence submitted by the conservancies was not part of the record of review in this case and affirmed the DNR's decision to issue the permit.[110]

Rock-Koshkonong Lake District v. State Department of Natural Resources

The Rock-Koshkonong Lake District, Rock River-Koshkonong Association, and Lake Koshkonong Recreational Association petitioned the DNR to raise the water levels of Lake Koshkonong.[111] The DNR rejected the petition, citing anticipated adverse impacts on adjacent wetlands and on the water quality in Lake Koshkonong and the Rock River.[112] The dispute moved through the courts until the Wisconsin Supreme Court was tasked with settling the issue.[113]

The supreme court held that the DNR erred to the extent that it based its determination on the impact to wetlands adjacent to and above the ordinary high-water mark of Lake Koshkonong.[114] The court held that this reasoning was an improper extension of the public trust doctrine because the wetlands, being above the ordinary high-water mark, were not navigable.[115] The court cautioned that, although the public trust doctrine should be interpreted broadly, applying it to nonnavigable land would be to ignore the rationale for the doctrine.[116]

Though the application of the public trust doctrine was held to be inappropriate, the supreme court noted that the DNR does have broad authority to protect wetlands that is grounded in the DNR's police powers.[117] The court held that the DNR had explicit authority to consider the impact that raising the water level of Lake Koshkonong would have on wetlands adjacent to the lake.[118] Ultimately, the matter was remanded to the circuit court for further proceedings.[119]

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108. *Id.* ¶ 48.

109. *Id.* ¶ 50.

110. *Id.* ¶¶ 48–61.

111. Rock-Koshkonong Lake District v. State Dep't of Natural Res., 2013 WI 74, ¶ 2, 350 Wis. 2d 45, 833 N.W.2d 800. The DNR is authorized to regulate the level and flow of navigable waters under Wis. Stat. § 31.02 (1).

112. *Rock-Koshkonong*, 2013 WI 74, ¶ 33.

113. *Id.* ¶ 3.

114. *Id.* ¶ 77.

115. *Id.*

116. *Id.* ¶¶ 72, 77.

117. *Id.* ¶ 95. See Wis. Stat. § 31.02 (1), which authorizes the DNR to "protect life, health, and property."

118. *Rock-Koshkonong*, 2013 WI 74, ¶ 95.

119. *Id.* ¶ 152.

Movrich v. Lobermeier

The Lobermeiers owned property, a portion of which is the bed of the Sailor Creek Flowage.[120] This flowage is a man-made lake formed by a dam placed on Sailor Creek.[121] The Movriches owned property that abuts the flowage and maintained a pier with footings on the bed owned by the Lobermeiers.[122] The Lobermeiers asserted the right to exclude the Movriches from the submerged land, but the circuit court ruled in favor of the Movriches, holding that the public trust doctrine confers a riparian owner the right to place a pier over privately owned land that is submerged beneath navigable water.[123] The court of appeals affirmed, and the case was taken up by the Wisconsin Supreme Court.[124]

Although there exists a presumption that the owner of property abutting a natural body of water enjoys certain riparian rights, the supreme court held that no such presumption exists in an artificial body of water located on another's property.[125] The court notes that the legislature may adopt regulations to protect public rights in navigable waters and acknowledges that the legislature has created a permit process for placing structures on the beds of navigable waters.[126] However, the court held that the state cannot compel private property owners to allow placement of piers on their property.[127]

The supreme court noted that one of the core rights enjoyed by the owner of private property is the right to exclude.[128] The court affirmed that if this dispute occurred between owners of upland, encroachment by one owner on the other's property would be trespass.[129] The court cautioned that "the presence of navigable water does not cancel private property rights."[130]

Conclusion

In addition to resolving a novel dispute about the intersection of the public trust doctrine, riparian rights, and private property rights, the *Movrich* case was also the Wisconsin Supreme Court's most recent opportunity to affirm the central tenets of the public trust doctrine in Wisconsin. The state holds the beds beneath navigable waters in trust for the public, except that a riparian owner may have title to the center of a streambed.[131] De-

120. Movrich v. Lobermeier, 2018 WI 9, ¶¶ 9–10, 379 Wis. 2d 269, 905 N.W.2d 807.

121. *Id.*

122. *Id.*

123. *Id.* ¶¶ 11–13.

124. *Id.* ¶¶ 13–14.

125. *Id.* ¶ 24.

126. *Id.* ¶ 29.

127. *Id.*

128. *Id.* ¶ 33.

129. *Id.*

130. *Id.* ¶ 30.

131. *Id.* ¶ 25 (citing Muench v. Public Serv. Comm'n, 261 Wis. 492, 501–2, 53 N.W.2d 514 (1952)).

spite originally being focused on commercial uses, the public's rights in navigable waters include boating, swimming, fishing, hunting, and preserving scenic beauty.[132] The public trust doctrine conveys no private property rights but acts as a limit on riparian rights.[133] The legislature, as trustee, may adopt regulations to protect the rights of the public under the public trust doctrine.[134]

The public trust doctrine, for all the simplicity of its language, is a sweeping protection of public rights that has been jealously guarded by courts for over 150 years. Time and time again, courts have heeded the call of the Wisconsin Supreme Court, writing in *Diana Shooting Club*:

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.[135]

The supreme court reaffirmed this position in *Movrich*, citing this passage and holding: "This remains good law."[136] ■

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132. *Id.* ¶ 27 (citing Rock-Koshkonong Lake District v. State Dep't of Natural Res., 2013 WI 74, ¶ 72, 350 Wis. 2d 45, 833 N.W.2d 800).

133. *Id.* ¶ 28 (citing R.W. Docks & Slips v. State, 2001 WI 73, ¶22, 244 Wis. 2d 497,628 N.W.2d).

134. *Id.* ¶29 (citing Town of Ashwaubenon v. Public Serv. Comm'n, 22 Wis. 2d 38, 125 N.W.2d 647 (1963) and State v. Bleck, 114 Wis. 2d 454, 338 N.W.2d 492 (1983)).

135. Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816 (1914).

136. Movrich v. Lobermeier, 2018 WI 9, ¶ 44, 379 Wis. 2d 269, 905 N.W.2d 807.