Legal doctrine meets water management reality

Part one in a four-part series on Wisconsin’s water laws and how they are being enforced

Twelve years ago, Wisconsin Trout published an article by attorney Melissa Scanlan on Wisconsin’s public trust doctrine. Back then, Scanlan had recently started Midwest Environmental Advocates, Wisconsin’s first non-profit environmental law center.

Scanlan is now the Water Law and Policy Scholar at the University of Wisconsin Law School, and she has just written a new article in Ecology Law Quarterly (39:1, 2012) that offers fresh insight into Wisconsin’s water laws and how they are being enforced. We are pleased to serialize this latest article over the next four issues of Wisconsin Trout.

Scanlan’s article starts by summarizing the “seven key concepts” found in Wisconsin’s water laws that, collectively, comprise the public trust doctrine. Look for these concepts covered two or three at a time in full-page, shaded boxes. You can thank these core concepts every time you pull up to a bridge and step into your favorite trout stream, knowing you can walk up and down that stream at will because you’re a part owner.

But the really special part of Scanlan’s article is its second half, which begins below. She interviewed dozens of the WDNR’s “water specialists” whose job it is to help the public comply with the state’s water laws. These specialists are quoted anonymously, so we learn what’s really happening across the state under the broad umbrella of enforcement. It’s tough for a water specialist to balance a private landowner’s wants with the public’s interest in a waterway, but the WDNR and others are making it tougher.

Scanlan concludes her piece with some suggestions for restoring balance to a system that has tilted toward private interests in recent years.

By Melissa Scanlan

In Wisconsin, the legislature, DNR, and state courts have been instrumental in defining the scope of public rights in water as well as the responsibility of the trustee. The legislature, as the primary trustee for the state’s water resources, codified part of the common law public trust doctrine and delegated primary responsibility to the trust to DNR. In turn, employs water resource managers who make daily determinations that impact public trust resources. Finally, the courts resolve concrete legal disputes concerning public trust assets and articulate the underlying legal doctrine.

To evaluate the utility of the public trust doctrine’s protections, it is valuable to understand how these three institutions interact. Scholars extensively review court decisions and legislation, but the literature is missing an understanding of how state water managers in the United States view and protect the public trust. In Part I of this article (in the shaded, full-page boxes serialized in Wisconsin Trout over the next three issues), I described how the courts and the legislature shaped the seven core concepts of the public trust doctrine. The shortcoming of analyzing court decisions alone is that published opinions cannot describe how the trust is actually administered. So (below) I assess the DNR’s ability to implement the doctrine. This Part illustrates how DNR applies the public trust doctrine, providing the reader with a vantage point for assessing the doctrine’s utility to protect water resources. While this study focuses on Wisconsin water managers, this Part is particularly useful for those who seek to compare and contrast other states’ institutional supports or barriers to public trust implementation to the Wisconsin DNR.

Research rationale and methodology

Regulators make thousands of decisions every year about the public trust that never reach a court of law. While the entire Water Division at DNR has a trustee role over Wisconsin’s navigable waters, the most immediate and regular impact comes from DNR’s Water Regulation and Zoning Specialists (Water Specialists). As described more fully in Core Concept Two (on p. 8), the legislature delegated trust authority to DNR and partly codified the public trust and riparian rights in chapters 30 and 31 of the Wisconsin Statutes. [147] Water Specialists carry out these statutes and the common law public trust mandates daily by deciding whether to issue a permit allowing a private riparian’s exercise of rights, what management strategies will best balance competing uses of water, and when to initiate an enforcement action to stop private encroachment onto public trust property.

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One needs to understand the Water Specialists’ perspectives, the challenges they face, and the systems in which they work to better assess the impact of the public water regulatory framework on contemporary water management issues. Through qualitative research interviews with Water Specialists, researchers can discern how Water Specialists regularly make decisions regarding the trust and the impediments to members fulfilling the legal doctrine.143

With this in mind, I undertook a series of qualitative research interviews with almost two-thirds of DNR’s current Water Specialists, randomly selected but representing all regions of the state (see Table 1). I also interviewed key upper management personnel and lawyers, some of whom are retired.146

I maintained the confidentiality of current DNR staff by omitting names of DNR employees from this article and uniformly using the male pronoun when describing their responses. Two retired political appointees — former DNR Secretary Janice Mei and former Water Division Administrator Todd Amb — are notable exceptions to this procedure. I also interviewed Mr. Peshok, a well-known Wisconsin environmental attorney who has had the unique experience of serving as a Public Intervenor142 prior to representing corporate clients and private companies.143 Analysis of the data shows how DNR applies the public trust doctrine and provides information regarding the doctrine’s utility to protect water resources from development.

**DNR is the central trustee to guard the state’s waters against private taking for narrow special interests**

“I stay in water regulations because this is the most important position at DNR. If we don’t have water or our water, nothing else will survive.”140

1. **Introducing the trustees: DNR’s Water Specialists**

This research focuses primarily on Water Specialists who administer chapters 30 and 31 of the Wisconsin Administrative Code, the state’s water regulations. Every day the Water Specialists encounter conflicts that arise between competing individual interests and public interests in the near shore area. To get a better understanding of how the Water Specialists implement the public trust doctrine, I describe the type of people who occupy such a position, their motivations, and the context in which they function.

Mike DNR regulations that are prescribed by minimum federal standards, such as the Clean Air Act and Clean Water Act, the public trust doctrine is based on interpretation of the provisions, states, and in some cases, the public trust doctrine is particularly malleable to more localized interests and political pressure. The increased volume of regulated actors further complicates matters. Unlike the defined universe of the federal regulations, the Wisconsin regulatory framework, regulated by the Clean Air Act and Clean Water Act, which in Wisconsin involves hundreds of entities, the public trust doctrine involves protecting public rights for millions of individuals sharing a resource.

Moreover, compared to other DNR positions, the Water Specialist position is stressful because the staff interact with private property owners, navigate sometimes contentious interactions between private and public property, and try to show individuals how their activities can have an impact on public rights in the state’s waters.144 As one Water Specialist noted, “Langdon, issues like—when a neighbor they think is harming shared water resources, but not when it applies to what they want to do on their own land and do not take kindly to DNR or the Mayor or the Water Specialist agreed, stating that “[P]eople want their little waterfront property and they want to place their driveway in a wetland and drive ATV’s through state land and I think that Water Specialist’s experience has shown that “[l]andowners want to get as much out of the project as they can and then the DNR’s job is to see that the public resource impacts. There is a lot of hatred for DNR and what it stands for.”140 One upper manager observed, “This is the most difficult job in the agency because of the interactions with private property owners.”142

Water Specialist conflicts extend beyond the interactions with property owners. A more experienced Water Specialist reflected, “I’ve never had a permit denial overturned, but I am bad mouthed in the local paper with distorted half truths.”140 He added, “I need to be vigilant to protect against taking public resources and put- ting them in private hands. I’ve become a very unpopular person in my area.”149

The Water Specialist position requires someone who can understand the pertinent legal statutes and regulations and work as a representative to be in a variety of roles: experts to understand the range of impacts caused by a proposal, such as historic conservation, wildlife, plants, and construction runoff.150 The Water Specialist must be able to communicate clearly and comfortably with a wide variety of riparian landowners, ranging from vacation newcomers, the newest Water Specialist, to farmers, to big box developers.151 Increasingly, Water Specialists also need to explain and justify their decisions with state legislators.156

Almost all of the interviewed Water Specialists had formal educational backgrounds of either a B.S. or M.S. in natural resource management, biology, or related fields.157 Most of the Water Specialists came to DNR because they are avid hunters, fishers, or nature enthusiasts. They tend to take pride in their job; one asserted, “I’m honored to be a trustee of the state’s water resources.” However, one Water Specialist captured the challenge, “Natural resource agencies tend to attract people who are scientific and idealistic, but these qualities don’t necessarily make for tough negotiation. Thus, finding Water Specialists with this combination of skills is a more difficult than one might imagine.”

2. Educating the public about best practices may advance water protections

On the political right and know that when I can explain the public how a project, like mak- ing a pond that wets up right next to a Class 1 trout stream, will take away your ability to have an exceptional fishing area, you understand it. But when I paint- ed as a bureaucrat with this perva-

At times, perhaps as a result of a combination of political pressure, upper management vetoes, and inexperience, the newest Water Specialist approach being a water regulator almost apologetically. As long as people are flexible with project design, “any project can receive a permit,” according to one Water Specialist.

Some Water Specialists use peer pressure and competition to protect the state’s public waters. One such Specialist has contractors send them photos of completed projects so that if they see a really good work, it promote it among the other contractors and riparian owners.150

Evaluating the regulated public because the project’s state on the DNR, so there is no systematic approach to educating the public. Instead, it does not have a range of professionals and is not practiced across the board by all Water Specialists as a regular part of their interactions with landowners.3. **Landowner-oriented approach: apologetic regulators**

The interests of riparian may overly influence the focus of many Water Specialists at the expense of the overall public trust. Although one government agency is concerned that private riparian view Water Specialists as “antagon- istic to the public” or that Water Single Special view themselves as helping riparian complete their permits. Although Water Specialists are water enthusiasts, they tend to take a practical approach to balancing riparian activities with protecting water resources. “We aren’t able to have zero degrada- tion. We have to try and work with riparians to figure out how to determine what degradation is acceptable and get a positive benefit for the public, the most effective of protecting.”151 One Water Specialist said he “wants to meet customer service requirement” and makes “the experience easy for the permit applicant” and “explains the law so they understand.”151 In a similar sentiment, a Water Specialist reflected: “I try to steer landowners into projects that fit general permit standards so they pay less a application fee and have a quicker process.”155

In some cases, as a result of a combination of political pressure, upper management vetoes, and inexperience, the newest Water Specialist approach being a water regulator almost apologetically. As long as people are flexible with project design, “any project can receive a permit,” according to one Water Specialist.156 He added, “I’m trying not to ask so much of the landowner that some- one up the last day DNR will op-pose my decision.”157 Upper management encourages this landowner oriented approach, partly as a way to cope with budget cuts and a reduced work force. Another way manage- ment has dealt with reduced budget is to implement a triage approach to regulating Wisconsin state’s waters.158

(*To save space, footnote text is not shown here. Footnotes often refer to court cases and legal opinions. To read the footnotes, see the complete Scanlan piece, a link to which is at www.WisconsinTU.org. Ed.*)
Part one in a series on understanding Wisconsin’s water laws...

The core principles of Wisconsin’s Public Trust Doctrine

By Melissa Scanlan

At its core, the public trust doctrine describes a state’s relationship to its water resources and its citizens. The doctrine directs the state to hold navigable waters in trust for shared use by the public. It is the bedrock of this relationship and the use of the doctrine to protect natural resources and public rights with changing uses of water. Courts and legislatures have continually expanded the doctrine unencumbered by the public trust and the public’s interest in those resources to include public rights ranging from hunting to maintaining water quality.1 Due to its elasticity, the public trust doctrine has been one of the most useful adaptations of traditional legal doctrines for balancing public rights and responsibilities in the modern era.2

There are seven core concepts undergirding Wisconsin’s public trust doctrine:

1. A limited trust; the public trust in water; which includes identifiable trustee states, counties, and cities, and trust property;

2. Water planning; the authority to regulate public rights in Wisconsin’s navigable water;

3. Trustees have a supervisory duty that requires adaptive management;

4. The public trust is a flexible doctrine that expands, as needed, to recognize water needs and the interests of other commons and public rights;

5. The legislature may grant lapsed titles to entities other than the state, but only under certain limited circumstances;

6. Private riparian property may be limited when it doesn’t encroach on public uses in navigable waters; and

7. A healthy public trust requires a strong political constituency by the trustees and the beneficiaries.

These concepts provide a framework to understand and interpret the emerging conflicts over the state’s water. Wisconsin, consistent with federal common law,3 directs its public trust ownership to include title to the beds underlying navigable waters, up to the ordinary high water mark, as well as their associated waters.4 Wisconsin courts have further clarified that, irrespective of ownership, the bed underlying navigable waters, the public trust applies to water flowing in streams, rivers, ponds, and lakes.5 Privately-issued riparian titles6 hold “a qualified title in the stream bed to the center thereof of navigable streams.”7 The public trust, however, burdens this title:

Navigable waters are public waters and as such they should inure to the benefit of the public. They should carry out all for commerce, for travel, for recreation, and also for hunting and fishing, which are neither certain forms of recreation.8

The water commons are different from other forms of property in one cannot own water. Whether a riparian landowner or a public trust benefactor holds water rights unquestionably — one has the right to use, but not own, water. Water is to be used and developed in an evolving cycle of shared and interconnected rights.

Core Concept 2: trustees have a legal duty to protect Wisconsin’s navigable water

States may regulate water-related activities under their property powers.9 Given a state’s broad police powers, some have questioned the need to base water protection on the public trust doctrine.10 However, basing water protection on the public trust doctrine is important because it recognizes two critical aspects of the doctrine that the state police power lacks. First, the state trustee has a duty to take action to protect trust resources.11 Second, under the public trust doctrine, states have broad protected public rights to use and enjoy trust resources.12 In other words, a state need not simply forbid the management of the water commons because it is politically expedient, or too costly, but potentially forego-ing all of its trustee duties.13 A corollary of this concept is that a member of a public beneficiary group may bring a legal action to protect public rights if the state fails to carry out its trustee duties.

When Wisconsin entered the Union, on equal footing with the original states, it incorporated into its constitution the Northwest Ordinance of 1787’s language that stated navigable waters are “common highways and forever free” for all inhabitants of the territory.14 The common highways waters leading into the Mississippi and St. Law rence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of this state as to the citizens of the United States, without an express grant of any part of the same.”15 This language firmly established Wisconsin’s public trust doctrine.16 On the federal level, the U.S. Supreme Court recognized the public trust doctrine as a substantive restraint on a “state’s ability to alienate the beds and banks of navigable waters, or to authorize regulatory control over those waters.”17 However, the Wisconsin Supreme Court has gone further by holding that the state’s constitutional mandate places a duty on

trustees to protect public waters, not just refrain from harming or misusing them.”18 The doctrine applies to the legislature, and to the Department of Natural Resources, to the legislature’s delegated trustee responsibilities.

A. Wisconsin’s Legislature Is a Constituent trustee and Must Take Action to protect navigable waters

The legislature, as trustee of the navigable waters in the state, has a significant role in administering the trust. As early as 1927, the Wisconsin Supreme Court identified the legislature’s duty to restrict actions that might endanger the trust and take affirmative actions to protect the trust. The trust reposed in the state is not a passive trust; it is government, active and administrative. Representing the state in its legislative capacity, the legislature is fully vested with the power of control and regulation. The equitable title to the submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust. As trustee, be-ing both active and administrative, requires the law-making body to act in all cases where decision is necessarily, not only to preserve the trust, but to promote it. As has heretofore been shown, the condition confronting the legislature was not a theory but a fact. This condition required positive action. In accordance with the Wisconsin Supreme Court’s mandate, if a legislature challenges action as violating the public trust doctrine, courts closely scrutinize the law to determine whether it carried out its duty to protect the public interest in trust resources.19 For example, in response to the legislature’s attempts to convey trust property to a private development, the courts in Priewe v. Wisconsin State Land and Improvement Co. was not bound by the legislature’s stated purpose of pur-pose when deciding whether the legislation benefited the public.20 Rather than define the true legislative purpose of protecting public health, the court carefully organized the record and determined that conveying a lake to John Reynolds so he could potentially drain and profit off of land speculation was a loss to the public, rather than a benefit.21 By the 1980s, the courts have continued to play this role as inde-pendent check on legislative action involving trust resources.22

B. Wisconsin’s Department of Natural Resources has broad authority to take the trust in navigable waters

To satisfy the “state’s affirmative obligations as a trustee of the navigable waters,”23 in 1965 the legislature created the Wisconsin Department of Natural Resources (DNR), an agency with the “nec-es-sary powers” to protect Wisconsin waters.24 The agency established DNR as the central agency with “general supervision and control over the water of the state,” thereby delegating to DNR broad responsibility for the admin-is-tration of the trust.25

The legislature established state water policy objectives of “protect, maintain and improve the quality and management of the waters of the state.”26 Then the legislature

directed DNR to create a “comprehensive action program...to pro-tect and enhance the quality of Wisconsin’s aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and all other uses of water.”27 The legislature mandated that future interagency water and fish management orders promulgated under this sub-chapter shall be liberally construed in favor of the public interests, and orders promulgated under this sub-chapter shall be liberally construed in favor of the public interests...” Thus, DNR has a tremendous duty as well as authority to protect the state’s waters.28

One way the trustees carry out their duty is by establishing protect-ions for public rights against encroachment by private riparians. To do this, the legislature codified common riparian law and public trust rights in chapters 30, 31, and 281 of the Wisconsin Statutes.29 These statutes authorize DNR to issue permits and supervise and control riparian activities to ensure they are neither “detrimental to the public interest” nor would they obstruct the public trust. Although some statutory provisions govern-ing DNR’s activities do not explicitly list DNR to protect navigable waters, such as when iss-uing a groundwater permit, DNR still must ensure that its activities do not negatively affect navigable waters based on a broad reading of the legisla-tion creating DNR and delegating trustee duties.

DNR’s duty to administer these statutes requires its agents to en-gage in a balancing act between allowing an individual riparian to exercise their rights and preventing protect-the broader public rights in those shared waters. DNR water managers are required by law to protect Wisconsin’s public trust heritage in its water commons against interference by riparian landowners who have narrower self-interests.30 The public interest in these water resources provides the basis for DNR to choose among competing uses and deny or modify permits to minimize harm to pub-lic trust resources.31

Based on these clear legal mandates, DNR’s decisions are subject to DNR decisions when DNR protec-tends the trust, but view more criti-cally and tend to uphold DNR or legis-la-ble or legislative decisions that privatize or degrade public trust resources. Given Wisconsin’s overwhelming trust to the trustees, one might expect this to impact DNR’s water man-agement. Part II of this Article an-alyzes how DNR balances riparian and public rights, and identifies key improvements to the DNR’s manage-ment.

To save space, footnote num-bers are shown here, but footnote text is not. Footnote text often refers to cases and legal opinions. To read these sources, see Melissa Scanlan piece posted at www.Wiscon-sinTB.org under “news.”

NEXT ISSUE: More core principles of Wisconsin’s Public Trust Doctrine will be presented in the next issue of Wisconsin Trust.

A link to Melissa Scanlan’s complete article can be found at www.WisconsinTB.org under “news.”