The Public Trust Doctrine in Wisconsin

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I. INTRODUCTION

Water resources in Wisconsin and the United States are under constant pressure from increased development and use. The protection of these resources is essential to assure a high quality of life for American citizens and to assure the maintenance of the nation's natural resources. One of the legal doctrines that states employ to protect water resources is the public trust doctrine. Under the public trust doctrine a state holds the beds of navigable bodies of water in trust for all of its citizens and has an obligation to protect public rights in navigable waters.[1]

The public trust doctrine has a long history, with roots in Roman civil law.[2] Although the doctrine developed first as a matter of federal common law in the United States,[3] currently states control the extent to which the doctrine is applied in their jurisdictions.[4] Many states have developed the

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[1] Muench v. Public Service Commission, 53 N.W.2d 514, 517 (Wis. 1952).

[2] For a brief discussion of the public trust doctrine's antecedents in Roman, English, and American law, *see* Timothy Patrick Brady, *But Most of it Belongs to Those Yet Born: The Public Trust Doctrine, NEPA, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621, 624-29 (1990).

[3] Michael L. Wolz, *Applications of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?*, 6 B.Y.U. J. OF PUB. L. 475, 483-84 (1992).

[4] Appleby v. City of New York, 271 U.S. 364 (1926) (individual states determine the extent of state power to relinquish beds of navigable waters); Barney v. Keokuk, 94 U.S. 324 (1876) (individual states hold title to the beds of navigable rivers).

doctrine through statutory, constitutional, or common law vehicles.[5] For instance, Alaska's public trust doctrine is based upon the state constitution and has been further defined by case law and statute.[6] Arizona has a public trust doctrine based on a recent statute that recognizes the public's right to recreational use of navigable waters.[7] Colorado, on the other hand, has no public trust doctrine.[8]

Wisconsin possesses a well-developed public trust doctrine. Water resources in the state are protected not only by statute, but also by the state constitution, as interpreted by the Wisconsin Supreme Court in *Muench v. Public Service Commission* and other decisions.[9] This comment traces the common law and statutory development of the public trust doctrine in Wisconsin and addresses the doctrine's use as a means to protect our water resources from dangers such as pollution and wetland loss. The article concludes that, while recent United States Supreme Court cases have limited the states' ability to protect natural resources through land use regulation, the possibility remains that states may use protection of public trust rights in navigable waters as a justification for some these regulations.

Part II of the article discusses the early development of the Wisconsin public trust doctrine through the important case of *Muench v. Public Service Commission*. Part III discusses the development and clarification of the doctrine since *Muench*. Part IV analyzes expansion of the public trust doctrine to protect other natural resources, such as wetlands.

II. HISTORY OF THE PUBLIC TRUST DOCTRINE IN WISCONSIN

The Wisconsin public trust doctrine has its roots in the Northwest Ordinance of 1787.[10] The Ordinance required that all navigable waters flowing into the Mississippi and St. Lawrence Rivers remain free public highways.[11] When Wisconsin became a state in 1848, the Wisconsin Constitution incorporated this requirement.[12]

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[5] *See generally* 6 ROBERT E. BECK, WATERS AND WATER RIGHTS at 649 (ed. 1991).

[6] *Id.* at 13.

[7] *Id.* at 20.

[8] *Id.* at 64.

[9] 53 N.W.2d at 516.

[10] *Id.* at 516.

[11] U.S. Rev. St. 1878, p.16.

[12] WIS. CONST. art. IX, §1 states that navigable waters and the "carrying places between the same" were to remain "forever free." This provision could potentially extend the public trust doctrine to many uplands which would not otherwise be covered. However, "carrying places" has been determined to include only those areas used to further commercial navigation. Since there are no longer portages between navigable waters used for commercial purposes, no "carrying places" are covered by the public trust doctrine in Wisconsin. 75 Op. Wis. Att'y Gen. 89 (1986).

In the years that followed, the Wisconsin courts developed a public trust doctrine based on this requirement. The Wisconsin Supreme Court clarified the roots of the Wisconsin public trust doctrine in *Illinois Steel Co. v. Bilot*:

> The United States never had title, in the Northwest Territory, out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must continue there forever, so far as necessary to the enjoyment thereof by the people.[13]

Once Wisconsin courts established the existence of the public trust, they began to determine which bodies of water were subject to public rights. Wisconsin courts have traditionally based these determinations on the purposes for which the waters in question were used. For instance, in *Olson v. Merrill*,[14] the Wisconsin Supreme Court developed a test of navigability known as the "saw-log" test.[15] In *Olson*, a small stream was used to float logs during certain seasons of the year.[16] In finding that the state's public trust applied to this stream, the court held that a body of water is navigable if the flow is sufficient to allow the flotation of logs during regularly recurring time periods.[17] This determination involved commercial considerations.[18] If streams of this type did not remain open, it would be difficult to transport logs from the forests to their destinations. Therefore, the court found it "essential to the public interest" that such streams be subject to the public trust.[19]

The Wisconsin Supreme Court later expanded the definition of navigability to protect recreational uses. In *Diana Shooting Club v. Husting*, the defendant hunted from a boat along a portion of the Rock River in which the abutting landowners claimed to have exclusive hunting rights.[20] The supreme court found that the public trust in navigable waters protects public hunting on those waters.[21] The defendant's use of the

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[13] Illinois Steel Co. v. Bilot, 84 N.W. 855, 856-57 (Wis. 1901). The court went on to conclude that the state could grant title to the beds of navigable streams to owners of land bordering these streams if these grants did not violate the trust. *Id.* at 857.

[14] 42 Wis. 203 (1877).

[15] Since there was no federal guidance as to what constituted navigable waters, states were free to develop their own tests of navigability. Adolph Kanneberg, *Wisconsin Law of Waters*, 13 WIS. L. REV. 345, 349-50 (1946).

[16] *Olson*, 42 Wis. at 204.

[17] *Id.* at 212.

[18] *Muench*, 53 N.W.2d at 517.

[19] *Olson*, 42 Wis. at 212.

[20] 145 N.W. 816 (Wis. 1914).

[21] *Id.* at 820.

hunting boat itself established navigability.[22] The court decided it was "immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation."[23]

These cases culminated in the 1952 decision of *Muench v. Public Service Commission*. This case reviewed and restated the elements of the public trust doctrine in Wisconsin and became the basis of future Wisconsin public trust cases. *Muench* involved a dispute over the Public Service Commission's approval of a hydroelectric dam on the Namekagon River. The Public Service Commission acted on the basis of county board approval of the dam without taking into account public rights in the waters of the river as required by statute.[24] Muench, a private citizen, and the attorney general both challenged the Public Service Commission action. The trial court ruled that the dam permit was not subject to review and that Muench was not an aggrieved party and therefore lacked standing to sue. Muench appealed this decision to the supreme court, which reversed the trial court's ruling.

In rendering its opinion, the court relied on the public trust doctrine. The court held that the state holds the beds of navigable waters in trust for all citizens.[25] It further held that riparian owners hold a qualified title to the beds of navigable streams which is subject to the rights of the public. The court defined navigable water as water "capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes."[26] In addition, waters need not be navigable on a continual basis. They need only be navigable on a regularly recurring basis.[27]

The court refused to limit the public trust doctrine to the protection of commercial use of water. It found that public rights protected by the trust include commerce, recreation, and the enjoyment of scenic beauty.[28]

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[22] *Id.*

[23] *Id.* The *Muench* court found this case to be significant because navigability was established by use of small boats for recreation purposes, not by use for commercial purposes. *Muench*, 53 N.W.2d at 518-19.

[24] The statute in question in *Muench* was WIS. STAT. § 31.06(3) (1991), which requires the Department of Natural Resources to balance the public interest in recreation and enjoyment of scenic beauty associated with the free flowing water with the economic benefits of the proposed dam before awarding a permit for dam construction.

[25] *Muench*, 53 N.W.2d at 517.

[26] *Id.* at 519.

[27] *See* discussion *infra* part III.C.

[28] *Muench*, 53 N.W. 2d at 517-21. The public's right in the enjoyment of scenic beauty has been used to justify the construction of a civic center which required the filling of part of the bed of a navigable lake. The Wisconsin Supreme Court reasoned that the building of a civic center, which was open for public recreation, on the shore of Lake Monona in Madison both enhanced the shore area and created a vantage point from which the public could enjoy the scenic beauty of the lake. As such, it was consistent with the public's rights in navigable waters. City of Madison v.

Citizens may challenge actions adversely affecting their public rights in navigable waters in Wisconsin courts.[29] They need not suffer pecuniary loss to assert these rights.[30] Finally, the state has a duty to intervene on behalf of the public to protect public rights in navigable waters.[31]

Applying these principles, the court ruled that both the state and Muench had standing to challenge the Public Service Commission's approval of the dam.[32] It also found that the "county board law," which instructed the Public Service Commission to disregard public navigation and recreation rights in the dam permit process when the affected counties had previously approved the dam, was unconstitutional.[33] The Wisconsin view of the public trust doctrine considers the public rights in navigable waters to be of state-wide concern.[34] Article IV, sec. 22 of the Wisconsin Constitution allows the legislature to grant powers of a local character to the counties, but power over matters of state-wide concern cannot be delegated.[35] Therefore, the legislature cannot delegate power over navigable waters completely to the counties. As a result, the case was remanded to the Public Service Commission to make findings that considered public rights.

The *Muench* case articulated a strong public trust doctrine for Wisconsin. It established substantial rights in state citizens to protect their rights in navigable waters, as well as substantial duties in the state government to protect the public interest in navigable waters. By restating and clarifying the Wisconsin public trust doctrine, the case provided a framework for further use and expansion of public rights in navigable waters.

III. APPLICATION OF THE PUBLIC TRUST DOCTRINE SINCE *MUENCH*

In the four decades since the *Muench* case, the Wisconsin public trust doctrine has developed in four major areas: (1) the state's role in protecting public rights, (2) the scope of the standing rights given to private citizens,

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State, 83 N.W.2d 674 (1957).

[29] *Muench*, 53 N.W.2d at 522-23.

[30] *Id.*

[31] *Id.* at 523.

[32] *Id.* at 522-23.

[33] *Id.* at 525.

[34] *Id.* at 524.

[35] WIS. CONST. art. IV, § 22 provides that "the legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

(3) the definition of navigable waters, and (4) the conflict between public rights and riparian rights.

A. The State's Role in Protecting the Public Trust

The Wisconsin public trust doctrine requires the state to intervene to protect public rights in the commercial or recreational use of navigable waters.[36] The state can discharge this duty through permitting requirements for water projects, through court action enjoining nuisances in navigable waters, and through statutes authorizing local zoning ordinances limiting development along navigable waterways.[37] In some cases, the state also has the right to physically remove a nuisance from a public body of water.[38]

Through a series of statutes, the Wisconsin legislature has delegated most of the state's authority and responsibilities under the public trust to the Department of Natural Resources (DNR).[39] Permitting procedures are the most common statutory mechanism through which the DNR protects public rights in navigable waters.[40] When the DNR exercises its powers under the public trust, it is acting for the benefit of the general public, not for the benefit of the state government itself.[41] Most of the cases involving the public trust since *Muench* have been disputes over the DNR's application

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[36] *See* discussion *supra* part II.

[37] *See, e.g.*, WIS. STAT. § 144.26(1) (1991) which authorizes the use of shoreland zoning regulations to protect the public interest in navigable water. *See also* discussion *infra* part IV.

[38] State v. Sensenbrenner, 53 N.W.2d 773, 776 (Wis. 1952) (while state could not force riparian owner to remove a beaver dam in navigable river bordering the riparian's land, the state had the right to remove the dam itself if it did not trespass on riparian's property).

[39] WIS. STAT. § 30.12 (1991) (DNR authorized to regulate the construction of structures on and the deposit of materials in navigable water); WIS. STAT. § 30.13 (1991) (DNR authorized to regulate wharves, piers and swimming rafts in navigable water); WIS. STAT. § 30.18 (1991) (DNR authorized to regulate diversion of water from navigable lakes and streams); WIS. STAT. § 30.19 (1991) (DNR authorized to regulate enlargements of navigable waterways); WIS. STAT. § 30.195 (1991) (DNR authorized to regulate the changing of stream courses); WIS. STAT. § 30.20 (1991) (DNR authorized to contract for the removal of material from lake beds); WIS. STAT. § 31.02 (1991) (DNR authorized to regulate the construction of dams on navigable waterways).

[40] *See* sources cited *supra* note 39.

[41] WIS. STAT. § 13.48(13) (1991) subjects construction "for the benefit of or use of the state or any state agency" to local zoning requirements. The word "state" in this context was construed to mean the state government and not the inhabitants of the state. Therefore, since construction under the public trust doctrine is for the benefit of the public and not the government, the DNR may bypass local zoning regulations. Wis. OAG 9-93 (June 30, 1993).

of the public trust statutes. Generally, courts show deference to the DNR's factual determinations and interpretation of the statutes.[42]

Although the legislature has delegated certain duties regarding the public trust to local governments,[43] Wisconsin courts have limited the scope of these delegations. As noted earlier, the court in *Muench* determined that only matters of local concern could be delegated to local governments and, therefore, decisions affecting the public rights in navigable waters must be made at the state level.[44]

The court of appeals used this principle in *Village of Menomonee Falls v. Wisconsin Department of Natural Resources*[45] to restrict a legislative grant of "management and control" over navigable waters to local governments.[46] The Village of Menomonee Falls wished to channelize a navigable creek, but was denied a permit by the DNR.[47] The village argued that the legislature had given local governments the authority to alter these waterways.[48] The court refused to construe these statutes as a "blanket delegation of the state's public trust authority," finding that, as with the law struck down in *Muench*, such a broad interpretation of the statutes would violate the public trust doctrine.[49] Delegation of public trust authority to local governments is allowed only "when in furtherance of that trust and where delegation will not block the advancement of the paramount interests appurtenant to navigable waters."[50]

Thus, the state government, acting through the DNR, retains ultimate control over all issues essential to the protection of the public trust. Complete delegation of public trust authority to local governments is allowed only in limited circumstances where state-wide interests in

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[42] *See, e.g.*, DeGayner & Co. v. Department of Natural Resources, 236 N.W.2d 217, 223 (Wis. 1975) (court upheld the DNR's finding of navigability despite the fact that most experts concluded the stream was nonnavigable); Village of Menomonee Falls v. Wisconsin Department of Natural Resources, 412 N.W.2d 505, 511-12 (Wis. Ct. App. 1987) (court declined to reverse a DNR decision regarding navigability even if against the great weight of the evidence if there was substantial evidence to support it).

[43] *See, e.g.*, WIS. STAT. § 30.16 (1991) which authorizes local governments to remove obstructions to navigation within their jurisdiction.

[44] *Muench*, 53 N.W.2d at 524.

[45] 412 N.W.2d 505 (Wis. Ct. App. 1987).

[46] WIS. STAT. § 61.34(1) (1991).

[47] *Menomonee Falls*, 412 N.W.2d at 507-08.

[48] *Id.* at 513. *See* WIS. STAT. § 61.36 (1991).

[49] *Menomonee Falls*, 412 N.W.2d at 514.

[50] *Id.* at 514-15.

navigable waters are not affected.[51] When there is conflict between regulation by local governments and by the DNR, it is the DNR, as the representative of the state, whose regulation will control.[52]

B. Standing Rights Under the Public Trust Doctrine

Wisconsin courts have held that the public trust doctrine allows private citizens to bring suit to protect public rights in navigable waters.[53] This right provides citizens with a valuable tool to protect water quality. However, Wisconsin courts have also held that the public trust doctrine does not itself create any substantive rights, but only creates standing to assert rights embodied in statutes or common law concepts such as nuisance. If the action to be challenged does not violate a statute or the common law, the complainants cannot look to the public trust doctrine to provide further rights.

The Wisconsin Supreme Court made this point clear in *State v. Deetz*.[54] In *Deetz*, the state brought action against various defendants to prevent activities that were causing the deposit of materials in Lake Wisconsin through erosion.[55] The court found that the defendants had not violated any state law.[56] However, the state argued that the public trust doctrine allowed the state to bring action to abate any interference with the public's rights in navigable waters.[57] The court disagreed, stating that "the public trust doctrine merely establishes standing for the state, or any person suing in the name of the state for the purpose of vindicating the

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[51] The state may partially delegate duties under the public trust to local governments so long as the state does not completely abdicate its responsibilities under the public trust. For instance, statutes allowing municipalities to alter watercourses are constitutional as long as the DNR retains permitting authority. *Menomonee Falls*, 412 N.W.2d at 513. However, in *Muench*, the statute requiring the Public Service Commission to grant a permit for a dam which had been approved by a county board was a complete abdication of the state's responsibilities and was therefore unconstitutional. *See* discussion *supra* part II. In addition, any delegation of public trust duties must be in clear and unmistakable language. City of Madison v. Tolzman, 97 N.W.2d 513, 516 (Wis. 1959).

[52] Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69, 77 (Wis. 1978) (where DNR regulations conflicted with Madison laws regarding use of chemicals in lakes, the court found that the legislature had intended to give centralized authority over state waters to the DNR).

[53] *See* discussion *supra* part II.

[54] 224 N.W.2d 407 (Wis. 1974).

[55] *Id.* at 409.

[56] *Id.* at 412.

[57] *Id.*

public trust, to assert a cause of action recognized by the existing law of Wisconsin."[58]

In addition to requiring that public trust suits be based on existing substantive law, the Wisconsin Supreme Court also requires that the alleged statutory or common law violations have caused specific injury to navigable waters for a party to claim standing under the public trust doctrine. In *Wisconsin Environmental Decade v. Public Service Commission of Wisconsin*, the Wisconsin Environmental Decade (WED) sued to enjoin the Public Service Commission approval of a priority system for the distribution of natural gas developed by the Wisconsin Public Service Corporation.[59] WED claimed that the system would harm the environment in general.[60] No mention was made of damage to navigable waters. However, after standing was rejected by the trial court, the WED on appeal claimed standing under the public trust doctrine.[61] The court denied standing, maintaining that complaints must allege specific harm to navigable waters, not simply general environmental harm, to claim standing under the public trust doctrine.[62]

The state public intervenor may also use public trust standing rights. The state public intervenor is an office created by statute to protect public rights in water and other natural resources.[63] The intervenor is authorized to intervene in all actions where protection of these rights is required. The public intervenor's ability to use the standing rights under the public trust doctrine was temporarily restricted by a Wisconsin Supreme Court decision foreclosing the public intervenor from initiating a suit against the DNR.[64] However, the legislature amended the public intervenor's statutory authority to allow the office to "initiate actions and proceedings before any agency or court."[65] Therefore, this restriction no longer exists.

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[58] *Id.* at 413. The court did determine, however, that the common law of Wisconsin regarding surface water should be changed. Previously, Wisconsin had accepted the "common enemy" rule, under which landowners were free to drain surface waters from their land in whatever way they felt to be appropriate. Deetz's actions were appropriate under this standard. The court adopted, for prospective application only, the reasonable use test. Under this test, landowners are liable when they harm other landowners through unreasonable interference with the flow of surface water. *Id.* at 413-16.

[59] 230 N.W.2d 243, 250 (Wis. 1975).

[60] *Id.* at 246.

[61] *Id.* at 250.

[62] *Id.*

[63] See WIS. STAT. § 165.07 (1991).

[64] State Public Intervenor v. Wisconsin Department of Natural Resources, 339 N.W.2d 324 (Wis. 1983).

[65] *See* WIS. STAT. § 165.075 (1991).

The Wisconsin public trust doctrine grants standing rights to state citizens to protect navigable waters, subject to certain court-imposed restrictions. Since state agencies have the primary responsibility to protect public rights in navigable waters, these standing rights serve primarily to provide a check on the diligence of state agencies in performing their public trust duties by allowing citizens to challenge agency action affecting navigable waters. When reviewing such challenges, courts have the responsibility to protect public rights by ensuring that agencies have acted within their statutory authority in taking the action.

C. The Test of Navigability

Since the public trust doctrine applies to navigable waters, the determination of the navigability of a body of water is an important prerequisite to the application of the public trust doctrine. Several cases since *Muench* have involved disputes over the navigability of bodies of water. These cases have clarified and expanded the definition of navigable waters.

Generally, the Wisconsin courts will defer to a DNR finding of navigability, asking only if it was "reasonable."[66] In *DeGayner & Co. v. Department of Natural Resources*, the plaintiff challenged the DNR's finding of navigability regarding Five Mile Creek, which was only navigable during periods of high water created by beaver dams.[67] The plaintiff argued that navigability should be determined by the normal condition of the stream.[68] The court disagreed, stating that "the test is not whether the stream is navigable in a normal or natural condition, but whether it is in some sense permanently navigable, i.e., regularly recurring or of a duration to make it conducive to recreational uses."[69] Under this test, the court found the DNR's determination of navigability reasonable.[70]

In a recent case, *Klingeisen v. State Department of Natural Resources*, the Wisconsin Court of Appeals clarified the definition of navigability to cover certain artificial waters.[71] Klingeisen, who had been ordered to remove a boathouse from an artificial body of water, argued that the DNR had no jurisdiction over this water.[72] The court of appeals, however, held that the public trust included "public, artificial waters that are directly and

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[66] *Menomonee Falls*, 412 N.W.2d at 511-12; *DeGayner*, 236 N.W.2d at 223.
[67] 236 N.W.2d at 219-22.
[68] *Id.* at 221-22.
[69] *Id.* at 222.
[70] *Id.* at 223.
[71] 472 N.W.2d 603, 605-06 (Wis. Ct. App. 1991).
[72] *Id.* at 605.

inseparably connected with natural waters."[73] The court found this extension necessary to protect the purposes of the public trust doctrine. The channel at issue in *Klingeisen* was public because it was "connected to and maintained by the waters of Green Bay" and because the public had free access to the waters by both deed and use.[74]

Not all artificial waters connected to navigable waters are covered by the public trust doctrine, however. For instance, artificial channels that drain water from lands in agricultural use are defined as not navigable by statute.[75] While most agricultural ditches are distinguishable from the channel in *Klingeisen* both in use (drainage versus public recreation), source (agricultural runoff versus navigable water), and lack of connection with natural navigable water, some ditches may be sufficiently connected to navigable water to satisfy the *Klingeisen* criteria.

One of the most interesting challenges to a DNR determination of navigability occurred in *Village of Menomonee Falls v. Wisconsin Department of Natural Resources*.[76] In this case, the DNR determined that Lilly Creek was navigable and denied Menomonee Falls permits for a channelization project.[77] The village challenged the finding of navigability on the grounds that the test was not simply the water body's ability to float a small boat for recreation.[78] Using language from the *DeGayner* case which suggested that the test for navigability might be broader than strict navigability in fact,[79] the village argued that navigability should depend on whether there was actual public use of the water and, therefore, any public rights at stake.[80] The court rejected the test proposed by the village and reaffirmed the test of navigability defined in *Muench*, declaring that "navigability in fact is the keystone" to determining the coverage of the public trust doctrine.[81] Thus, the application of the public trust doctrine does not depend upon the existence of public use. Public use is merely part

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[73] *Id.* at 606.

[74] *Id.* at 605.

[75] WIS. STAT. § 30.10(4)(c) (1991).

[76] 412 N.W.2d 505 (Wis. Ct. App. 1987).

[77] *Id.* at 507-08.

[78] *Id.* at 508-09.

[79] The court in *DeGayner* had speculated about a definition of navigability even more expansive than that established in *Muench*. It stated that "the question may well come down to an issue far broader than navigability *per se*, *i. e.*, will the damming or obstruction of a stream destroy some beneficial interest of the public." This beneficial interest could conceivably involve non-navigable uplands affected by a project, thus extending the public trust doctrine beyond navigable water. *DeGayner*, 236 N.W. 2d at 223-24.

[80] *Menomonee Falls*, 412 N.W.2d at 509.

[81] *Id.* at 510.

of the balancing test examined in the permit process after the water has come under the jurisdiction of the DNR.[82]

In conclusion, the Wisconsin courts have established a broad definition of navigability that accounts for both commercial and recreational navigation. A Wisconsin body of water is navigable if it is capable of floating a boat of shallow draft for recreation. This capability need not be constant, only regularly recurring. In addition, the public trust doctrine covers certain artificial waters connected to navigable water. This broad interpretation strengthens the public trust doctrine in Wisconsin and gives the state wide latitude to protect the water resources of the state.

D. Public Trust Rights Versus Riparian Rights

Wisconsin law recognizes the riparian system of surface water rights, under which the owners of riparian lands (those bordering bodies of water) hold rights in the water adjoining their property.[83] These rights include the use of the shoreline,[84] the reasonable use of the water,[85] and a right to build piers for navigation.[86] In the case of navigable waters, however, the rights of riparians might conflict with those protected by the public trust. For instance, a pier built by a riparian might obstruct a non-riparian's ability to navigate a body of water. When these conflicts occur, the riparian rights are secondary to the public interest.[87]

The state has a responsibility to protect public rights against encroachment from riparians.[88] The state has done this by codifying these riparian rights into statutes, which are simply an "acknowledgement by the legislature of certain common law riparian rights."[89] In the process, the legislature has created permitting procedures under which the DNR can control the exercise of riparian rights to insure that public rights are protected.[90] For instance, the DNR may grant a permit to a riparian owner to place a structure upon the bed of a navigable water, but only if it does not obstruct navigation and is not "detrimental to the public

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[82] *Id.*

[83] State *ex rel.* Chain O'Lakes Protective Association v. Moses, 193 N.W.2d 708, 710 (Wis. 1972).

[84] Bino v. Hurley, 76 N.W.2d 571, 575 (Wis. 1956).

[85] *Chain O'Lakes*, 193 N.W.2d at 710.

[86] Boorman v. Sunnuchs, 42 Wis. 233, 242 (1877).

[87] State v. Bleck, 338 N.W.2d 492, 498-99 (Wis. 1983).

[88] *Id.* at 498.

[89] *Id.*

[90] *See* sources cited *supra* note 39.

interest."[91] In this manner, public rights in navigable waters are protected from interference by landowners exercising their riparian rights.

IV. THE FUTURE OF THE PUBLIC TRUST DOCTRINE

Over the years in Wisconsin, the public trust doctrine has been transformed from a common law principle developed by courts into an extensive statutory framework enacted by the Wisconsin legislature for the purpose of maintaining public rights. Through this statutory framework, the DNR has extensive authority through which it protects navigable waters from pollution and overdevelopment. Some of these statutes impose upon the DNR the duty to protect navigable waters from physical obstructions that are a hindrance to navigation.[92] Others impose upon the DNR the duty to protect the water quality in navigable waters.[93]

While the legislature enacted these statutes to fulfill the state's public trust duties, the public trust doctrine also can play a role in overcoming constitutional obstacles to zoning regulations designed to protect navigable waters and other related resources.[94] Many zoning regulations are designed to reduce development near bodies of water, often for the purpose of preventing wetlands loss. Because these ordinances place restrictions upon the uses to which land can be put, however, affected landowners often challenge them on the basis that they deprive them of property without just compensation as required by the 5th and 14th Amendments of the United States Constitution and by Article I, sec. 13 of the Wisconsin Constitution. If governments were required to pay compensation in these cases, many of

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[91] WIS. STAT. § 30.12(2) (1991).

[92] *See* sources cited *supra* note 39.

[93] WIS. STAT. ch. 33 (1991) authorizes the DNR to administer a program of lake protection and rehabilitation projects and to work with locally created lake protection and rehabilitation districts to implement these projects. WIS. STAT. §§ 144.02-144.27 (1991) give the DNR wide-sweeping authority to protect water quality in all waters of the state, including navigable waters. Some specific areas which are provided for include water resource conservation, clean drinking water, sewage disposal, point source pollution, nonpoint source pollution, and erosion control. WIS. STAT. ch. 147 (1991) establishes a permit procedure under which the DNR controls all pollutant discharges into the state's waters.

[94] For instance, one of the Wisconsin statutes with great potential for protecting water resources is the navigable waters protection law. 1965 Wis. Laws 614 enacting WIS. STAT. § 59.971 (1991), WIS. STAT. § 87.30 (1991), and WIS. STAT. § 144.26. This law encourages the development and implementation of zoning regulations relating to "lands under, abutting or lying close to navigable waters" for the purposes of preventing pollution, protecting wildlife, preserving natural beauty, and maintaining healthy conditions. WIS. STAT. § 144.26(1). The DNR is to coordinate state activity under this statute. The regulations established under this statute can be designed to protect navigable waters from dangers which might not be adequately addressed by other state regulations, such as wetlands loss and nonpoint source pollution.

the regulations would become unfeasible. However, states may use the public trust doctrine as a justification for land use regulations which protect public rights in water by regulating interference with these rights under the common law concept of nuisance.

The Wisconsin case of *Just v. Marinette County* illustrates the problem.[95] The Justs challenged Marinette County's Shoreland Zoning Ordinance, which required owners of land near navigable waters to obtain permits to undertake certain uses of that land.[96] The Justs, without obtaining a permit, had filled an area of wetlands on their property that was adjacent to Lake Noquebay, a navigable lake.[97] However, because this area had been designated as a swamp or marsh and the filling of that land was not a permitted use under the county ordinance, the Justs needed to obtain a permit to undertake this action.[98] The Justs challenged the ordinance on the grounds that it took their property without compensation and was, therefore, unconstitutional.[99] In response, Marinette County argued that these restrictions were a proper exercise of the state's police power and, therefore, it need not provide compensation to the Justs.[100]

According to the Wisconsin Supreme Court, compensation is required only "when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm."[101] Under this test, compensation was not required because the purpose of the regulation was the protection of public rights.[102] Thus, the court viewed this exercise of the police power as a method through which the state fulfilled its public trust duties.[103] Since deterioration of public rights would be considered a public harm, no compensation is required when the state protects public rights.

The court in *Just* went on to conclude, in dicta, that a landowner "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

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[95] 201 N.W.2d 761 (Wis. 1972).

[96] This local zoning ordinance was authorized under WIS. STAT. § 59.971 and WIS. STAT. § 144.26 and supervised by the state Department of Natural Resources. *Just*, 201 N.W.2d at 764-65.

[97] *Just*, 201 N.W.2d at 766.

[98] *Id.* at 765-66.

[99] *Id.* at 767.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 765.

[103] The fact that the ordinance was part of a state program to protect navigable waters influenced the court's view that the it was an exercise of public trust duties by the state. *Id.* at 768-69.

state and which injures the rights of others."[104] The state could exercise its police power to "prevent harm to public rights by limiting the use of private property to its natural uses."[105]

These statements by the court in *Just* imply an extension of the public trust doctrine to protect public rights in lands not previously covered by the trust. Traditionally, the public trust covered all navigable waters up to the point of the ordinary high-water mark.[106] The ordinary high-water mark is defined as the "point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."[107] Wetlands that are below the ordinary high-water mark of a navigable water are already covered by the public trust doctrine. However, there are some wetlands, such as those at issue in *Just,* that are not part of navigable waters.[108] By definition, the public trust does not cover these lands. However, as noted above, the decision in *Just* suggested public trust application to these lands because of their impact on public rights in navigable water.[109]

There are some who advocate widening the applicability of the public trust beyond navigable waters so as to fulfill the ultimate goal of the public trust doctrine—the protection of public rights in navigable waters.[110] California, for instance, has extended the public trust doctrine to protect navigable waters from harm caused by damage to nonnavigable tributaries.[111] In addition, scholars have advocated expanding the trust to cover wetlands and uplands related to navigable water and the dry sand area

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[104] *Id.* at 768.

[105] *Id.*

[106] State v. Trudeau, 408 N.W.2d 337, 341 (Wis. 1987); Illinois Steel v. Bilot, 84 N.W. 855, 856 (Wis. 1901).

[107] Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914).

[108] *Just*, 201 N.W.2d at 766.

[109] In addition, as noted earlier, the Wisconsin Supreme Court has suggested in the *DeGayner* case that the public trust might extend to areas in which the public has a beneficial interest. These areas might include non-navigable uplands which impact upon public rights in navigable waters. While Wisconsin courts retreated from that position in *Menomonee Falls*, that case was heard before the court of appeals and it remains possible that Wisconsin may accept a broader definition of navigability.

[110] An argument has been made that courts have historically used the public trust doctrine to subordinate private property rights to public economic policy. Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 WIS. L. REV. 1403, 1403-04 (1980). If this is the case, an argument may be made that modern courts, in an era in which environmental concerns have increased, should use the public trust doctrine to subordinate private property interests to public environmental policy.

[111] National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 721 (Cal. 1983).

of coastal waters.[112] This would subject these lands to the public interest. As such, a claim of compensation for state regulation of these lands would fail because the private owners of the land would only hold it subject to public rights.

This view of the public trust reflects a new conception of private property advocated by Joseph Sax.[113] Professor Sax proposes the adoption of what he calls the usufructuary model of property rights.[114] Under this model, a private property owner would only have the right to use their property in a way that is "compatible with the community's dependence on the property as a resource."[115] Therefore, landowners would not be entitled to receive compensation for regulation of their property designed to protect its resource value, even if the land were rendered valueless. This view would formulate a new balance between the public's need for ecological preservation and the rights of private landowners.

Courts have not accepted the Sax proposition. Professor Sax has acknowledged that the United States Supreme Court rejected this view in the recent case of *Lucas v. South Carolina Coastal Council*.[116] In *Lucas*, the Court required South Carolina to pay compensation when it restricted all development on the plaintiff's beachfront lands because the restriction "deprives the land of all economically beneficial use."[117] South Carolina could deny compensation only if the owner did not possess the affected rights to develop the property in the first place.[118]

According to Professor Sax, the Supreme Court in *Lucas* rejected a view of property in which public rights in ecological resources are paramount to private rights.[119] In so doing, it has also rejected the view of the Wisconsin Supreme Court in *Just* that a state may require a landowner to retain property in its natural state.[120] Under the takings analysis adopted by the Supreme Court, expansion of the public trust

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[112] Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 555 (1992).

[113] Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

[114] *Id.* at 1452.

[115] *Id.*

[116] 112 S.Ct. 2886 (1992). Sax claims that, in *Lucas*, the Court "repudiates the conclusion of *Just*, and instead effectively reverses the Wisconsin court's conclusion that 'it is not an unreasonable exercise of [police] power to prevent harm to public rights by limiting the use of private property to natural uses.'" Sax, *supra* note 113, at 1440.

[117] *Lucas*, 112 S.Ct. at 2899.

[118] *Id.*

[119] Sax, *supra* note 113, at 1437-42.

[120] *Id.*

doctrine based upon public rights in ecological resources will pose constitutional problems.

Lucas does leave the door open for some regulation of private property for the purpose of protecting public rights in natural resources, but these regulations may only duplicate what could be achieved through common law remedies, such as a public or private nuisance action.[121] Thus, as interference with public rights in navigable water could be considered a public nuisance,[122] states may be able to justify regulations on private land use which protect public rights as a prevention of a public nuisance.[123] Shoreland zoning such as that involved in *Just* is illustrative. These zoning regulations protect navigable waters from damage as a result of development along the shore. An action which negatively affects public rights has the characteristics of a public nuisance.

Wisconsin courts have developed a common law framework over the years for the application of the public trust doctrine. Lawmakers could use that framework to design a system of regulations that would meet the takings criteria set out by the Supreme Court in *Lucas*, because this framework would be based on the common law remedies allowed by the Supreme Court. Under this rubric, the core issue in suits seeking compensation for restrictions on land use as a result of regulations protecting navigable waters could change substantially. Instead of using a 5th Amendment analysis under the *Lucas* criteria, courts could simply engage in a fact-specific inquiry into whether the action restrained constitutes a public nuisance.

V. CONCLUSION

Wisconsin has a strong public trust doctrine which has been developed through decades of statutes and case law. The doctrine requires the state to protect the quality of water in Wisconsin for commercial, recreational, and aesthetic use. Under the doctrine, the state holds the beds of all navigable waters in trust for the public. As a result, the state must prevent interference with public rights in these waters. Since the Wisconsin definition of navigability is broad, including even some artificial bodies of

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[121] *Lucas*, 112 S.Ct. at 2900.

[122] As noted *supra* in part III.B, nuisance law is one of the substantive areas under which a public trust doctrine suit may be brought.

[123] California courts have characterized state legislation which creates coastal development permit and planning programs as exercises of the state's traditional power to regulate nuisances. *See* Leslie Salt Company v. San Francisco Bay Conservation and Development Commission, 200 Cal.Rptr. 575, 583-84 (Cal. Ct. App. 1984); CEEED v. California Coastal Zone Conservation Commission, 118 Cal.Rptr. 315, 323-24 (Cal. Ct. App. 1974).

water, public trust protections extend to many of the state's water resources. This broad definition enhances the effectiveness of the doctrine. Citizens may also protect their rights in navigable water by gaining access to the courts through standing rights granted by the doctrine.

While the public trust doctrine does impose upon the state the duty to protect public rights in navigable waters, it does not provide the vehicles through which this duty is discharged. These vehicles are found either in statutes or common law concepts such as nuisance.

The state of Wisconsin is subject to constitutional restrictions, such as the requirement that the state pay compensation when it takes property for a public purpose, when employing these methods to protect public rights. These restrictions may limit the ability of the state to expand the scope of the public trust to protect areas, such as wetlands, which have effects on navigable water. However, under the Supreme Court's rationale in *Lucas*, the state may be able to justify regulations which protect public rights in navigable water as the prevention of a public nuisance.