An Overview of the Public Trust Doctrine: 
Public Rights in Surface Water¹

Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

With 15,000 lakes and 33,000 miles of rivers and streams woven into the landscape of our state, it is not surprising that hundreds of Wisconsin cities and villages have some variety of lake, river, or stream within their jurisdiction. As a result, local officials are likely to come into contact with the complex legal framework that governs these resources.

The Public Trust Doctrine is one of the most important pieces of the surface water legal framework. Consequently, city and village officials will benefit from understanding the doctrine’s basic concepts.

THE PUBLIC TRUST DOCTRINE

The public trust doctrine’s historical path can be traced from Roman civil law to early American common law. The Wisconsin Supreme Court summarized a portion of the trust doctrine’s American history in *Muench v. Public Service Comm’n*,² as follows:

> After the Revolutionary War, the original thirteen states were impoverished and were confronted with the problem of paying the debts created by the war. States without western lands demanded that Virginia, and other states claiming such lands to the west, should cede the same to the Confederation to be sold to pay such debts. In 1783 the Virginia legislature authorized the ceding of the Northwest Territory to the Confederation, and the actual deed of conveyance was executed March 1, 1784. This cession was made upon two conditions: (1) The new states to be admitted as members of the Federal Union were to have the same rights to sovereignty as the original states; and (2) the navigable waters flowing into the Mississippi and the St. Lawrence rivers, and the carrying places between them, were to be forever free public highways. These conditions were incorporated into the Northwest Ordinance of 1787, which set up the machinery for the government of the Northwest Territory.

On February 17, 1848, the Wisconsin territorial convention adopted the Northwest Ordinance language regarding navigable waters verbatim in art. IX, sec. 1 of the Wisconsin Constitution. That section reads:

> The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefor.

Thus, the Wisconsin Constitution establishes a trust for the public in navigable waters of the state to be administered by the state.

Many court decisions have clarified the nature of the trust created by art. IX, sec. 1. Moreover, these decisions established what is known as the public trust doctrine.

One of the clearest summaries of the trust doctrine is found in *Illinois Steel Co. v. Bilot*,³ where the Wisconsin Supreme Court stated as follows:

> The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.

This summary, alone, does not fully explain the trust doctrine. However, it does identify several key concepts. These concepts are represented by the terms or

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phrases “navigable,” “ordinary high-water mark,” “enjoyment of the waters” and “preserve.” A useful understanding of the trust doctrine requires exploring these ideas.

“NAVIGABLE”

The applicability of the trust doctrine to a lake or river depends in great part on whether it is navigable. Early on, the courts required proof that the waterway was suitable for commercial navigation or floating logs to sawmills.4 In 1911, the legislature enacted a statutory definition which considered streams and lakes navigable if they are “navigable in fact for any purpose.”5 As developed in subsequent court decisions, a stream is “navigable in fact” if it is possible to float a canoe or small recreational craft at some time during the year.6 All that is required for a stream to be considered navigable is that it have regularly recurring periods when it is navigable, or that it have navigable periods lasting long enough to be conducive to recreational use.7

Generally, once navigability is established, it is “immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation.”8 However, some characteristics of the water body are significant.

For example, the trust doctrine only applies to a navigable water body that is standing or permanent.9 Accordingly, flooded backyards and street gutters cannot be declared navigable waters.10 A water body’s artificialness may also be significant. If a non-navigable stream is artificially raised so as to make it navigable, the public may gain rights in the water only if the public use has continued over an extended period of time.11 However, the trust doctrine

4. Olson v. Merrill, 42 Wis. 203 (1877).
5. 1911 Wis. Laws ch. 652.
6. DeGayner & Co., Inc. v. DNR, 70 Wis. 2d 936, 236 N.W.2d 217 (1975); Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987).
7. Id.
9. Getka v. Lader, 71 Wis. 2d 936, 236 N.W.2d 217 (1975).
10. Village of Menomonee Falls, supra.
11. See Haase v. Kingston Creamery, 212 Wis. 585, 250 N.W. 444 (1933) and Smith v. Youmans, 96 Wis. 103, 70 N.W. 1115 (1897).
extends to an artificial water body, such as a lagoon, that is “directly and inseparably connected with natural navigable waters” irrespective of the public use history.

“ORDINARY HIGH-WATER MARK”

Like navigability, the “ordinary high-water mark” of a river, lake, or stream is an important physical attribute. In Houslet v. Natural Resources Department, the court stated:

[T]he public interest in and title to the navigable waters in this state attaches to more than the open and perpetually navigable waters contained in lakes, rivers and streams. It extends to areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question.

Thus, the ordinary high-water mark, not the water’s edge, establishes the geographical boundary of the public trust.

The ordinary high-water mark is the point on the bank or shore where the water, by its presence, wave action, or flow, leaves a distinct mark on the shore or bank that is indicated by erosion, destruction of vegetation, changes from aquatic to terrestrial vegetation, or other characteristics. Significantly, the ordinary high-water mark and the applicability of the trust doctrine is not altered by artificial barriers. If the water in its natural condition would flow into an area, the ordinary high-water mark extends to the elevation consistent with the ordinary high-water mark determination for the water body.

While the boundary of the public trust established by art. IX, sec. 1 of the Wisconsin Constitution is delineated by the ordinary high-water mark, it is also important to note that the trust doctrine can have an impact beyond that boundary. For example, the Wisconsin Supreme Court noted that the land adjacent to or near navigable waters exists in a special relationship to the state, and is subject to public trust powers of the state implemented through shoreland zoning. In addition, the courts have held that the public trust doctrine “applies to shore appurtenant to navigable waters in order to ensure the public’s continued access and free use of those waters.”

“ENJOYMENT OF THE WATERS”

As noted earlier, the public trust was established to preserve the public’s “enjoyment of the waters.” Initially, this right was limited to navigation relating to commerce. The term “navigation” was subsequently broadened to include other incidents of navigation such as travel, fishing, recreation, and hunting.

In 1987, the Wisconsin Supreme Court offered a more expanded view of the rights protected by the trust doctrine when it stated, “[t]he rights Wisconsin citizens enjoy with respect to bodies of water held in trust by the state include the enjoyment of the natural scenic beauty as well as the purposes of navigation, swimming, and hunting.”

Although these enlarged rights do not extend to uses separate and unrelated to navigation, such as beachcombing and walking dogs, the trust doctrine clearly grants the public a broad range of constitutionally recognized rights that warrant a corresponding degree of consideration in local government decisions that may affect those rights.

On the other hand, the public’s right to exercise the rights guaranteed by the trust doctrine is not absolute. It is well established that the state has power, as trustee for the public, to regulate public uses of navigable waters to best accomplish and promote the public interest.

Many of those regulations are set forth in Chapter 30 of the Wisconsin Statutes. Some of them may involve local boating regulations adopted by a city or village pursuant to Wis. Stat. § 30.77. Although the authority has been limited by court rulings, cities and villages are also specifically empowered to regulate navigable waters within their respective jurisdictions by Wis. Stat. §§ 62.11(5) and 61.34(1). Public use of a navigable water may also be limited by

13. Houslet v. Natural Resources Department, 110 Wis. 2d 280, 329 N.W.2d 562 (Ct. App. 1997).
14. State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987); State v. McFarren, 156 Wis. 2d 492, 498 N.W.2d 459 (1974); Diana Shooting Club v. Hustling, 156 Wis. 2d 261, 145 N.W. 816 (1914); see also Wis. Admin. Code NR § 115.03(6).
15. State v. Trudeau, id.
19. Muench, supra.; Diana Shooting Club, supra; Willow River Club v. Wade, 100 Wis. 86, 145 N.W. 273 (1896).
20. State v. Trudeau, 139 Wis. 2d 91 at 10.
22. In re Trempealeau Drainage Dist., 146 Wis. 398, 131 N.W. 838 (1913).
23. See, e.g., Wis. Stat. § 30.19(1)(c), which imposes a permit requirement for shoreland grading activities.
municipal zoning regulations. The right of the public to use navigable waters is therefore subject to state and local police power to ensure that such rights are exercised in a safe and orderly manner.

The rights established by the public trust are also limited by nature. In general, the public may exercise its rights under the public trust only to the water’s edge which necessarily fluctuates in response to rain and other natural forces. Thus, although the public trust extends to the ordinary high-water mark, the owner of property abutting a navigable water body may lawfully exclude persons from entering and using that portion of the shore of a navigable water body lying between the ordinary high- and low-water marks for purposes unrelated to navigation. Moreover, the owner may maintain a trespass action against a person for such entry.

“PRESERVE”

The public trust doctrine requires that the rights established by it shall be preserved to the people forever. On the one hand, this imposes an obligation on the state, as trustee, not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty. In addition, it also imposes a duty on state and local governments to maintain control of those trust properties under their jurisdiction.

Early on, the courts strongly opposed attempts to convey trust property even for asserted public purposes. In Prieue v. Wisconsin State Land & Imp. Co., the court stated,

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

25. Gianoli, supra.
26. Doeml, supra.
27. Wisconsin’s Environmental Decade, Inc. v. Department of Natural Resources, 85 Wis. 2d 518, 271 N.W.2d 69 (1978).
However, this position has been modified. Today, the courts will uphold limited encroachments upon the beds of navigable waters where the public interest will be served. For example, in City of Madison v. State, the Wisconsin Supreme Court upheld the filling of part of the bed of a navigable lake for the construction of a civic center because it enhanced the shore area and created a vantage point from which the public could enjoy the scenic beauty of the lake and was thus consistent with the public’s rights in navigable waters.

The duty to preserve is expressly imposed on the state. The state may also delegate its obligation to preserve navigable waters to local units of government as long as the delegation furthers the purposes of the public interest. However, the power to preserve and protect the public rights in navigable waters is not solely the domain of state and local government.

The public may also challenge actions adversely affecting their rights in navigable waters. Significantly, this not only includes the right to challenge the determinations of a state agency, but also the right to sue a third party directly even where the state has decided not to pursue enforcement action. Thus, the public retains significant power to preserve its rights in navigable waters when the state or municipality does not.

CONCLUSION

The foregoing summary of the public trust doctrine provides a start to understanding one of the most important parts of the legal framework for surface water in Wisconsin. Moreover, it highlights the point that public use and enjoyment of navigable waters for boating, swimming, fishing, hunting, and scenic beauty is more than just another set of interests to be considered in policy debates that affect a navigable lake, river, or stream. While subject to reasonable police power regulation, they are rights embodied in the public trust doctrine and the highest law of the state, the state constitution. They are also rights that may be asserted directly by the public in the courts. Therefore, sustainable local policies and decisions that directly or indirectly affect lakes, rivers, and streams need to reflect the consideration due the constitutionally recognized rights of the public in navigable waters.

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About the Author:
Claire Silverman is Legal Counsel for the League of Wisconsin Municipalities. Claire joined the League staff in 1992. Contact Claire at cms@lwm-info.org

30. 1 Wis. 2d 252, 83 N.W.2d 674 (1957).
32. Muench, supra.
33. Id.