

Wisconsin's Public Trust Doctrine

Presentation Outline

- * Wisconsin's legacy of conservationists
- * Public Trust Doctrine
 - * Origin
 - * Core principles
 - * What is protected
 - * Who protects public trust resources
- * Current issues in the protection of Wisconsin's waters



“When we try to pick out anything by itself, we find it hitched to everything else in the Universe.”

John Muir

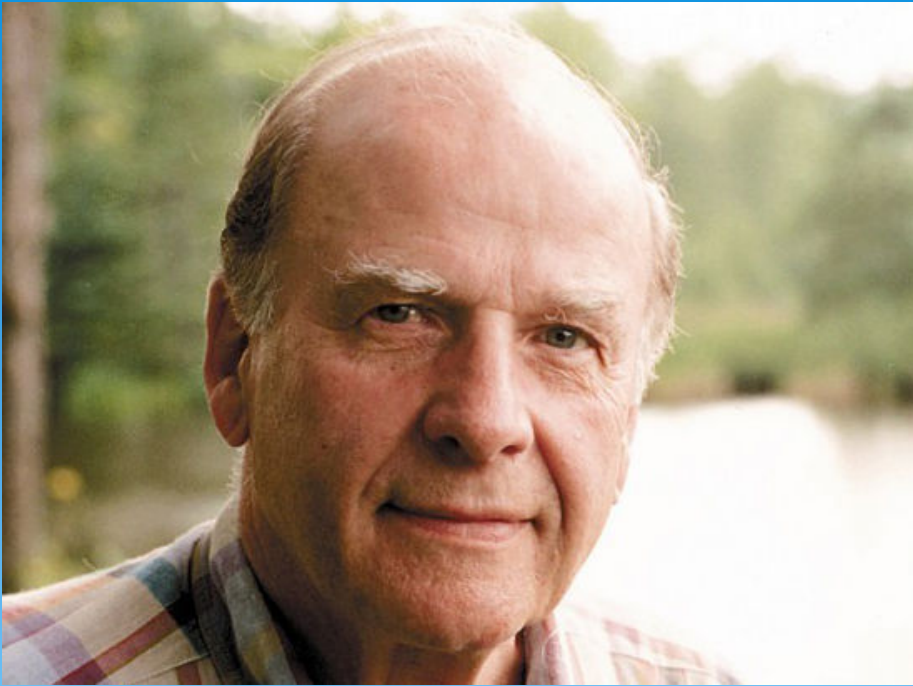
- Raised in Wisconsin
- Advocate for wilderness preservation
- Helped create National Parks System



Aldo Leopold

“We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect.”

- UW-Madison professor
- Wrote *A Sand County Almanac* while living on the Wisconsin River
- “Land Ethic”
- Worked to preserve wilderness and roadless areas



“The wealth of the nation is its air, water, soil, forests, minerals, rivers, lakes, oceans, scenic beauty, wildlife habitats and biodiversity... that's all there is. That's the whole economy. That's where all the economic activity and jobs come from. These biological systems are the sustaining wealth of the world.”

Gaylord Nelson

- Wisconsin native, Governor and U.S. Senator
- Founder of Earth Day
- As U.S. Senator, led the enactment of several federal environmental laws and the national

Public Trust Doctrine - Origin

Wisconsin Constitution, Art. IX, Sec. 1

The navigable waters of Wisconsin “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.”

Public Trust Doctrine – Core Principles

The **Public Trust Doctrine**:

- “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.” *Diana Shooting Club* (1914)
- “**is not a passive trust; it is governmental, active and administrative**, [and] requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.” *City of Milwaukee v. State* (1927)
- “requires the state not only to promote navigation but also to **protect and preserve those waters for fishing, recreation, and scenic beauty.**” *Just v. Marinette* (1972)
- “is a **fundamental tenet of our constitution.**” *Lake Beulah v. DNR* (2011)

2011 – WI Supreme Court “confirmed the **ongoing strength and vitality of the State’s duty under the public trust doctrine** to protect our valuable water resources.” *Lake Beulah v. DNR*

Public Trust Doctrine – What is protected?

Public trust waters:

- * Navigable and non-navigable lakes and streams
- * Groundwater use if it impairs surface waters
- * Wetlands and uplands? – historically protected (*Just*, 1972), but protection arguably limited by WI Supreme Court in *Rock-Koshkonong* (2013)

Uses protected:

- * Navigation
- * Fishing
- * Recreation
- * Natural beauty
- * Enjoyment of pollution-free waters

Public Trust Doctrine – Who protects our waters?

The **legislature has the primary authority** to administer the public trust for the protection of the public's rights, and to effectuate the purposes of the trust. *Hilton v. DNR* (2006)

Legislature delegated “broad authority and general duty” to DNR “to manage, protect, and maintain waters of the state.” *Lake Beulah Mgmt. Dist. v. DNR* (2011)

The **duties of the DNR are comprehensive**, and its role in protecting state waters is clearly dominant.” *Wisconsin’s Environmental Decade, Inc. v. DNR* (1978)

Current issues in Wisconsin's protection of our waters

WI Supreme Court departing from public trust precedent?

- * First split court decision after decades of unanimous public trust court decisions – *Rock Koshkonong v. DNR* (2013)

Has legislature fully delegated public trust duties to DNR?

- * Courts say YES – *Lake Beulah v. DNR* (WI Supreme Court upholds DNR duty to protect public trust resources from groundwater pumping); and *Clean Wisconsin v. DNR* (state court affirms DNR authority to impose conditions in permits to protect waters from concentrated animal feeding operations)
- * WI Attorney General says NO – 2016 AG opinion says legislature's public trust delegation does not explicitly give DNR authority to impose well approval conditions necessary to protect surface waters

Current issues in Wisconsin's protection of our waters (cont.)

Can members of the public protect public trust resources if legislature has not fully delegated public trust duty to DNR?

- * Citizens successfully challenged DNR high capacity well decision that would impair public trust waters due to cumulative impacts – *Friends of the Central Sands v. DNR* (Richfield CAFO well)
- * *BUT* – the legislature enacted a statute that prohibits challenges to high capacity well decisions based on DNR's failure to consider cumulative impacts to surface waters or other resources – Wis. Stat. § 281.34(5m)

Thank you!

“The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land... In short, a land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.”

— Aldo Leopold