The Public Trust Doctrine has helped Wisconsin protect waters and wetlands

"Common highways and forever free"
- Wisconsin's Public Trust Doctrine

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Article IX, Section 1 or the Wisconsin Constitution provides that "…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.…" This language provides the basis for the Public Trust Doctrine in navigable water in Wisconsin.

With 2003 designated as the Year of Water in Wisconsin to celebrate the state's remarkable water resources and address future water challenges, it's vital to understand and consider the history of the protections that have been put in place to assure the state's waters remain "common highways and forever free."

The "common highways and forever free" language in the Constitution can be traced back to ancient Rome, when Emperor Justinian, in 528 AD condensed prior decrees of Emperors into a code of law that included the phrase, "By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea." These same concepts were incorporated into English law in the Magna Carta, in 1225, under which the sovereign -- the King -- owned the public lands, but held them in trust for the public, and that all citizens had the right to use and enjoy those public resources.

This same "doctrine of the public trust" was brought to colonies in America and incorporated into the laws of the original 13 states. As settlement continued to the west, it was declared in the Northwest Ordinance of 1787 that "The navigable waters leading into the Mississippi and St. Lawrence…shall be common highways and forever free…." This language was obviously adopted as part of the Wisconsin Constitution in 1848.

Over the 155 years Wisconsin has been a state, the state Supreme Court, the Legislature, the Department of Natural Resources, and the citizens of the state have been responsible for administering this public trust established in the Constitution. The Wisconsin Supreme Court has been very active in upholding the trust doctrine and has broadly construed it. Citizens have routinely brought violations of the Public Trust Doctrine to the court seeking remedies.

Additionally, the Public Trust Doctrine has evolved as society's understanding of the ecology of water and waterways and the uses made of our waters have changed over time.

In 1914, in the Husting case, which affirmed that all citizens had the right to hunt on the waters of the Rock River as they flowed though the Horicon Marsh, the state Supreme Court noted the public nature of all state waters and recognized the need to broadly construe the trust doctrine so "the people reap the full benefit of the grant secured to them."

The court admonished that, at the time of statehood, the State of Wisconsin "became a trustee of the people charged with the faithful execution of the trust created for their benefit" and that the "wisdom of the policy which steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned, nor should it be limited by narrow constructions."

In the 1930s, the courts noted that as people began to use waters for more recreational activities, “sailing, rowing, canoeing, bathing, fishing, hunting, and skating” are public uses that are protected under the trust doctrine.

In the 1950s, both the Legislature and the Supreme Court noted that enjoyment of natural scenic beauty is a protected public right. In the 1960s, as the Clean Water Act was being adopted on the federal level, and as water quality problems became critically important in Wisconsin, the Wisconsin Court noted that the right to clean, unpolluted waters was an important consideration under the Public Trust Doctrine.

The state Supreme Court also held that state officials must consider the cumulative impacts of fills and structures in waters, noting that: “A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist.”

In 1972, the Court noted that wetlands, which were once considered “wasteland,” now are recognized to play a “vital role in nature” and that protection of such areas is critical “not only to promote navigation but also to protect and preserve those waters for fishing, recreation and scenic beauty.”

The Legislature has adopted regulations, which are administered by the DNR and local municipalities, to assure that the “public rights and interests” in state surface waters and wetlands are protected under the trust doctrine. The courts have recognized that those citizens who own property abutting waters have rights to use their frontage for access to the water and have the right to “reasonable use” of the water for such things as piers and boat storage. These private rights are, however, subject to the rights of the public under the public trust doctrine.

This tension between the rights of the public and rights of private landowners often results in controversy. The Wisconsin Supreme Court has repeatedly made it clear that regulations put in place to prevent harm to these public trust waters are reasonable and necessary under the Public Trust Doctrine and do not constitute a taking of private property.

It is sobering, to look back over the 155 years of statehood at the impacts people have had on Wisconsin’s lakes, rivers, and wetlands. But the doctrine that these resources are held in public trust has greatly helped Wisconsin protect its water and wetland resources.

During this same time we have also made great strides in understanding the ecology and interconnectedness of natural systems. We are developing new information, through research and experience, concerning how we can preserve habitat and scenic beauty while allowing development of waterbodies to occur.

There is more work to do and many challenges remain. But the doctrine that was handed down to us through time assuring that state waters are “common highways and forever free,” will continue to reinforce our efforts to assure that 150 years from now, or 1,500 years from now, this “public trust,” remains healthy and viable for those who follow us”.