# Common Ways:
# The Public Trust Doctrine in Wisconsin

Presented at
2003 Northwest Lakes Leadership Conference
Marvin M. Schwan Retreat &
Conference Center
Trego, Wisconsin

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June 27, 2003

I feel very honored to have this opportunity to join with lake leaders and lake lovers about the public trust doctrine - the foundation of Wisconsin Water Law.

"Common highways and forever free." That stirring clause runs like a powerful current through the water law of Wisconsin. Enshrined since statehood in our Constitution, those words have been at the very soul of our water policy from the earliest days of the American Republic. And the public trust concept those words embody reaches back to the English Civil War, Magna Carta and further still to the law of ancient Rome.

Wisconsin – this remarkable land of ours – bounded by the shores of two Great Lakes, and America's legendary Big River – speckled with some 15,000 inland lakes, and coursed by thousands of miles of running stream – is (perhaps like no other state) a land of water. And so it is natural that our most basic law addresses the nature of water as a common resource.

Article 9 of the Wisconsin Constitution says that the navigable waters of the state are "common highways and forever free from tax, duty or impost". But that ringing phrase did not originate with the state constitution's drafters. It was plagiarized, almost word for word from the Northwest Ordinance of 1787.

After General Washington defeated Cornwallis at Yorktown, the British read the writing on the wall, and began negotiations in Paris with Ben Franklin and other American representatives. Peace finally came when the Treaty of Paris was signed in 1783. The crown recognized the independent United States of America, extending from the 13 colonies west to the Mississippi – including what we call Wisconsin.

Much of the new nation's land mass was not within the bounds of the settled colonies, although some of them (particularly Virginia) claimed interests in lands extending far into the unsettled West. In the early 1780s these claims were ceded to the United States. But how would the territory be governed? That critical issue was addressed by a Committee of the Confederation Congress (as the Continental Congress was called under the Articles of

Confederation). Nathan Dane of Massachusetts (after whom my home Dane County is named) and others drafted the bill, providing for the governance of the lands North and West of the Ohio River --- the Northwest Ordinance.

The Ordinance aimed to encourage Westward expansion, provide a means to establish land titles and permit the formation of States that would join the 13 colonies on equal footing. Part of the genius of the Ordinance was its so-called Charter Provisions – a kind of Bill of Rights reflecting the essential freedoms guaranteed by Congress to those who would settle the Territory. These included a prohibition on the institution of slavery, a rule of uniform taxation and the promise that "the navigable waters would be common highways, and forever free of tax or duty."

That pledge has been understood as a legally enforceable promise, a binding obligation of government. In legal terms, the words are considered to establish a trust, in which the state is charged to safeguard navigable waters for the whole public.

In 150 plus years since Statehood, the Wisconsin Supreme Court, the Legislature and agencies like DNR and plain Wisconsin citizens have put flesh on the bare bones of that promise. And - overall - these institutions and the people of the state have lived up to the task.

In the early years, the trust focused on the literal idea that navigable waters are "common highways" available to the public for travel. Native Americans, trappers and voyageurs were our earliest boaters. Not long after Statehood, our rivers became highways for lumber as the Paul Bunyan age "cut the top off Wisconsin" and sent the logs down the river.

By the early days of the 20th Century, the Old Northwest Territory had been transformed into a settled agrarian landscape, with growing industrial cities and trade center villages and towns. With the decline of logging and the coming of the railroads, the use of waterways for commercial navigation began to fade and Wisconsin people turned to waterways for recreation.

And – while it may not have been on the minds of Nathan Dane and his committee colleagues when they drafted the Ordinance – the Wisconsin Supreme Court clearly recognized that the public's right to use the waters for recreation was as much a sacred trust as commercial navigation.

Over the years, the Court has recognized the right of the public (under this public trust doctrine) to use the State's navigable waters for hunting and fishing, recreational boating and swimming. By the mid-20th century, the Wisconsin Supreme Court even recognized the public's trust interest in Wisconsin's waters to include water quality, plant and animal habitat, and the enjoyment of natural scenic beauty.

The State's trusteeship over public waters has been recognized as an active duty, to protect and preserve. That duty is carried out by the State through laws enacted by the legislature. Chapter 30 of the Wisconsin Statutes governs navigable waters and has been recognized by the Supreme Court as a codification of the public trust. In many cases, the Legislature has empowered DNR to promulgate administrative rules to further detail the requirements deemed necessary to protect the public interest in waters. These laws address a

wide variety of matters including pollution control; regulations on the placement of structures in water; filling, draining and enlarging water bodies; erecting dams; regulating boating equipment and use; water diversion and pumping; regulation of shoreland development and investments in public access.

The trust doctrine does not require a state of nature. The doctrine permits the use of waters for the felt needs of the times, even – sometimes – when those human uses may diminish water quality or the ecological habitat waters can provide. But the doctrine stands as a powerful bulwark against unreasonable or excessive interference with the public's interest in our navigable waters.

The public trust in waters is a unique and remarkable doctrine. And in no place in the Old Northwest Territory, or in the United States for that matter, has the doctrine been more carefully considered, nurtured and advanced than here. This is an area of progressive government about which Wisconsin can still proudly boast.

The meaning of the public trust doctrine is complex. And I lack the talent to plumb its depths in the short time I have with you this morning. But I want to look briefly at four attributes of the trust doctrine, that I hope will help to illustrate its breadth and significance.

First, the public trust doctrine defines and protects a publicly-owned asset – an amazing sparkling public asset teaming with life whose financial worth is beyond calculation. I recently pursued a case to the state supreme court in which my client, the Wisconsin Association of Lakes, claimed a "dockominium" scheme had the practical effect of "selling" public waters. The dockominium involved the sale of boat slips on an enlargement of Geneva Lake in Walworth County. Land is pretty valuable there, and (it turns out) water (if you could sell it) would be darn valuable, too. The dockominiums involved rectangles of surface water about 10 feet by 20 feet, or 200 square feet for a price in the range of $50 thousand dollars. This placed a cash value of about $4,000,000 per acre on that inland water. My calculator isn't powerful enough to project a per-acre value like that to the State's 15,000 lakes, let alone the hundreds of miles of rivers and streams and wetlands. But it may be of some small comfort to know that the astronomical value of this public asset dwarfs the scale of the State's punishing budget deficit. I am trying to suggest part of a long-term strategy for Wisconsin's economy. Not to sell the waters – which the public trust doctrine forbids --- but instead to recognize that the health and economy of our state depend critically on the health and quality of our waters. I wish our state leaders would re-focus on the importance of this crown jewel resource of ours whether from a commitment to natural resource conservation or from the plain economic importance of waters, to the economy of the North Woods and much of the State.

A second key attribute of the public trust doctrine is that it establishes a Civil Right. Just as our free speech is protected by the Bill of Rights, so to is our right to use and enjoy the public's rich estate in Navigable Waters. It is a right guaranteed by our State Constitution. A right that extends to each of us.

A third key attribute of the trust doctrine is a legalistic concept, but one that is essential to its vitality. That is that the trust doctrine is a rule of legal standing. Legal rights don't mean

anything if – like the Soviet Constitution's guarantees of civil freedom - there is no mechanism to enforce them. Generally, the law carefully limits access to the Courts to persons who have a very direct, distinct (usually economic) interest and bars access where people's interests are represented by others. But the Wisconsin Supreme Court has consistently recognized that every person has a direct legal interest in the public waters of this State. And the Court has acknowledged that interest to grant each one of us the legal standing to enforce the trust. This concept has been key to Wisconsin public trust history. Time and again, the felt needs of the times have lead elected officials to compromise the public interest in water for a compelling local or economic need. And time and again, plain citizens have stared down the government and the mighty, daring to challenge the abrogation of public rights in water and they have won:

- In 1911, Paul Husting dared to trespass on part of Horicon Marsh the Diana Shooting Club called its own. And he made law when the Court declared citizen Husting had the constitutional right to navigate the sloughs in quest of waterfowl.

- In 1951, Virgil Muench dared to challenge the Legislature's granting local governments the awesome power to authorize the damming of one of Wisconsin's premier trout streams. Muench made law when the Supreme Court declared that public trust prohibited the Legislature from delegating the fate of public waters to local officials whose outlook could not adequately embrace the whole and enduring interests of the people of Wisconsin.

- In 1996, John Gillen dared to challenge the decision of DNR to authorize private use of a public lakebed. Others argued that citizens had no legal standing to question a decision made by the agency empowered to regulate such things. But Wisconsin's Supreme Court held firm, holding that "every person has standing" to enforce the public trust in waters. As my father used to say: "Even a cat can look at a king."

A fourth key to understanding the public trust doctrine is its role as a check and balance. The founders recognized the need for a Senate whose members held longer terms of office, as a check against the lower House whose members now no sooner take their oath of office than they begin campaigning for the next term. A wise student of the public trust doctrine, Professor Joseph Saxe, has recognized that - in a similar way - the public trust doctrine has been used by the Courts to cool the passions of legislatures, that sometimes react to a present perceived crisis in a way that loses sight of enduring values.

The Waters of Wisconsin are a thing of enduring value. Our lakes and streams, their shorelands and wetlands define this place. With due respect to Tim's Hill (our highest point), we have no mountains. No oceans. But we have a globally important collection of glacial lakes, some splendid reaches of streams, and a perch alongside of the greatest freshwater bodies on earth.

My youngest daughter, who finished the 4th grade a few weeks ago, has recently been studying the Solar system. And so I have been advised that most of our fellow planets are rocky or gaseous, terribly hot or freezing cold. But, amazingly, our little earth is mostly covered with water. Most of that water is salty or brackish. Only a fraction is fresh.

In our little corner of the Old Northwest Territory, we've got a lot of fresh water, much of it - but not enough - still clean enough to fish and swim. We are wonderfully lucky to be here.

And we have the foundation in law to sustain that public legacy, if only we have the pluck. It's not something to be left to elected powers or agency officials, though they have critical roles to play. Instead, when it comes to the waters of Wisconsin, each of us is a trustee.

I thank you for your attention and wish you well in your work here at the Schwan Center.

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