

## New limits on the public trust doctrine

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After years of expanding the public trust doctrine, the Wisconsin Supreme Court and the Legislature are reversing course.

The doctrine is laid forth in the Wisconsin Constitution as follows:

[T]he 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. Art. IX, § 1 of the Wis. Constitution.

Wisconsin courts have interpreted this provision to mean that the state is to hold the navigable waters in trust for the public. In fact, the doctrine originally applied solely to commercial navigation, based on the constitution's language that navigable waters are to be "common highways" and "forever free."

Over time, however, Wisconsin courts expanded the public trust doctrine so that it now extends beyond its plain meaning and original intent. For example, courts have interpreted the constitutional language so that it applies, in limited circumstances, to recreational purposes, including boating, swimming, fishing, hunting and even scenic beauty.

In its past two terms, the Wisconsin Supreme Court issued two opinions that tackle the doctrine with diverging outcomes. The first decision, *Lake Beulah Management District v. Wisconsin Department of Natural Resources*, greatly expanded the public trust doctrine by applying it to groundwater. In the more recent *Rock-Koshkonong Lake District v. Department of Natural Resources*, the court reversed course by imposing parameters on the doctrine and on [DNR regulatory authority](#).

### Expanding the public trust doctrine

In 2011, the Wisconsin Supreme Court expanded the public trust doctrine in *Lake Beulah* by granting the DNR broad authority to approve or deny groundwater permits for high capacity wells by ignoring specific permit criteria contained in the statutes. In essence, the court gave the DNR nearly unfettered authority to regulate land use through the public trust doctrine.

For example, the court held that the DNR has both the authority and a general duty under the public trust doctrine "to consider environmental harm to waters of the state when reviewing a high capacity well permit application," despite the fact that the high capacity well statute enacted by the Wisconsin Legislature does not explicitly include such a requirement.

The court concluded that through enabling provisions describing the DNR's general duties and powers, the Legislature delegated the state's "public trust doctrine to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters such as *Lake Beulah*."

Thus, for the first time, the court extended the public trust doctrine to allow the DNR to look beyond actual legislative language regulating high capacity wells and apply the public trust doctrine to deny a high capacity groundwater permit.

### Limiting public trust jurisdiction

Shortly after its decision in *Lake Beulah*, the Wisconsin Supreme Court accepted another public trust

doctrine case: Rock-Koshkonong Lake District. Unlike previous decisions expanding the public trust doctrine, the court began to reinsert protections for property owners.

For example, the court rejected the DNR's attempt to extend its public trust jurisdiction beyond navigable waters to non-navigable wetlands above the ordinary high water mark. The court explained that if it were to accept the DNR's claim, it would eliminate the element of "navigability" from the public trust doctrine and therefore "remove one of the prerequisites for the DNR's constitutional basis for regulating" water. According to the court, this "would eliminate the rationale for the doctrine."

The court stated unequivocally that there "is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the [ordinary high water mark] of a navigable lake or stream."

The court's decision marked an important turning point in the public trust doctrine line of cases. Rock-Koshkonong explicitly limited the DNR's scope of authority to navigable waters below the ordinary high water mark and stated that the public trust doctrine does not apply to adjacent wetlands. As the court noted, the Legislature already has enacted statutes that more than adequately protect wetlands.

The court's decision also provided for property owners important protections from arbitrary DNR decisions where the agency has no authority. As the court explained, "if the public trust doctrine were extended to cover wetlands that are not navigable, it would create significant questions about ownership of and trespass on private land, and it would be difficult to cabin expansion of the state's new constitutionally based jurisdiction over private land." This, according to the court, would have very significant "ramifications" for property owners.

While Rock-Koshkonong Lake Dist. is limited to the facts of the case, it is an important step toward placing proper limits on the DNR's authority to regulate land use through the public trust doctrine.

### **Legislative response**

The Wisconsin Legislature responded to the court's expansion of the public trust doctrine by imposing statutory limitations on the DNR's authority.

In 2011, the Wisconsin Legislature enacted Act 21, providing sweeping regulatory reform that, among other things, overturned a key aspect of Lake Beulah. The Legislature rejected the court's finding that prefatory statutory provisions outlining an agency's general powers and duties confers regulatory authority to the agency.

Act 21 makes it clear again that an agency must have separate and explicit enabling authorities in the statutes. That is, enabling legislation, such as that intending to govern high capacity wells, provides both authorities and limits on those authorities.

This year, the Legislature provided additional restrictions on the DNR's authorities that were expanded in Lake Beulah through judicial fiat. Act 20 provides that "no person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells."

This is a direct response to the court's decision in Lake Beulah where it held that the DNR could consider such effects based on the public trust doctrine, even though the specific high capacity well statutes did provide DNR such authority.

Most recently, the [legislation was introduced](#) to address "ambiguities" caused by the Lake Beulah decision. Specifically, SB 302 clarifies the DNR's authority when approving high capacity wells by prohibiting DNR from imposing permit conditions beyond those specifically provided in statute.

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This will further prevent the DNR from citing the public trust doctrine to impose conditions beyond those prescribed by law.

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