

# The Public Trust Doctrine and Groundwater Law in Wisconsin

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## The Problem

- **Wisconsin's history and culture, and therefore our law, focuses on navigable waters**
- **Wisconsin law historically has not recognized the interrelationship among groundwater, wetlands, and navigable waters**
- **Wisconsin's water regulatory programs do not create an integrated, comprehensive system for managing water resources.**

# Fundamentals of Wisconsin's Water Resources

## Wisconsin Is a Water Rich State

- **Great Lakes = 20% of global fresh surface water (5,500 cubic miles)**
- **Wisconsin has >800 miles of Great Lakes coastline; 200 miles of Mississippi River shoreline**
- **15,000+ inland lakes comprising ≤1 million acres**
- **13,500 miles of rivers and streams**
- **>1.2 million acres of wetlands in 11 coastal counties (5 million acres in state)**
- **1.2 million billion (15 0's) gallons of groundwater**

# Wisconsin's Navigable Surface Waters Define Our History, Industry and Identity

- Trappers, missionaries, settlers
- Logging, shipping, agriculture, tourism, beer
- Fishing, water sports, cabin up north

# Current Pressures on Water Resource Protection

## Drinking Water Supply

- **97% of inland municipalities (70% of population) obtain their drinking water from groundwater.**
- **Wisconsin (and elsewhere in the U.S.) uses drinking water for toilets, residential gardens, etc.**
- **Groundwater in many areas of the state are insufficient to support the user population (e.g., Waukesha)**

## Industry

- **Water-consumptive industries**
  - Beverages
  - Paper mills
- **Agriculture**
  - Crop irrigation
  - Dairy products



## Development

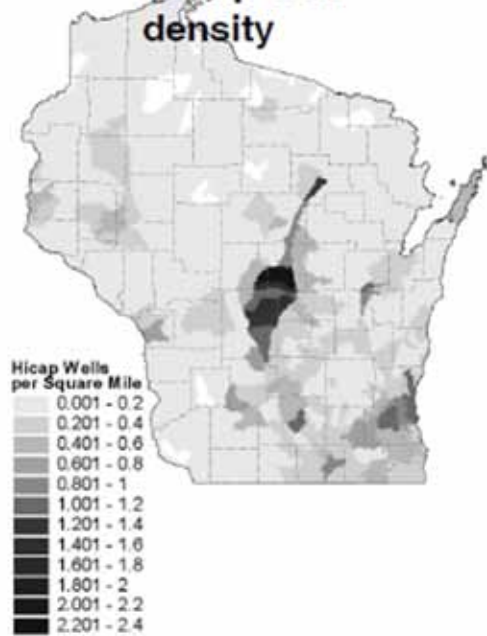
- **Impervious surfaces inhibit infiltration of precipitation**
- **Significant loss of groundwater recharge potential**
- **Less than 30% of precipitation soaks into ground to replenish groundwater**



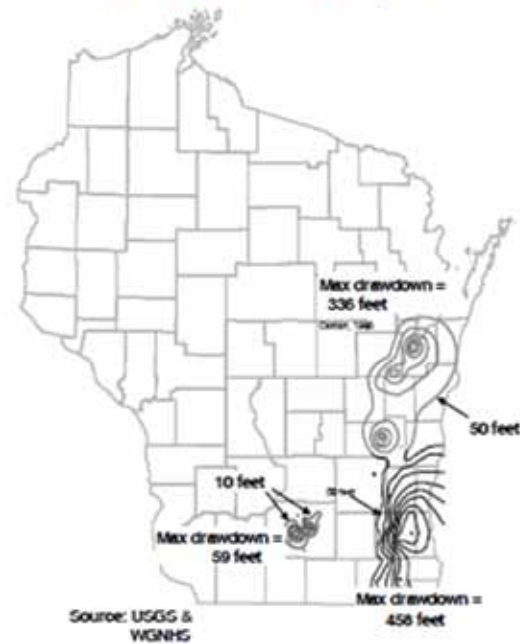
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values, hard work. <sup>SM</sup>

### Hi cap well density



### Drawdown in the Sandstone Aquifer





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s, old values, hard work. <sup>SM</sup>

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# Legal Framework for Water Regulation in Wisconsin

## Public Trust Doctrine

**“ . . . the river Mississippi and the navigable waters leading into the Mississippi and the 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.”**

**Wisconsin Constitution, Article IX, Section 1.**

## Public Trust Doctrine Caselaw

**“riparian owners on navigable streams have only a qualified title to the beds thereof, which title is entirely subordinated to, and not inconsistent with, the rights of the state to secure and preserve to the people the full enjoyment of navigation and the rights incident thereto.”**

**Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).**

## Public Trust Doctrine Caselaw (cont.)

**“the state holds the navigable waters of this state in trust for the public, and that such trust extends to the uses of such waters for fishing, hunting, and other recreational purposes, as well as for pure navigation.”**

**Muench v. Public Service Commission, 261 Wis. 492, 55 N.W.2d 40 (1952).**

## Public Trust Doctrine Caselaw (cont.)

**“The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. To further this duty, the legislature may delegate authority to local units of government, which the state did by requiring counties to pass shoreland zoning ordinances.”**

**Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972)**



## Public Trust Doctrine Caselaw (cont.)

**“Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.”**

**Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972)**



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New ideas, old values, hard work. <sup>SM</sup>

# Groundwater Regulation

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# Groundwater Protection Policy

## § 281.11:

**... The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed ....**

# Groundwater Protection Authority

## § 281.12

**(1) The department [of natural resources] shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter....**

## Groundwater Withdrawals

### § 281.34: High-capacity wells

- No approval required for wells less than 100,000 gpd capacity: notification required
- Approval required for wells with greater than 100,000 gpd capacity: limited required environmental review

### § 281.35: Largest wells

- Environmental review for wells with greater than 2,000,000 gpd water loss

### § 281.343-.346: Great Lakes basin

# High Capacity Well Requirements

## § 281.34(5)

- **General approval criteria**
  - Does not impair public water supply
  - Required annual pumping report
- **Environmental review for sensitive resources**
  - Groundwater protection area
  - Water loss greater than 95%
  - Significant impact on spring

# Large Water Loss Well Requirements

## § 281.35

- **Focuses on water loss, not capacity**
- **Detailed application requirement**
- **Grounds for approval focus on:**
  - **Environment and ecosystem of Great Lakes and Upper Mississippi River basins**
  - **Public rights in navigable waters**
  - **Public health, safety welfare and public interest**
  - **Water quality and quantity in state**
  - **Inter-basin transfer impacts**

# **Case Study:**

## **Lake Beulah Management District v. DNR and Village of East Troy**



## Case Facts

- **2003: Village applies for and obtains High Cap Approval**
  - >100,000 gpd capacity
  - <2,000,000 gpd water loss
- **Challenge by lake management district, alleging surface water impact**
- **Village withholds construction pending lawsuits**

## Case Facts (cont.)

- **2005: Approval expiring, Village requests extension**
- **Lake Management District submits affidavit of potential surface water impact in companion lawsuit, but not regarding new well application; does not request hearing**
- **DNR grants extension (treated as new approval by Ct. of App.)**

## Issues

- **Whether DNR has authority to consider surface water impacts when acting on high capacity well applications**
- **Whether DNR was required to consider affidavit in companion case.**

## Positions of Parties

- **Village of East Troy**
  - DNR does not have authority to consider surface water impacts because not expressly in § 281.34
  - DNR also not required to consider evidence of surface water impact here because not properly submitted
- **Lake Beulah Management District**
  - DNR must always investigate potential surface water impacts
  - Here, DNR had affidavit evidence of potential impacts

## Positions of Parties (cont.)

- **DNR (and Supreme Court)**
  - **DNR has statutory authority in § 281.12 to protect surface waters**
  - **DNR considers surface water impacts when it has scientific evidence of hydraulic connection and potential adverse effects**
  - **Here, District did not properly submit evidence according to state statutes to trigger evaluation**

# Case Study:

## Rock Koshkonong Lake District v. DNR

## Background Facts

- **Lake Koshkonong is a shallow, large surface area impoundment in the Rock River system**
  - **Populated, multi-use lake**
  - **Controlled by Indianford Dam**

## Background Facts (cont.)

- **Subject of lawsuit is DNR lake level Order**
  - **Lake district and some lake residents want higher water level for easier, more consistent access**
  - **Hunting club and environmentalists want to maintain existing level to protect resources, fishery**



## Public Trust Issue

- **Does DNR have constitutionally-based authority under the Public Trust Doctrine to protect upland resources as necessary to protect the navigable waters of Lake Koshkonong?**

## **Court Ruling (majority: 4 justices)**

- **DNR has statutory authority under Wis. Stat. §31.02 to consider impact to lake ecology in establishing lake level order**
- **State does not own resources above the ordinary high water mark**
- **Regulation for protection of upland resources is based on police powers, but not based on constitution**

## **Court Ruling (dissent: 3 justices)**

- **DNR is constitutional delegee under Public Trust Doctrine**
- **Majority misreads *Just, Lake Beulah*, and other PTD cases**
- **DNR's regulatory authority extends to upland wetlands due to their inextricable connection to protection of public trust resources**

# **Case Study: Richfield Dairy Pleasant Lake Management District v. DNR**

## Background Facts

- **Richfield Dairy (Milk Source) proposes CAFO in Adams County**
  - \_\_\_\_\_ animal units
  - High cap wells = 1,000 gpd, 525 mil. gpy
  - 2.5 miles from Pleasant Lake, trout streams

## Groundwater Issues

- **Scope of DNR evaluation under Lake Beulah**
  - **Whether DNR is required to consider and address cumulative impacts**
  - **Whether DNR's approval protects public trust resources**

## Procedural Status

- **DNR issued approval in \_\_\_\_\_, 2012.**
- **Circuit Court reversed environmental assessment (EA) in part in July 2012.**
- **DNR revised (EA) and issued new decision in March 2013**
- **Court of Appeals reverses EA on cumulative impacts issue in December 2013.**
- **Contested case hearing on well approval in June and December 2013 (9 days), decision pending.**

## Lessons from Case Studies

- **Uncertainties regarding scope of DNR authority to protect surface water and groundwater resources**
- **Potential regulatory gaps**
- **Need for integrated, comprehensive water resources management laws that recognize the interconnectedness of water resources**



## Recent Legislation

**2013 Act 20: creates § 281.34(5m):  
CONSIDERATION OF CUMULATIVE IMPACTS. 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.**

# Proposed Legislation

## **SB302/AB679: Amends § 281.34:**

- **65-day deadline for approval**
- **Transfer of approvals with land**
- **Limitations on environmental review**
- **Limitations on conditions of approval**

## What's Next?

- **Regulatory, judicial and legislative actions**
  - **CAFO-related cases in Central Sands**
  - **Waukesha request for Lake Michigan diversion**
  - **Groundwater legislation?**
- **How will these activities shape the Public Trust Doctrine?**

# QUESTIONS AND ANSWERS

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