

MARQUETTE UNIVERSITY LAW SCHOOL

The Public Trust Doctrine and Lakes

Wisconsin Lake Leaders Institute (October 17, 2018)

Prof. David A. Strifling, Director, MULS Water Law and Policy Initiative



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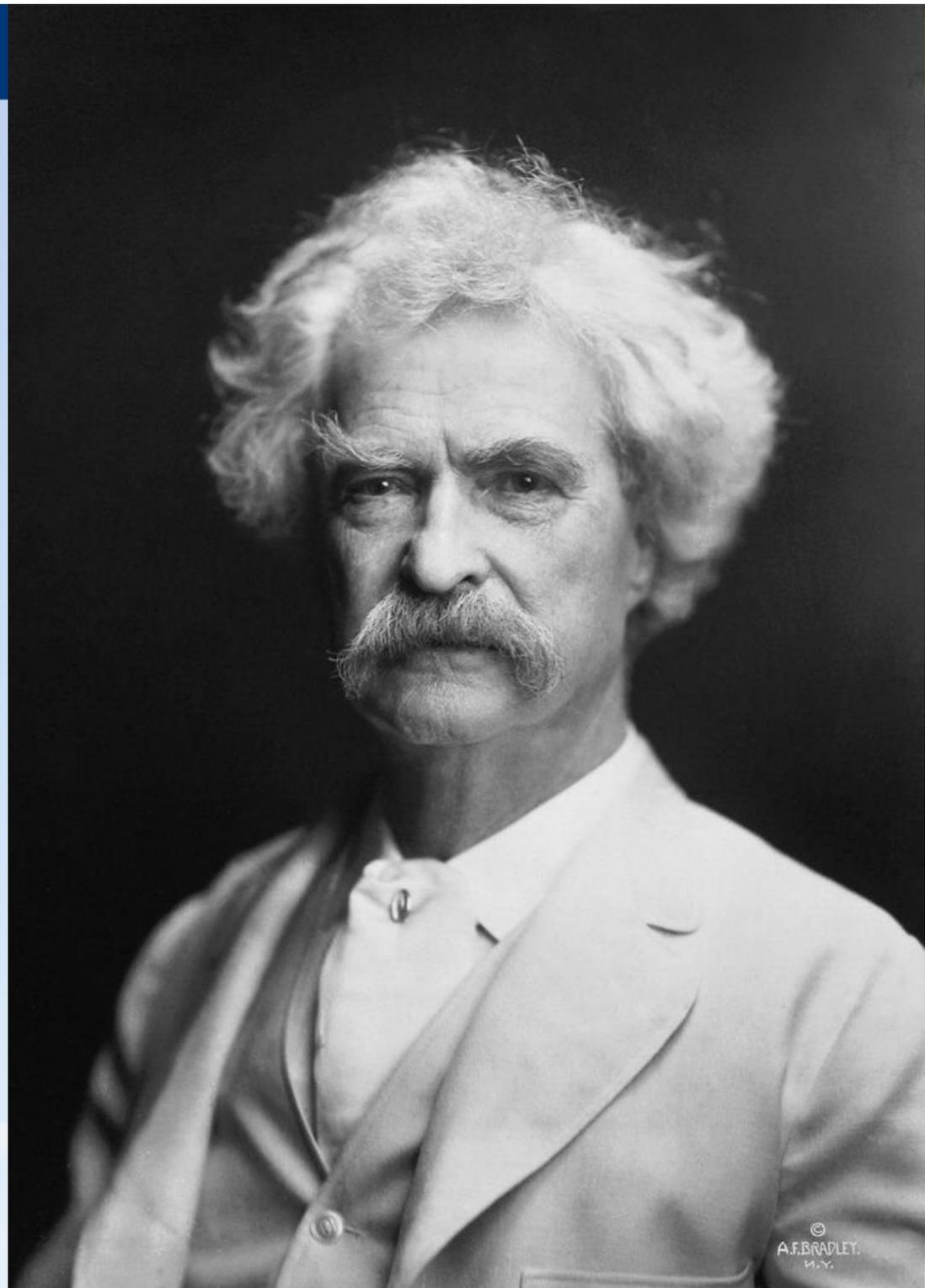


- “Where the waters gather”
- “A river runs through a red place”



“Whiskey is for
drinking, water is for
fighting over”

-attributed to Mark Twain



The public trust – an ancient doctrine



Image credit: Architect of the Capitol

- “By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings . . . “
– Institutes of Justinian, Sixth Century



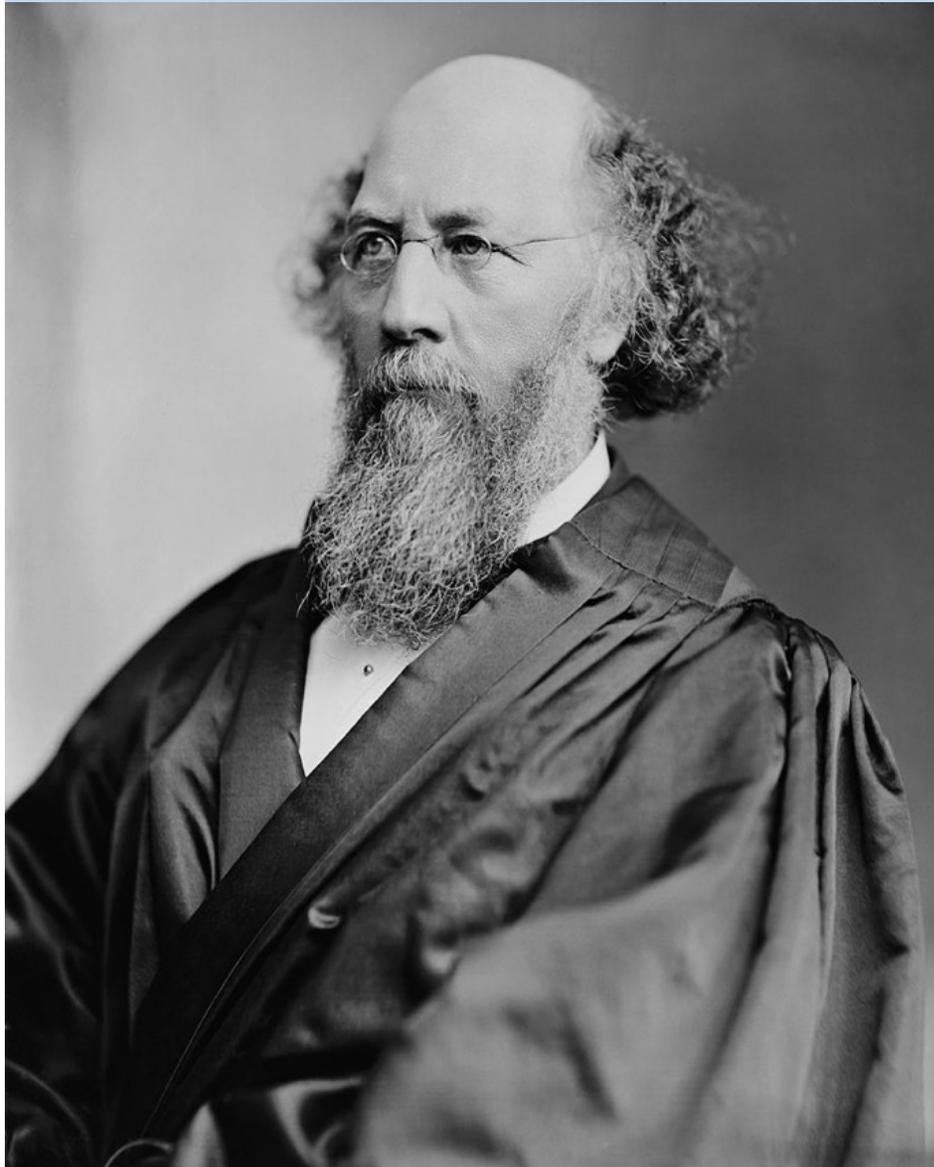
The public trust – in the United States



CHICAGO HARBOR, 1849



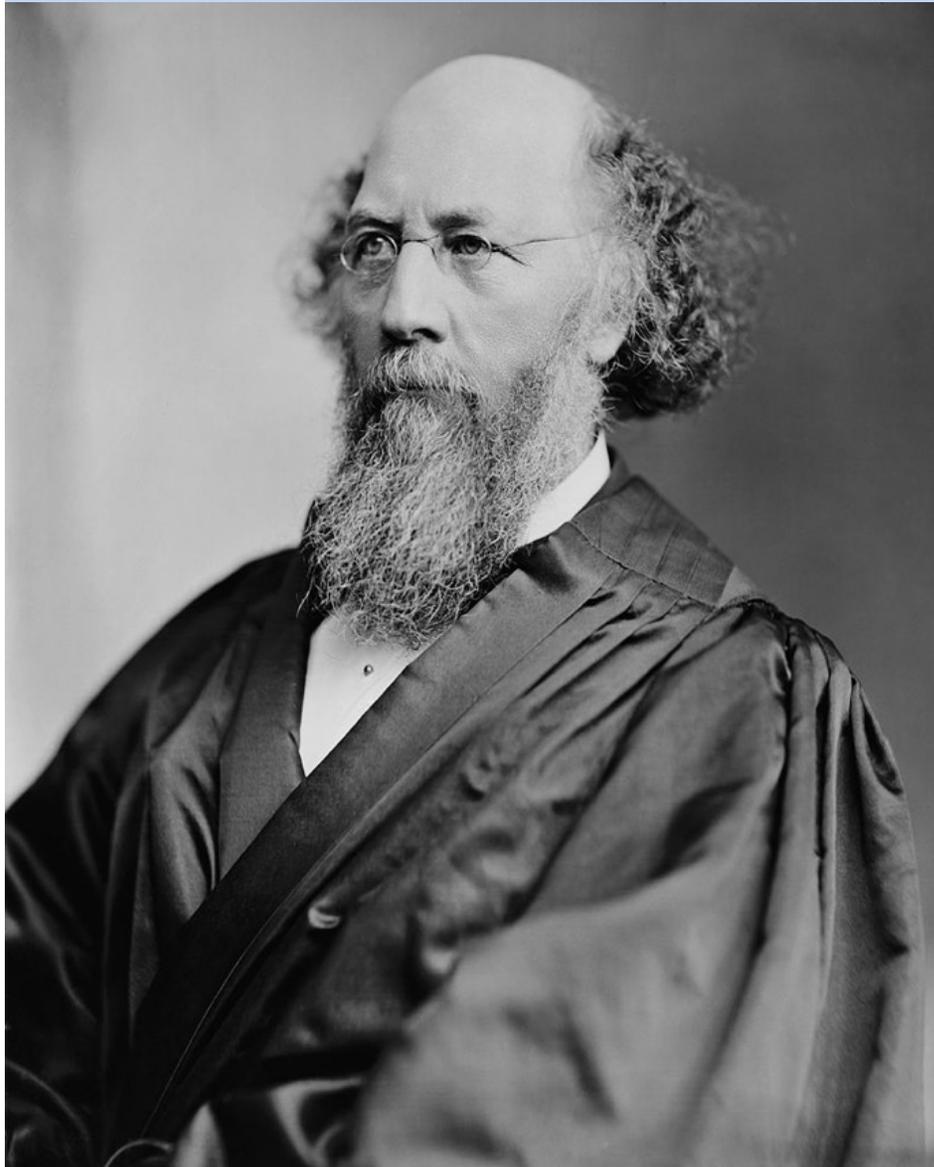
The public trust – in the United States



- Title to land under navigable waters is “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”
- Won’t sanction “abdication of the general control of the state over lands under the navigable waters of an entire harbor or .lake”



The public trust – in the United States



- “Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public.”
- State can make small grants if doing so improves or at least does not “substantially impair” the public interest.
- *Illinois Central v. Illinois* (1892)
- Decision 4-3, with two justices not participating



The public trust – in the United States

- Historically anchored in protecting narrow category of rights:
 - Commerce
 - Navigation
 - Fishing
- Question is how far doctrine should extend:
 - Water quality
 - Recreation
 - Enjoyment of natural beauty
 - Land that affects water
 - The atmosphere



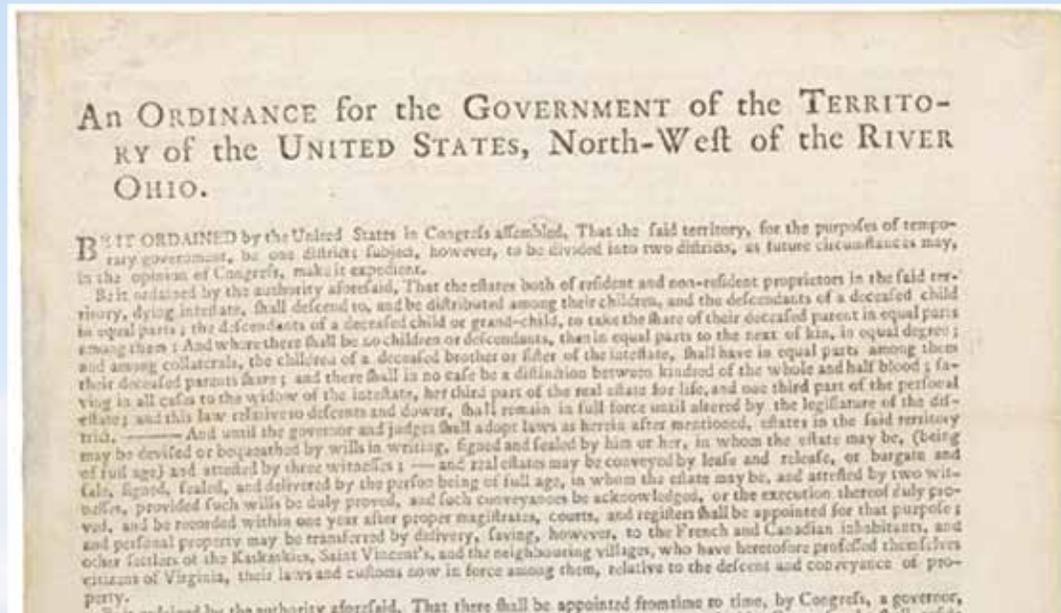
The public trust – in the United States

- Even though it originated in a *federal* case, the doctrine has evolved as a matter of *state* law
- 51 different versions, lots of variation by state:
 - Ban the transfer of certain (usually water-related) resources to private ownership
 - Describe the terms of ownership that apply to trust resources if transferred to private ownership (subject to ongoing regulatory power)
 - Preserve public access to trust resources



The public trust – in Wisconsin

- Equal Footing Doctrine
- Northwest Ordinance of 1787
- Wisconsin Constitution, Article IX, Section 1
 - “. . . 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 . . .”



The public trust – in Wisconsin

- Generally taken to mean that a state must act as “trustee” of certain natural resources, particularly navigable waters, and manage them from trust beneficiaries – its people
- State must promote and protect public rights in these waters
- Problem – what exactly does this mean? How do we operationalize it?
- Series of Wisconsin Supreme Court cases have attempted to figure this out

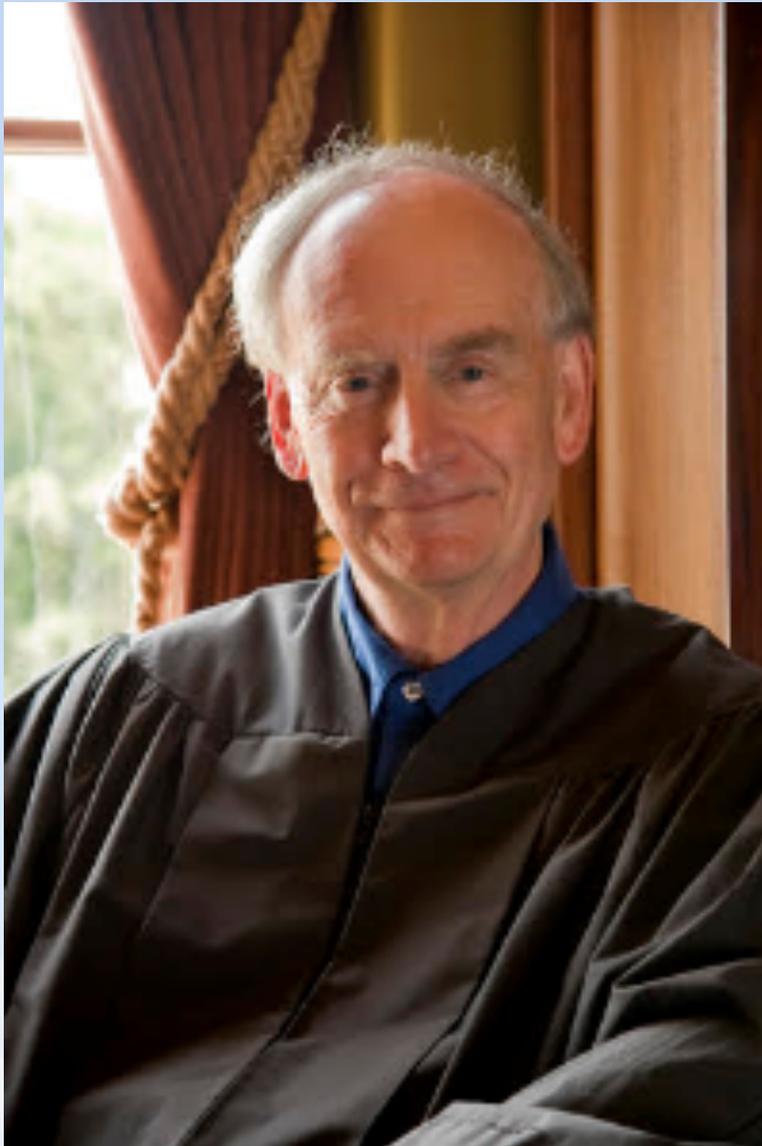


The public trust – in Wisconsin

- The public trust doctrine
 - 1914: With respect to navigable streams, State has right to “secure and preserve to the people the full enjoyment of navigation and the rights incident thereto.” *Diana Shooting Club v. Hasting*
 - 1952: State’s public 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*
 - 1972: Public trust duty requires state “not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.” *Just v. Marinette County*



The public trust – in Wisconsin



- The doctrine reaches a high point?
 - 2006: “When considering actions that affect navigable waters in the state, one must start with the public trust doctrine . . .” *Hilton v. DNR*
 - “..one of the most important legal principles for Wisconsin water law.”
–Paul Kent



The public trust – in Wisconsin

- More from *Hilton*
 - Primary authority to administer the trust rests with the Legislature
 - Legislature is charged with protection of the public’s rights in effectuating the purposes of the trust
 - Legislature may authorize limited encroachments on navigable waters, where public interest will be served
 - Legislature has generally delegated the duty to administer our environmental laws to the DNR
 - Which branch do we “trust” the most?



The public trust – in Wisconsin

- The public trust doctrine
 - 2011: DNR has statutory authority to protect surface waters, and “general duty to consider” whether high capacity well under review may harm waters of the state. The inquiry is highly fact-specific and depends on the material presented to the agency. *Lake Beulah Mgmt. Dist. v. DNR*
 - 2013: Focus of public trust doctrine must be on navigable waters. Because state doesn’t own natural resources (water) above ordinary high water mark (OHWM), DNR can’t use public trust authority to regulate non-navigable waters and lands (e.g., nearby wetlands.) State may only regulate these areas via police powers. *Rock-Koshkonong Lake Dist. v. DNR.*



The public trust – in Wisconsin

- Reshaping the public trust doctrine

(2m) No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Wis. Stat. 227.10(2m) (2011)



The public trust – in Wisconsin

- Reshaping the public trust doctrine
 - Opinion of the Attorney General, OAG-1-16: public trust doctrine does not give DNR *explicit* authority to impose any condition on high capacity well permits
 - No specific statute gives DNR this *explicit* authority, either
 - Per Wis. Stat. 227.10(2m), DNR may not impose conditions on HCW unless *explicitly* authorized by statute



Marquette University Law School Faculty Blog

MENU

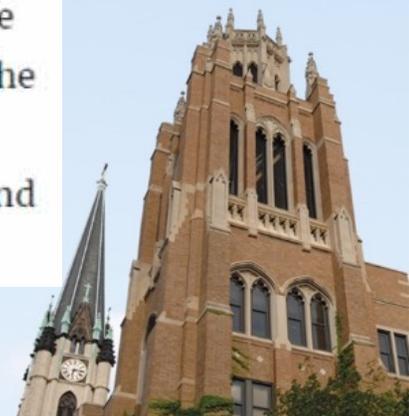
IS WISCONSIN'S PUBLIC TRUST DOCTRINE ERODING?

By: David Strifling

January 7, 2016

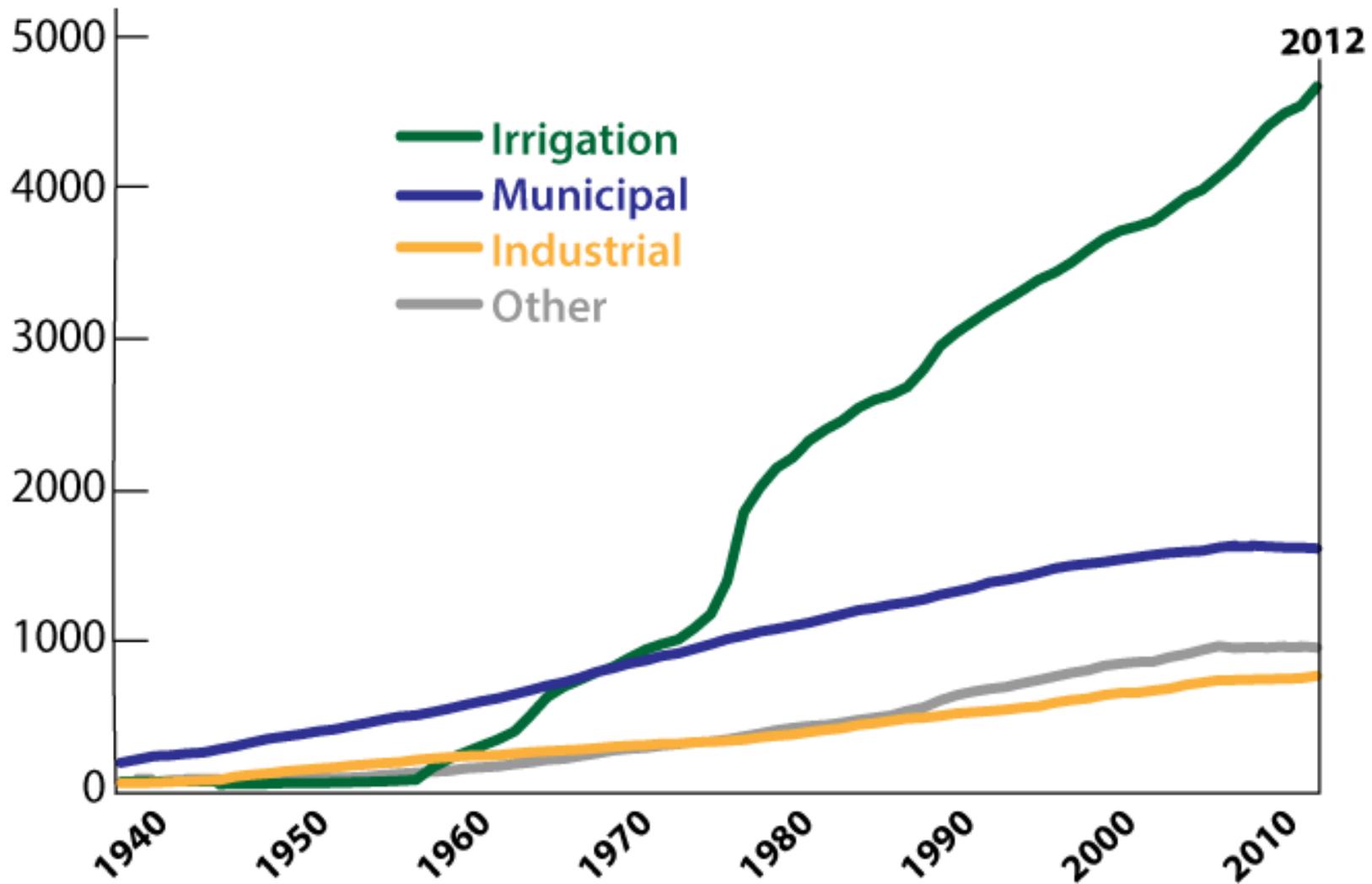
Environmental Law, Public, Water Law

Environmental law is of relatively recent vintage. Most of its significant principles date from the 1960s or later, with a few notable exceptions. The latter category includes the public trust doctrine. As the name suggests, the doctrine is generally taken to mean that a state must act as “trustee” of certain natural resources, particularly the navigable waters of the state, and manage them for the trust beneficiaries—its people. The doctrine can be

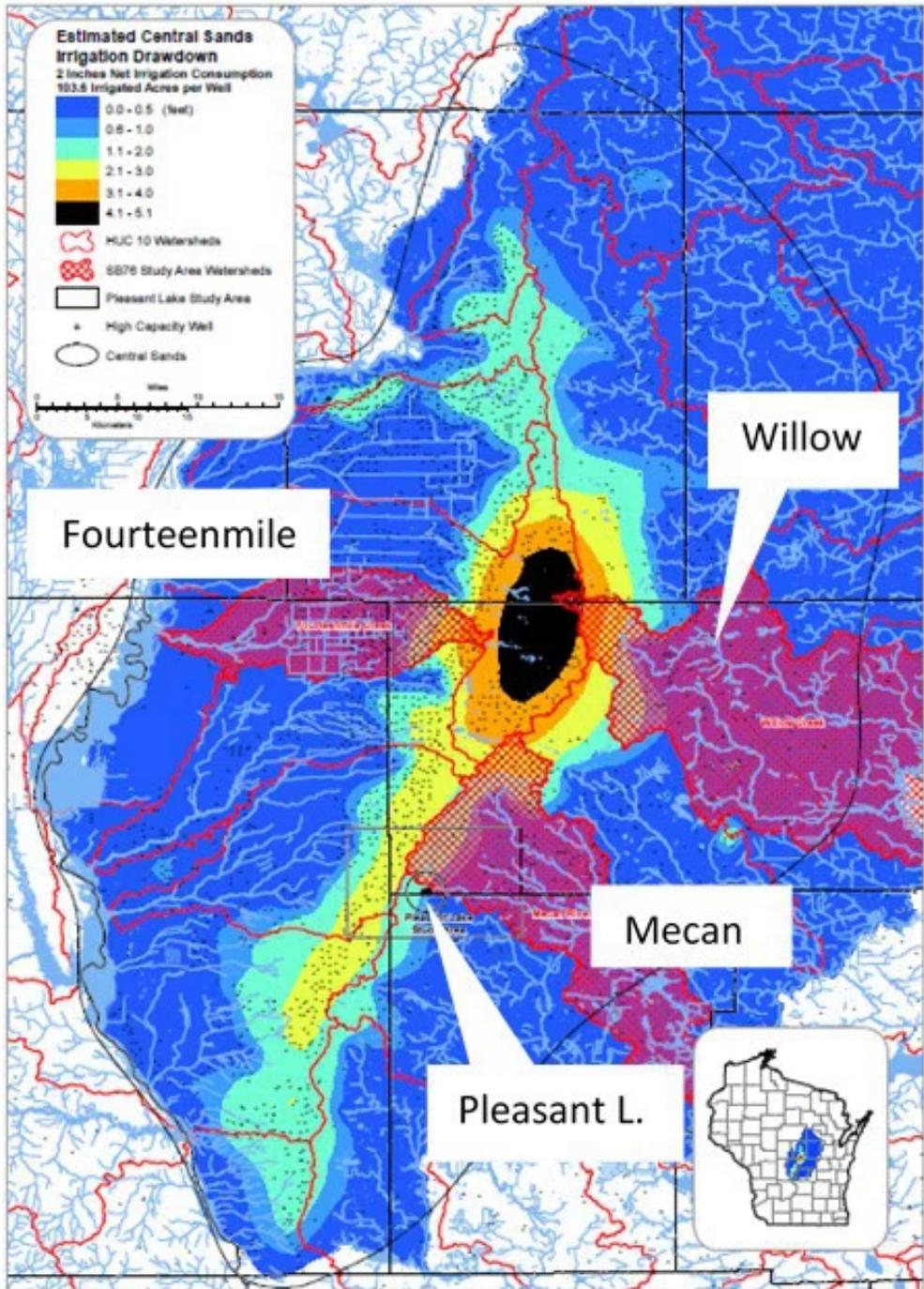


High capacity wells by type in Wisconsin

Number of operating wells with a daily capacity of 100,000 gallons per day or more

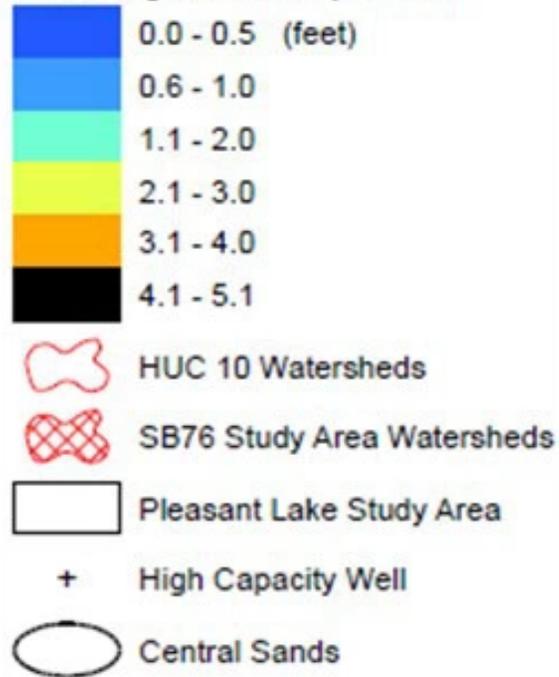


Data: Wisconsin Department of Natural Resources Credit: Kate Prengaman/Wisconsin Center for Investigative Journalism



Locations of three study watersheds plus Pleasant Lake in SB76. Note that the areas of study do not include the major impacted parts of the central sands. The already-studied Little Plover is also excluded.

Estimated Central Sands Irrigation Drawdown
2 Inches Net Irrigation Consumption
103.6 Irrigated Acres per Well



Source:
George Kraft,
UW-
Stevens
Point



Scott Walker signs bill easing regulations on high cap wells

Walker to sign bill easing regulations on high cap wells

Associated Press Jun 2, 2017

TRY 1 MONTH FOR 99¢



Gov. Scott Walker signed a bill to further deregulate high-capacity wells used by the agriculture industry and other businesses. [BUY NOW](#)

STEVE APPS, STATE JOURNAL ARCHIVES

Gov. Scott Walker on Thursday privately signed a bill opposed by environmentalists and Democrats that would ease state regulations on the pumping of water for agricultural use from high capacity wells.

MOST POPULAR

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- 5** Advocates hope November election will spark Wisconsin's debate on legalizing pot



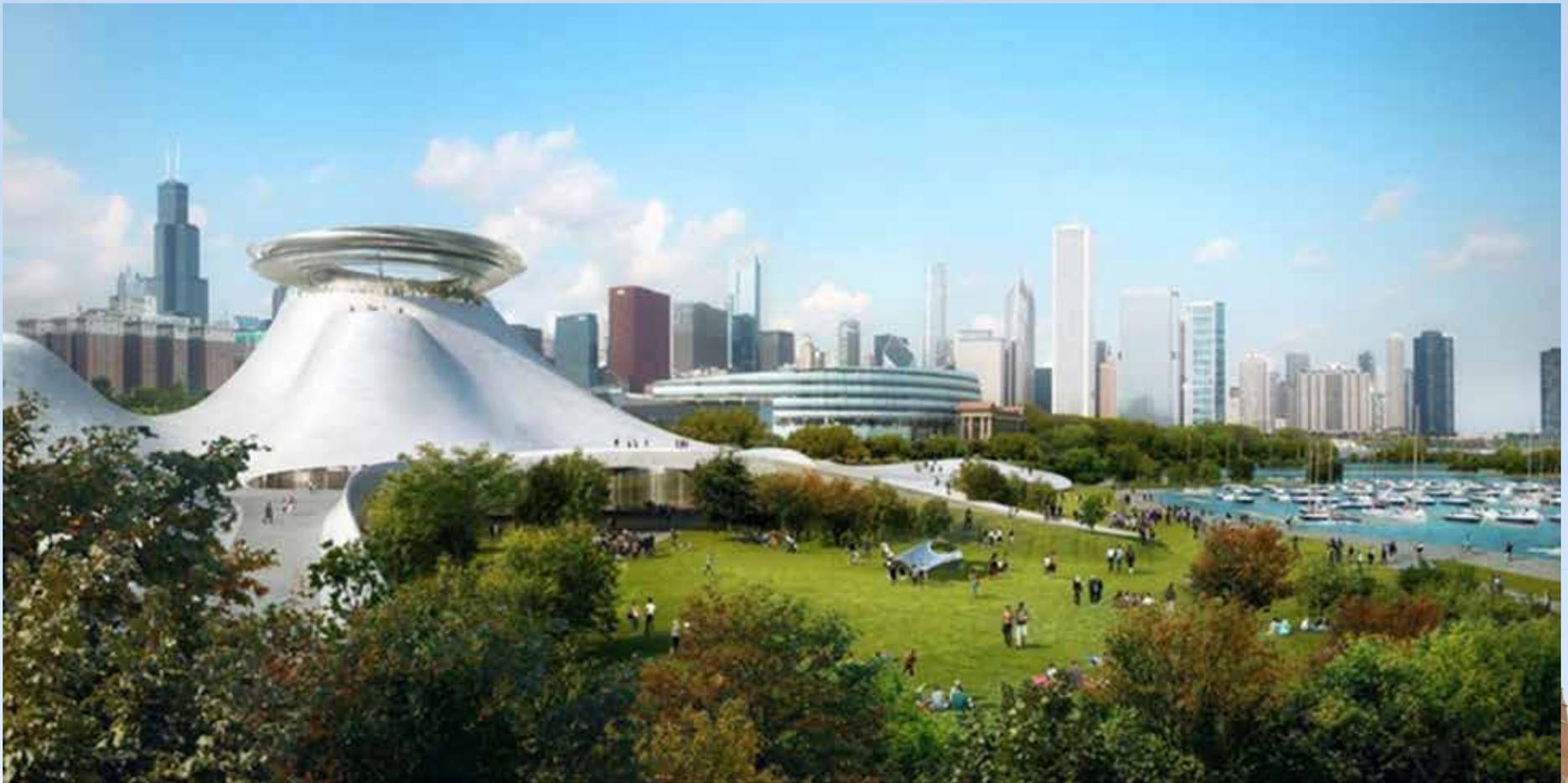
PROMOTION

New! Win with V PrepZone Prep Challenge

Sign up now to make \$100 each game of the Mac high school football season. Get a chance to win prizes.

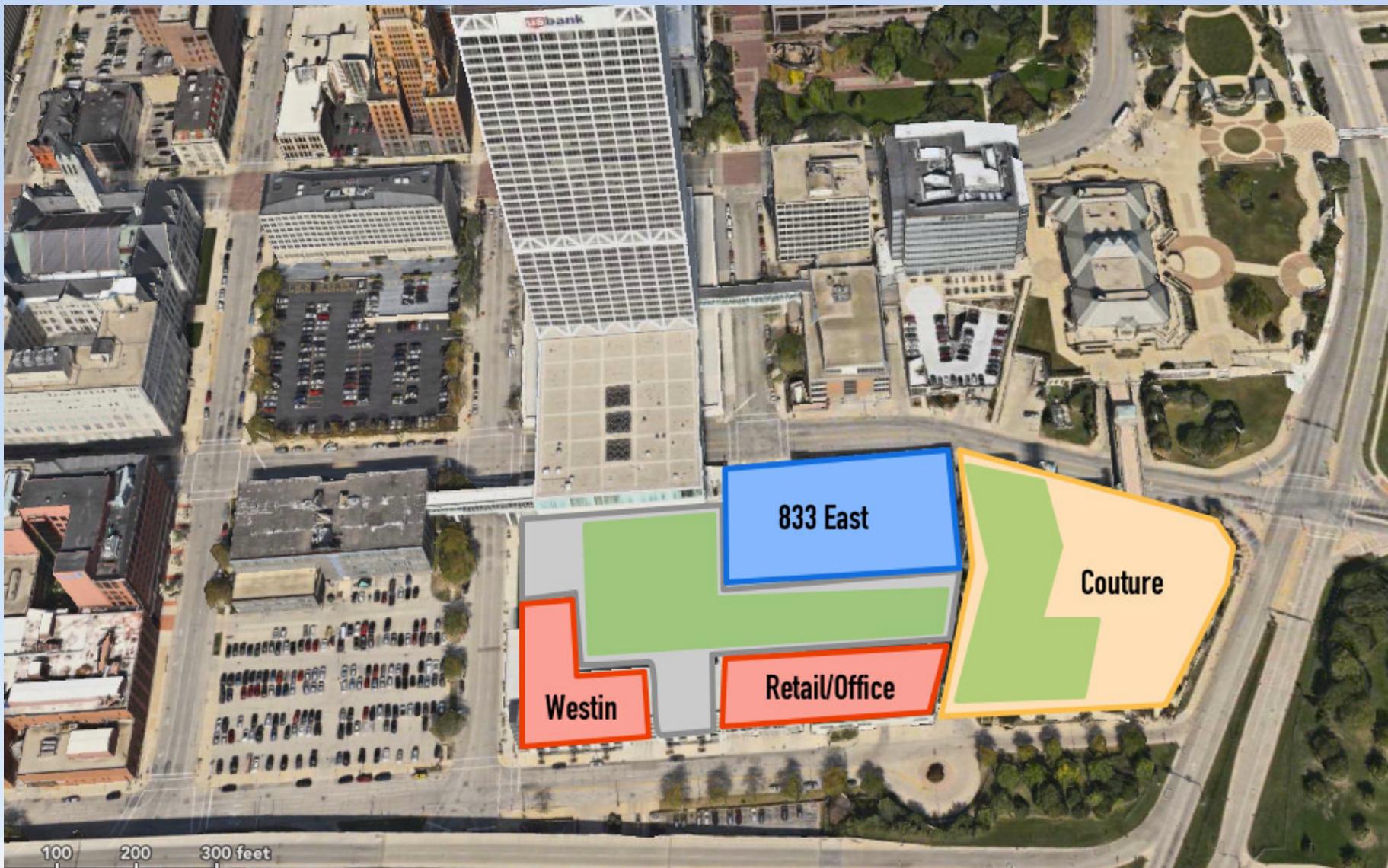


The public trust – A Tale of Two Cities?











MAP OF
MILWAUKEE

AS IT APPEARED IN 1835 & 6
 Made from U.S. Surveys and from Minutes
 furnished by
Jas. S. Buck & Dr. E. Chase

SCALE 20 CHS TO AN INCH.
 MILWAUKEE, LITH. & ENG. CO.





WISCONSIN LEGISLATIVE COUNCIL
ACT MEMO

2013 Wisconsin Act 140
[2013 Assembly Bill 655]

**Lake Michigan Shoreline in the
City of Milwaukee**

2013 Wisconsin Act 140 establishes the shoreline of Lake Michigan in the area of the City of Milwaukee along a line that extends from approximately the line of East Lafayette Place extended easterly on the north to the present north harbor entrance wall of the Milwaukee River on the south. The Act states that the declarations regarding the boundary line are made in lieu of, and have the same effect as, a final judgment entered by a court in an action claiming an interest in real property. The Act also makes any restrictions, conditions, reverters, or limitations on conveyances of land made by the Legislature over time inapplicable to land west of that boundary.

In addition, the Act sets forth certain legislative findings in a nonstatutory provision. Together, the findings provide an argument that the boundary line established under the Act is constitutional under the Public Trust Doctrine. Among other information, the findings state the following with regard to the boundary line established under the Act:

- According to the best available evidence, the boundary line is the location of the natural and historical shoreline of Lake Michigan.



The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 30.2038 of the statutes, as created by 2013 Wisconsin Act 20, is
2 repealed and recreated to read:

3 **30.2038 Milwaukee shoreline established. (1)** (a) The shoreline of Lake
4 Michigan in the city of Milwaukee is fixed and established to extend from
5 approximately the line of East Lafayette Place extended easterly on the north to the
6 present north harbor entrance wall of the Milwaukee River on the south as specified
7 in an agreement between the Chicago and Northwestern Railway Company and the
8 city of Milwaukee recorded with the office of the register of deeds of Milwaukee
9 County on April 23, 1913, in volume 662, pages 326-330, as document number
10 762955.

11 (b) The shoreline described under par. (a) constitutes the boundary line
12 between the lake bed of Lake Michigan and land that is not part of the lake bed of
13 Lake Michigan.



Last Buses Pull Out of Downtown Transit Center This Weekend

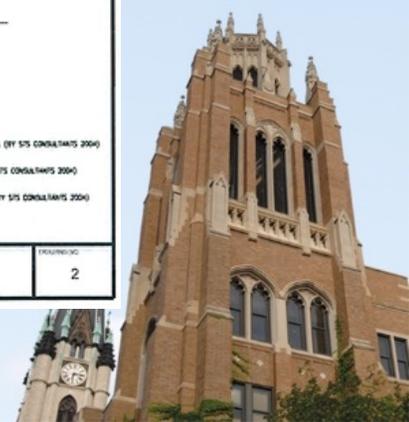
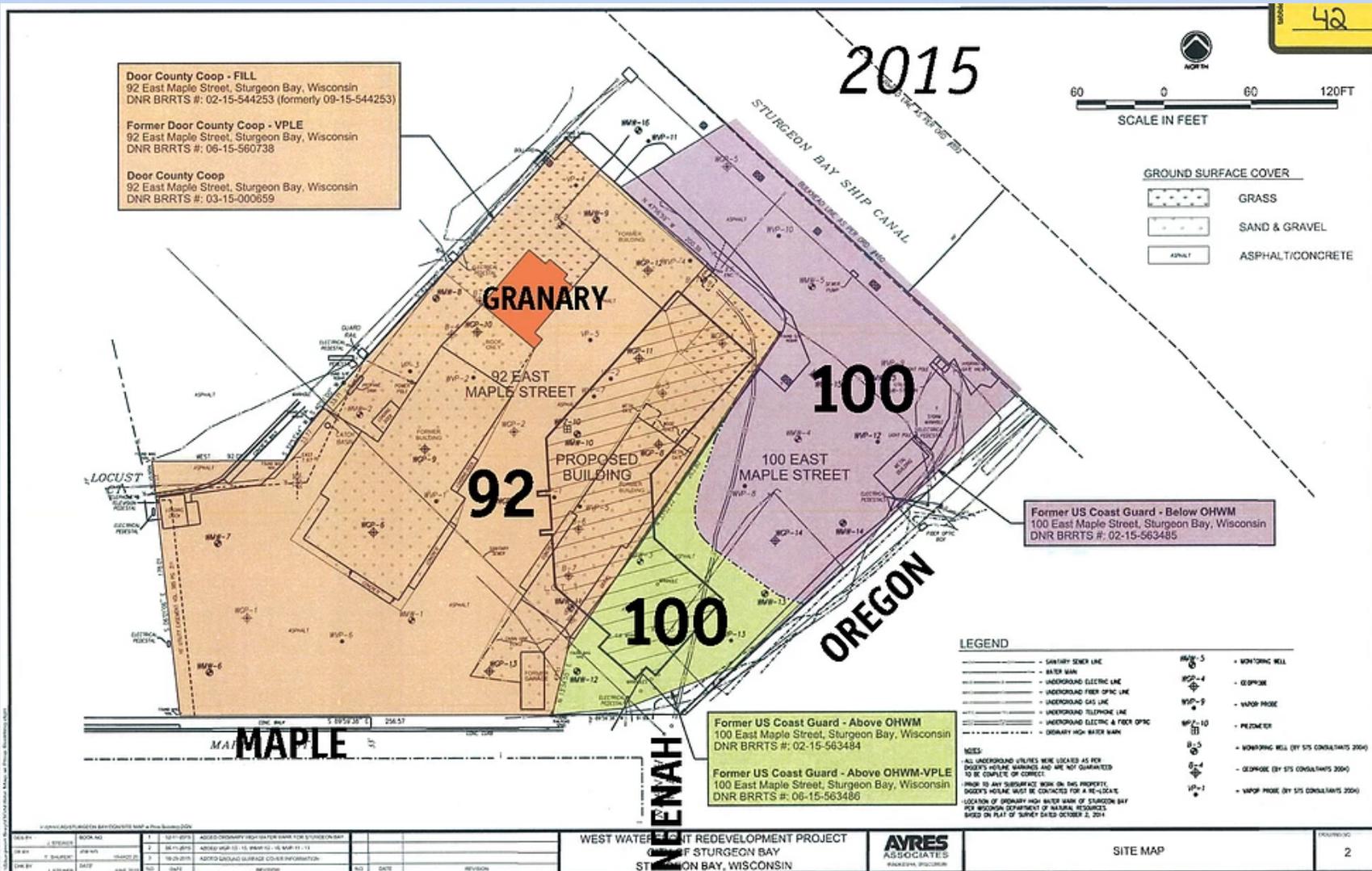
Milwaukee, WI – Transit history will be made this weekend when an MCTS bus pulls out of the Downtown Transit Center (DTC) for the final time. The Transit Center property was sold by Milwaukee County to developer Rick Barrett who is redeveloping the land into the Couture project. The Couture is planned as a 44-story high-rise building. The project will include access to the proposed MCTS Bus Rapid Transit (BRT) line and the City of Milwaukee Street Car.

“As this chapter in Milwaukee County history comes to a close, another exciting chapter begins,” said County Executive Chris Abele. “Not only will this project create thousands of good-paying jobs and millions of dollars in new economic development, the Couture development will also turn an underutilized piece of land into a generation defining and transformative landmark.”

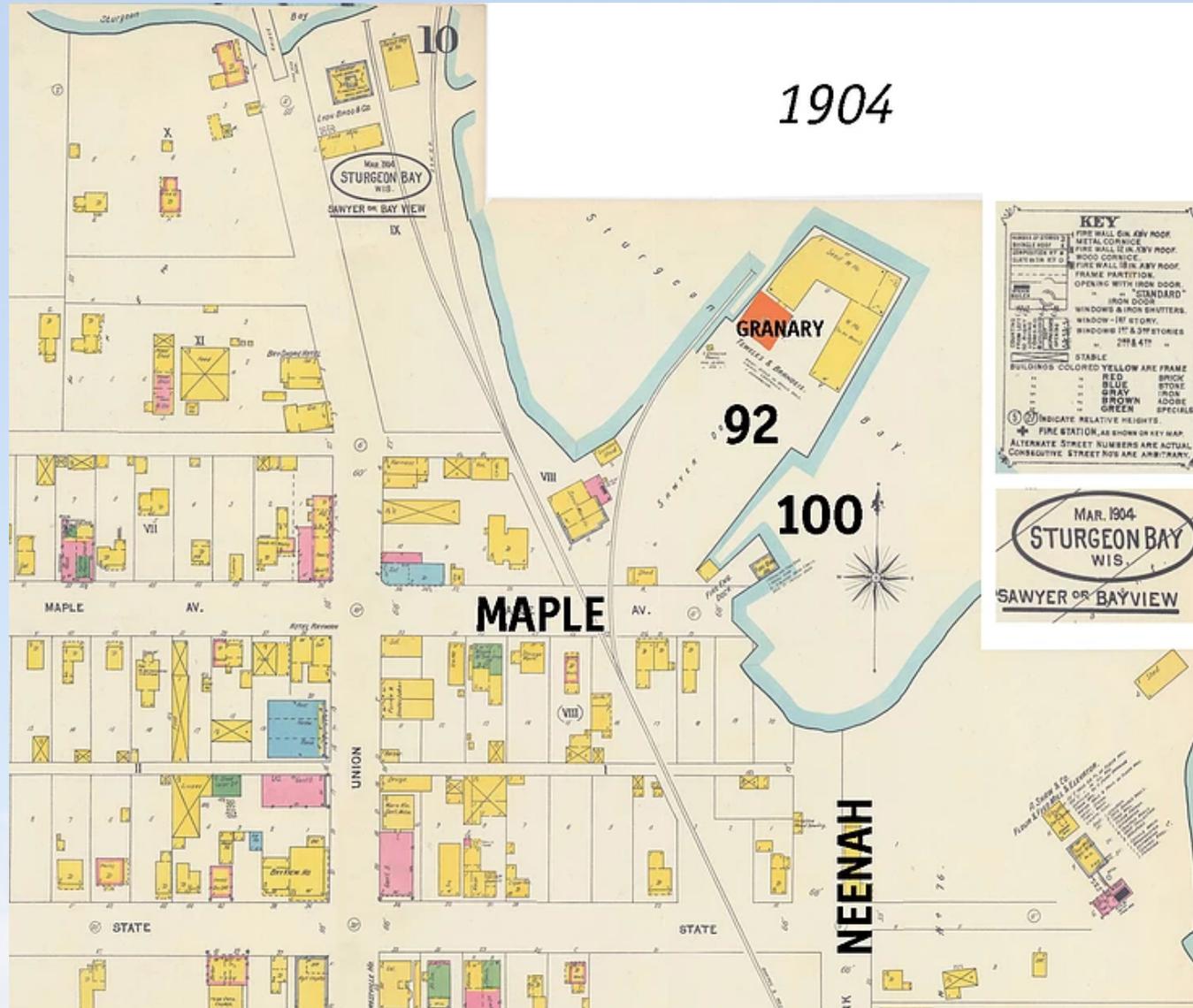
Buses that serve the DTC will run their normal schedules on Saturday, August 27th. The Route 12 will be the last bus to ever leave the DTC in service when it pulls-out early Sunday morning (12:35am).



The public trust in Wisconsin – a new chapter?



The public trust in Wisconsin – a new chapter?



The public trust – in Wisconsin

- Transcript of court's oral decision:
 - Majority of lots 92 and 100 were under water at the time of statehood.
 - In the time since, some of the area has filled in via natural accretion (and then later overfilled and bulkheaded).
 - “[T]he law is clear that a riparian owner can't retain title to lakebed property by filling that is done by that riparian owner.”



The public trust in Wisconsin – a new chapter?

2. Parcel 92 is basically the remnants of a dock and operating system started by prior riparian owners who extended the dock and filled beneath it.
3. Parcel 92 is largely or wholly owned by the State in trust for the benefit of the public under the public trust doctrine, Wis. Const., Art. IX, sec. 1, and may not be conveyed to a private party. In the course of this litigation, neither party has shown the Court where the ordinary high water mark will be, there may be some portion of Parcel 92 which may be above the ordinary high water mark.
4. The Wisconsin Department of Natural Resources has not made an Ordinary High Water Mark (“OHWM”) determination on Parcel 92.
5. Subject to the findings in paragraphs 2 and 3 above, the Court is unable to make a determination of the location of the OHWM on Parcel 92. Absent some determination, at some point in time, by the Wisconsin Department of Natural Resources as to where the actual ordinary high water mark is, of which there is insufficient evidence in this action, Parcel 92 cannot be sold.

The public trust – in Wisconsin

- The latest word: *Movrich v. Lobermeier*
 - Family dispute over access rights on Sailor Creek Flowage (submerged land created by damming Sailor Creek in 1941)
 - Bed of the flowage typically owned by original creator; then can be conveyed to a new owner
 - Here, Lobermeier owned the flowage bed
 - Movrich owned waterfront (“riparian”) property, and wanted to place a pier
 - How far do riparian rights extend?
 - Use the water for domestic, agricultural, recreational purposes
 - Use the shoreline
 - Access the water
 - Construct a pier(?)



The public trust – in Wisconsin



Photo credit: Tom Nicholls



The public trust – in Wisconsin

- The latest word: *Movrich v. Lobermeier*
 - Lower courts agreed that the riparian owner (Movrich) had the right to install a pier, like all owners adjacent to navigable waters
 - Supreme Court reversed in a 4-3 ruling
 - Property owners along a flowage do not have an inherent right to place a pier
 - Bed owners are entitled to exclude others from placing a pier or structure on the property (“bundle of rights”)
 - However, riparian owner could directly access the water (just without a pier)



The public trust – in Wisconsin

–Implications

- “Surprised many in the real estate industry,” and must consider when purchasing waterfront property *if on a flowage* (created by dams)
- May have significant impact on property values
- Must determine whether riparian owner also owns the adjacent submerged bed
- Negotiate for right if necessary



The public trust – in Wisconsin

–Implications

- Classification of the water is important
 - The curious comparison of *Diana Shooting Club*
 - Court says flowage riparians are not entitled to same rights held by riparians along naturally occurring water bodies
 - How many flowages in Wisconsin? 250+?
 - Flowages created by damming lakes versus damming streams; outcome could be different



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