

LAKE DISTRICT ADVANCED TOPICS: DAMS

A Little History and Legal Context

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The History of Dams Reflects the Economic History of Wisconsin

- Early settlers grew wheat
 - Dams powered mills to grind grain into flour
- Waterways were critical for transportation before the railroads
 - Dams elevated water levels to improve navigation
- Lumber was needed to build Midwest towns and cities
 - Dams powered sawmills and improved navigation
- Floods threatened towns and submerged rich farmland
 - Dams helped control flooding
- Power was needed for manufacturing
 - Hydroelectric dams provided energy to be delivered from source to workers
- Automobiles made rural recreation accessible to millions
 - Dams created recreational impoundments and raised the value of surrounding property

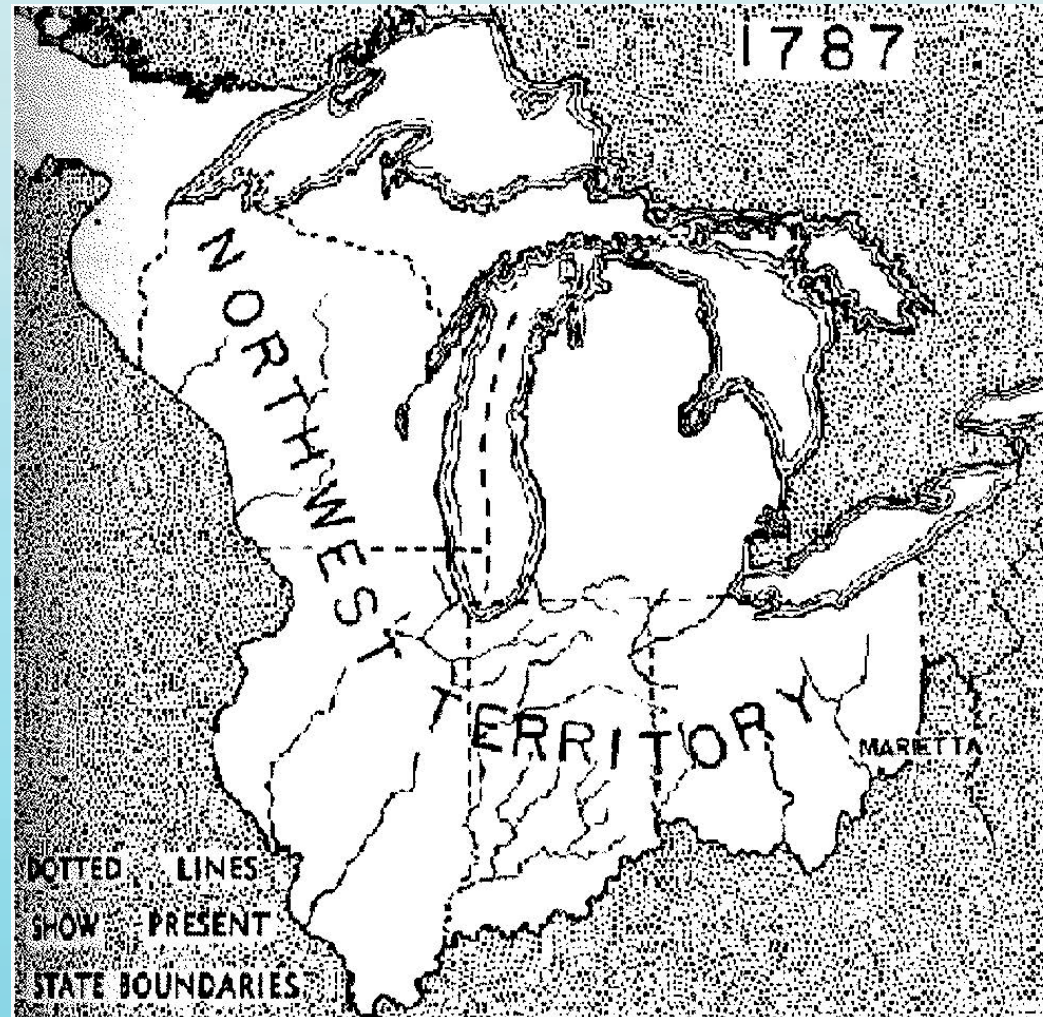
The Constitutional Public Trust Doctrine is the foundation of water law, including the placement and operation of dams.

Wisconsin Constitution, Article IX:

“Jurisdiction on rivers and lakes; navigable waters. SECTION 1.

The . . . 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, without any tax, impost or duty therefor.”

Wisconsin's Beginnings The Northwest Territory



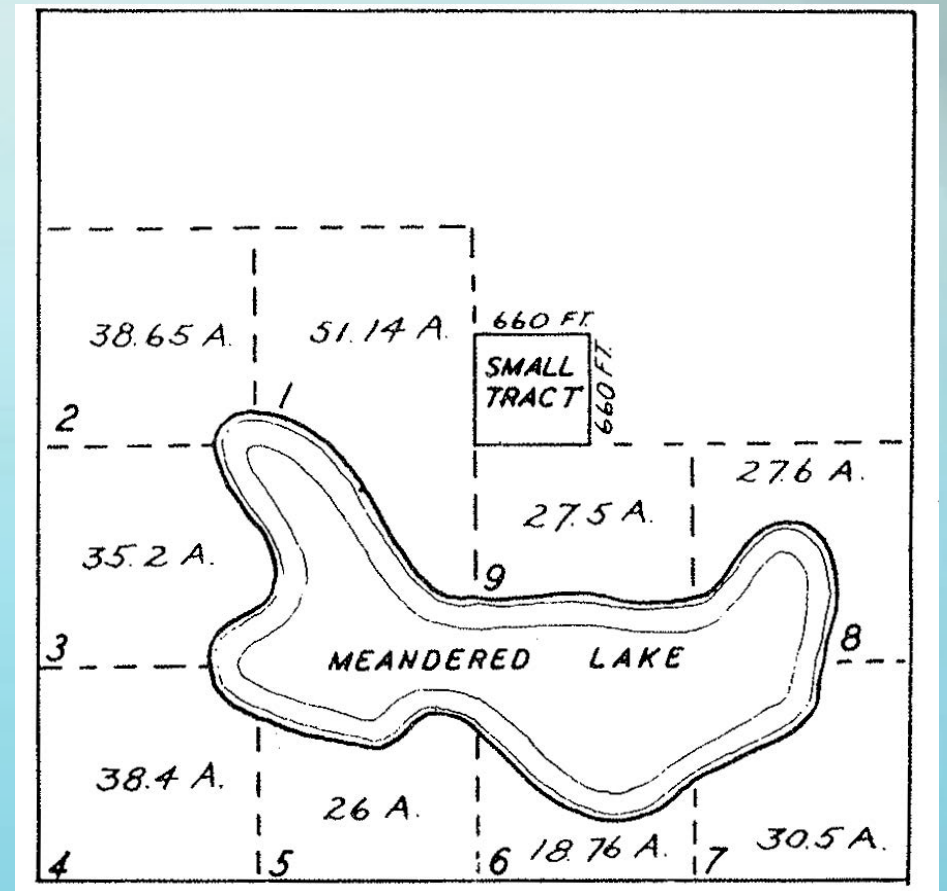
The Land Act (1785)

Special Surveys – Water Boundaries

TOWNSHIP LINE

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

RANGE LINE



“Common highways and forever free”

Northwest Ordinance of 1787, Article IV:

“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 said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor.”

The Public Trust Doctrine is based on evolving interpretation of “common highways and forever free.”

- Wisconsin Territorial Legislature (1836-1848)
- Wisconsin State Legislature (1848 – the present)
- Wisconsin Supreme Court
- Citizen beneficiaries of the Trust
 - Paul Husting v. Dianna Shooting Club
 - Virgil Muensch v. Public Service Commission
 - John Gillen v. Neenah

Key features of the Trust Doctrine:

- It defines a **vast public estate**, consisting of water and the beds of navigable lakes and bounded by the Ordinary High Water Mark
- It imposes an **affirmative obligation** on the State of Wisconsin to protect the trust property for the trust beneficiaries
- It establishes a **civil right** of citizens to use and enjoy public waters
- It establishes a broad rule of **legal standing**, permitting ordinary citizens to enforce the rights protected under the Trust Doctrine
- It serves as a **check** on the actions of elected officials and agencies

What does the Trust Doctrine Protect?

- Navigation (shipping and boating)
- Recreation (including hunting and fishing)
- Natural resource values (water quality, habitat, aquatic plant life and fisheries)
- Natural scenic beauty

Territorial Legislation

- The 1840's Mill Dam Laws encouraged the construction of dams on "non-navigable" streams
- Special local laws authorized placement of individual dams on navigable streams

Dam Legislation after Statehood

- The Wisconsin Legislature continued use of special laws authorizing individual dams into the early 20th Century.
- Modern dam regulation began with passage of the Water Power Act of 1915, delegating broad powers to an administrative agency (now DNR) including:
 - Dam placement and removal
 - Dam transfers
 - Plan approval
 - Flowage water levels
- These powers required the agency to address:
 - Public trust rights in navigable waters
 - Health and safety
 - Property
- This 100 year old legislation is still mostly in effect . See Wis. Stat. Ch. 31
- Navigable waters law is now mostly codified. See Wis. Stats. Ch. 30

Some Key Water Law Concepts Affecting Dams:

Which waterways are navigable?

- The concept has evolved over the decades due to changes on the ground or in the law
- Originally applied to streams used in commercial navigation
- **Navigability** now extends to any stream that is “navigable in fact”
- A stream is **navigable** if it can float any boat, skiff, or canoe of the shallowest draft on a reoccurring basis.
- When a stream is dammed, **public rights** expand to include flowed land.

Ordinary High Water Mark (OWHM)

- Is the boundary between public waters and adjacent lands.
- The OWHM is “the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristic.”
- Continuous for how long?
- What if circumstances change?
 - Construction of a dam?
 - Change in ordered water level?
 - Climate change?

Beds of Navigable Waters

- Unlike streambeds, natural lakebeds are public trust property
- Dams are normally constructed on private stream beds
- Private lands flowed by dams (flowage beds) are subject to public rights
- Some dam owners own the bed of the flowage
- Others hold only flowage rights, with the flowage beds held by others

Riparian Rights

- A riparian owner is one who holds title to land abutting a lake or stream
- Water raised by dam construction or operation cannot lawfully trespass onto the “upland” above the OHWM
- Riparian rights give waterfront owners special rights within adjacent waters (below the OHWM boundary), including:
 - Use of water for domestic or ag purposes
 - Water flow to the land without artificial obstruction
 - Additions to riparian land formed by accretion and reliction
 - Exclusive use of the shore (between water and the OHWM)
 - Placement of piers and structures to access navigable water
- Riparian rights are subordinate to public rights and subject to legislative regulation

TAKEAWAYS:

- Dam owners and regulators balance competing interests
- Water law has evolved over the decades, but many grey areas remain
- Property owners, regulators and plain citizens all have legal rights to challenge the actions and decisions affecting dams