

VILAS COUNTY LAKES ASSOCIATION

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The Public Trust Doctrine – John Bates and VCLA

The Vilas County Lakes Association commissioned John Bates, well-known northwoods writer and naturalist, to write about The Public Trust Doctrine so that readers could understand the importance of this document to all waterfront owners and everyone who enjoys Wisconsin's unusually large number of clear lakes.

In Wisconsin, The Public Trust Doctrine is an important part of our State Constitution (Article 1X, Section 1) that guarantees the public access to all navigable waters in the state.

Rapid shoreline development within the northwoods poses a major threat to the health of our aquatic ecosystems. As this threat increases, it becomes more important to uphold The Public Trust Doctrine. John Bates's article clearly describes the many benefits to the public from this Doctrine and why it is imperative for all citizens to become responsible stewards of the land.

The Public Trust Doctrine Or The Meaning of Trust

By John Bates, Northwoods, WI writer & naturalist
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The Problem in a Nutshell: The current rate of land development surrounding Wisconsin's waters is unprecedented in our state's history, and it shows no sign of diminishing. Scientific research specific to our area shows that shoreline development has had negative impacts on fish and wildlife habitats, and on the quality of the experience people have on the water. Throw in the proliferation of invasive species along with the multiplying recreational pressures exerted by an expanding population, and the impacts continue to grow with no end in sight.

What's at Stake: Just about everything. The quality of the recreational and aesthetic experiences we have on our waters - the pure enjoyment that brought most of us here - is at risk. Equally at risk are the ecological communities in and around the waters that make our enjoyment possible.

What to Do: Rein in our impacts on the lands and waters, or we will have failed future generations, as well as ourselves.

What We Have Going for Us: The Public Trust Doctrine, and ourselves.

A Short History of the Public Trust Doctrine: When Wisconsin became a state in 1848, the Federal government transferred ownership of all navigable waters to the state to be

held in trust as public waters. Far-sighted people wrote into our Constitution a section that became known as “The Public Trust Doctrine” (Article IX, Section 1). It states in part: “The river Mississippi and 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.”

The language they used traces back to ancient Rome and Emperor Justinian, who in 528 AD decreed, “By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shore of the sea.”

In 1225, the English Magna Carta incorporated similar concepts, under which the King, who owned all the lands, held them in trust for the public. All citizens were given the right to use and enjoy the lands.

The “Doctrine of the Public Trust” was held in such high regard that it traveled across the ocean in the freedom-seeking hearts of the first European settlers and was incorporated into the laws of the original 13 states in America.

After the Revolutionary War, westward expansion exploded, and in response the 1787 Northwest Ordinance declared, “The navigable waters leading into the Mississippi and St. Lawrence . . . shall be common highways and forever free . . .”

Today, 220 years later, all Wisconsin waters are still held in trust for the public good.

The Public Trust Doctrine Today

The importance of the Public Trust Doctrine today can't be overstated. At its heart, it provides the legal foundation for preserving our waters now and forever.

It is one thing, however, to have a legal document which states our waters must be protected in perpetuity. It is quite another thing to actually enact these responsibilities. Given the public's surging recreational and development pressures, many believe we are already failing that trust.

These pressures are nothing new, however. Since 1848, the Public Trust Doctrine has been challenged repeatedly in the Wisconsin Supreme Court, and the court's decisions have consistently upheld the doctrine, refining what it means to hold these waters in the public trust. The Court has promulgated the following decisions among others:

1898 – That fishing is a “right common to the public.”

1914 – That travel, recreation, and hunting and fishing on waterways is as equally important to the public as is commerce.

1951 – That it is a public right to enjoy scenic beauty along our waterways.

1969 – That the public has the right to clean, unpolluted waters, and water regulation permits can no longer be issued without first looking at water quality impacts.

1972 – That public rights can supercede private property rights: “An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”

1975 – That navigability includes “any waters capable of floating any boats, skiff, or canoe, of the shallowest draft used for recreational purposes . . .”

1996 – That expansion of boat slips at a condominium site has cumulative impacts that adversely impact fish spawning and nursery habitat, water quality, aquatic plants, and natural scenic beauty. The riparian owner's right to place structures is limited by the public's rights in the waterway and by the “reasonable use” doctrine, which provides that the rights of a riparian owner are “restricted always to that which is a reasonable use.”

1998 – That citizens may legally challenge “violations of the public trust doctrine.”

2006 – That “whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public's interest in the lakes.

The potential ecological impacts include direct impacts on the water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of cumulative impacts must be taken into account.”

In recent years, the legislature drafted Wisconsin Act 118 requiring limitations, among other things, on piers and swimming rafts, structures including boat shelters, boathouses and

houseboats, bridges, grading of banks, and dredging. While infinitely debatable in its details, the legislation intended to meet the legal obligations of the Public Trust Doctrine – the right of the public to access and use the unimpaired natural waters of our state.

It is not the intent of this article to engage in debate over Act 118, which must walk a tightrope between individual rights and public rights, and, by its very nature, will be both a dynamic and controversial policy. Rather, I hope to briefly explore the words “public” and “trust.” The meaning and implication of these terms constitute the heart of the Public Trust Doctrine and form the foundation for our civic responsibilities in conserving our waters.

Trust Defined

When you *trust* someone, it means you have complete confidence in that person. You feel an assurance that what you expect will be done. Trust means you can count on them in all circumstances - they'll be there when you need them. Trust forms from a firm belief in the honesty, integrity, and reliability of another person. It's a belief, a faith. And for many of us, faith is the deepest feeling we can hold.

Trust permeates virtually every aspect of our personal lives. We employ trust every minute because there's so much we can never fully know. I trust that my boss is treating me fairly, that my co-workers will do their share, that drivers will stay on their side of the road, that my child will be home when she tells me, that the school board will appropriately direct the education of my children, that the data in a scientific study is accurate, that the doctor's diagnosis is correct, that my car needs new brakes as the mechanic says, that the farmer is growing food that is safe to eat, that the town board is utilizing my tax dollars appropriately . . . and on and on.

Trust accumulates over time like a coral or a pearl, but it can be lost in the blink of an eye. And when it's lost, suspicion moves in and lives a long life. Suspicion means that nothing you can do will be done without it being filtered through a layer of doubt, a series of “Yeah, but remember back . . .” thoughts. While trust is married to a belief in loyalty and integrity, mistrust is beholden to the expectation of deceit and treachery.

Trust lies at the heart of the most important things in our lives - our closest friendships, our deepest loves, our most profound beliefs and commitments. It influences every current and every future action.

To Hold in Trust - the Public Trust

The word *public* means: “of or belonging to the people, for the use or benefit of all, acting on behalf of the people as a whole, something free and unrestricted to all.”

When we speak of the *public trust*, we speak of a higher ground, one that goes beyond personal relationships. Here, trust spreads in ever-broadening circles of organizations and communities until we reach the size of representative governments. To hold something in trust for the public, as the public trust doctrine holds our waters, is to say that something will be cared for forever. The state, and its citizens, can be trusted to always put the needs of that object first, and that we willingly share the responsibility for doing so. The *public trust*, then, requires us to care for something in perpetuity and to provide that care freely so that everyone may benefit.

Land trusts provide an example on a smaller scale. Through conservation easements, private landowners have the opportunity to leave a legacy for the benefit of the larger society, while the land trust takes legal oversight responsibility for protecting the land's conservation values. The key in conservation easements is that the landowner retains ownership of the land and must actively do the work of conserving the land. The landowner holds the land legally in trust and is literally entrusted with the care and safekeeping of it, thus becoming a trustee, a steward, of his or her land.

The Upshot

While the state delegates the regulation and enforcement of the Public Trust Doctrine to WDNR and the Department of Justice, we, the community of people living in the Northwoods, must enact that trust. We must live as the stewards of the land.

Even if we might wish to ignore this charge, we don't really have a choice. The reality is that as state budgets continually shrink, the DNR's actual oversight commensurately shrinks. The DNR simply cannot oversee our region in the manner it deserves, and, many would argue, we don't want the state peering over our shoulders anyway. So, who then will keep the trust in the Public Trust Doctrine?

It's time for private citizens to step up and effectively administer the Public Trust Doctrine. It's time to look beyond the rights we perceive in our ownership of land, and instead maximize and enact our responsibilities to the land. It's time to render DNR oversight in effect unnecessary through the ethical constraints we place upon ourselves. It's time to rise up as a diverse community of people bonded together by our deep love of this place to do the work we have previously consigned to the DNR.

Again, we don't have a choice. The DNR does what it can, but too often its enforcement is constrained by political agendas which render genuine stewardship secondary. And, like all human organizations, the DNR occasionally shoots itself in the foot. When that happens, hard-won trust instantly flies out the window, and we can feel rudderless.

Thus, we need to find a way to work from a common understanding of the greater good, an understanding that eclipses our property rights and embraces our property responsibilities. We have to think in terms of downstream and downwind, in terms of plant and animal communities as well as human communities, and how to keep all of those communities intact and thriving.

We're called upon to do this because we live in a globally important region of lakes and rivers. We're one of four areas in the world with this density of lakes. With that blessing comes an equally great responsibility.

A True Sense of Home in the Northwoods

What's the difference between a house and a home? Scott Russell Sanders writes most eloquently of this divide: "The shell of a house gives only shelter; a home gives sanctuary . . . Real estate ads offer houses for sale, not homes. A house is a garment, easily put off or on, casually bought and sold; a home is a skin. Merely change houses and you will be disoriented; change homes and you bleed. When the shell you live in has taken on the savor of your love, when your dwelling has become a taproot, then your house is a home."

When the Northwoods transforms for someone from a house into a home, then the narrowness of property rights alchemizes into a broader understanding of property responsibilities. I am not speaking of home as the building one lives in. I speak of home as the surrounding land and water, the thousands of acres that form this place we call the Northwoods. These lands and waters are on loan to us for our short lifetimes, as they were on loan to our ancestors, to the Ojibwe and Sioux, and as far back as the PaleoIndian people who were here 8,000 years ago.

Many of us have over time lost our childhood landscapes to development; we often have difficulty recognizing the farm fields or forests that long ago crystallized in our memory as our *home*. Thus, we have learned through personal loss how the apparently slow process of normal growth can grind a place away, can make it unrecognizable, or at the least, unfamiliar. "The trouble with normal is it only gets worse," goes the chorus of a popular folk song. Normal growth accumulates like rust on steel, or cancer in a cell, and can change both the patina and the functioning of a place forever.

Enacting the Public Trust

Maybe the best we can do for our lands and waters is to respect and honor them, to truly cherish them. Perhaps this is what the Public Trust Doctrine asks of each us. Our actions need to arise from a deep love, a love that doesn't expect some major return. To love something requires us to listen to it, to understand it as best we can, and then to take appropriate action or non-action to protect it.

Love, it seems to me, is never a taking. Property rights devotees talk so much about "takings." Far more important is what we are giving. Our rights as citizens in a democracy imply,

if not require, a giving back for the greater common good.

So what is it we are called to give back, to do? I've listed in a sidebar the "top ten" actions that shoreland owners can take. But unfortunately, there's no absolute formula or recipe book for our actions. I'm reminded of a quote that has become a near mantra for me: "There is no answer. Seek it lovingly."

Each of us will enact our love differently, reflecting the differences in the lands and waters we live on, and our ways of expressing our love. Perhaps the best we can do is to look closely at the remaining natural shorelines and uplands around us, and to try to mimic them. We need also to pay attention to the research being done in this area, and to respond appropriately. If the research clearly says to leave fallen trees and branches in the water for fish, bird, frog, and aquatic insect habitat - the myriad of aquatic life - then we need to leave the woody debris alone no matter how much it affronts our sense of tidiness.

There's one other thing we must do, and it's a matter only of changing our perspective. We have for too long created a false dichotomy where we see life as a battle between the human community and the natural community, where one community must suffer for the other's gain. We need to understand that we are one and the same. We are a species within nature, made up of elements derived from nature, sustained by elements provided by nature. If we can see ourselves in all things, and see them equally in us, then we may see that we are part of much larger whole. With that understanding, that vision, we can uphold the Public Trust Doctrine. We can leave the legacy of unimpaired waters that the future public, our children, require of us.

The Top Ten Things You Can Do as a Shoreland Owner

- 1- Maintain branches and trees that have fallen into the water.
- 2- Leave fallen trees and branches on the uplands and shorelands - these are microhabitats for dozens of species of birds that nest on the ground and require cover.
- 3- Leave dead and dying trees standing for the 30 or so species of birds that nest in cavity holes, like chickadees, nuthatches, wood ducks, mergansers, and swallows.
- 4- Maintain aquatic plants as absolutely necessary habitat for fish, semi-aquatic mammals like otters and muskrat, frogs, and insects like dragonflies. Aquatic plants also prevent shoreline erosion and most importantly a diverse native plant community is the best defense against invasive plant species like Eurasian watermilfoil
- 5- Create at least a 50-foot buffer zone of natural habitat between the shoreline and any lawn or buildings (buffer zones of 100 feet or more are better yet).
- 6- Keep at least 75% of your shoreline in natural vegetation. If you need a dock, and a pathway to it, keep it as small as you can. This will prevent erosion of your shoreline, keep geese from utilizing your lawn as a private restroom, and give you personal privacy. Natural shorelines also provide a host of wildlife values.
- 7- Keep the vegetation on your property layered to maximize wildlife habitat – from short herbaceous species to tall herbs, to shorter shrubs to taller shrubs, to shorter trees to taller trees.
- 8- Maintain or create a diversity of plant species on your property. Conifers provide winter cover, for instance, unlike deciduous trees. Fruiting shrubs and trees provide food for migrating and nesting birds.
- 9- Exert extreme caution in using herbicides, pesticides, and fertilizers. While we know a lot about their safety, we don't always have a long-term understanding of their impacts on other species.
- 10- Finally, when in doubt as to what to do, take time, lots of time, to watch and listen along natural shorelines. The species that survive here today, their placement and their diversity, have all been proven over thousands of years. Emulate what the natural world does, try to fit in to the existing community, and you'll be on the right path.

It is important to know local, county, state and federal laws regarding lake use and waterfront property. Here are some organizations to contact for more information:

University of Wisconsin Extension Lakes Program: www.uwsp.edu/cnr/uwexplakes

Wisconsin Association of Lakes: www.wisconsinlakes.org

River Alliance of Wisconsin: www.wisconsinrivers.org

WDNR Lakes Partnership: www.dnr.state.wi.us/org/water/fhp/lakes

Wisconsin Wetlands Association: www.wisconsinwetlands.org

University of Wisconsin Center for Limnology: www.limnology.wisc.edu

Vilas County Land and Water Conservation Department: www.co.vilas.wi.us/landconv

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