

Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World

Melissa K. Scanlan*

Since the 1970s, articles on the public trust doctrine—as articulated in judicial opinions, constitutional provisions, and statutes—have been replete in legal literature. Yet, few articles discuss the actual implementation of the doctrine, and none are informed by qualitative research interviews with water managers. This Article explores this missing dimension through an empirical study of the “on the ground” trustees of Wisconsin—its water managers.

Wisconsin’s legal framework is an example of a cutting-edge articulation of the public trust doctrine. Because Wisconsin has been on the forefront of developing the legal doctrine, and its water managers face budgetary constraints and conflicts between public rights and private property rights not unique to the state, this empirical study illustrates for those working in other states the tensions and structures that impede or enhance public trust protections. After exposing the systems that prevent water managers from fully carrying out their trustee duties, this Article provides several modest policy proposals for moving forward in a way that empowers water managers to satisfactorily meet their duties as trustees.

Introduction.....	125
I. Seven Core Concepts of the Public Trust Doctrine	128
A. Core Concept 1: Trust Relationship: Trustee, Beneficiary, and Property.....	129

Copyright © 2012 Regents of the University of California.

* Water Law and Policy Scholar, University of Wisconsin Law School and University of Wisconsin, Milwaukee, School of Freshwater Sciences; Fellow with On the Commons. The author thanks the Wisconsin Department of Natural Resources’ staff, current and retired, whom the author interviewed for this article. The author is grateful for the prior work, ideas, and comments on drafts from other legal scholars, in particular, Professors Joseph Sax, Noah Hall, Stephanie Tai, and Alexandra Klass. This research would not have been possible without the generous financial support of the Bradshaw-Knight Foundation. The views expressed herein, and any errors or omissions, are those of the author.

B.	Core Concept Two: Trustees Have a Legal Duty to Protect Wisconsin's Navigable Water.....	131
1.	Wisconsin's Legislature Has a Constitutional Duty to Take Action to Protect Navigable Waters.....	132
2.	Wisconsin's Department of Natural Resources Has Broad Authority to Protect the Trust in Navigable Waters.....	133
C.	Core Concept Three: The Trustees Have a Supervisory Duty Requiring Adaptive Management.....	135
D.	Core Concept Four: Courts and Legislatures Have Expanded the Public Trust Definition of Waters and Public Rights.....	137
1.	The Scope of Waters Protected by the Public Trust Doctrine Has Changed over Time.....	137
2.	The Legislature and Courts Have Broadened Public Rights Protected by the Public Trust Doctrine to Reflect the Public's Actual Use of Waters.....	140
E.	Core Concept Five: The Legislature May Grant Lakebed Title to Entities Other than the State, but Only Under Certain Limited Conditions.....	141
F.	Core Concept Six: Private Riparian Property Use May Not Encroach on Public Rights in Navigable Waters.....	144
G.	Core Concept Seven: A Healthy Public Trust Requires Active Enforcement by the Trustees and Beneficiaries.....	146
II.	Legal Doctrine Meets Water Management Reality.....	146
A.	Research Rationale and Methodology.....	147
B.	DNR Is the Central Trustee to Guard the State's Waters Against Private Taking for Narrow Special Interests.....	148
1.	Introducing the Trustees: DNR's Water Specialists.....	148
2.	Educating the Public About Best Practices May Advance Water Protections.....	150
3.	Landowner-Oriented Approach: Apologetic Regulators.....	151
C.	Systemic Changes Undermine DNR's Ability to Function Effectively as a Trustee of the State's Waters.....	152
1.	Budget Cuts, Staff Reductions, and High Turnover Undermine the Trustees' Ability to Effectively Protect Public Resources.....	152
2.	Workload Reductions and Their Impact on the Waters.....	154
3.	DNR Has Eliminated Essential Training for Water Specialists.....	157
4.	Recent Statutory Changes Weaken Water Protections.....	158
a.	Conflicts Between the Riparian Right to Build a Pier and Public Rights in Navigable Waters.....	159
b.	Water Protection Consequences of Act 118's Changes to Grading Regulations.....	161

D.	Enforcement and the Deterrence Problem in a State with Weak Enforcement of Water Laws.....	163
1.	DNR Has Broad Legal Authority to Enforce the Public Trust in Navigable Waters	163
2.	Does DNR Have the Adequate Funding, Staffing and Training to Enforce the Public Trust Doctrine?.....	165
a.	A Rise in Voluntary Instead of Formal Enforcement Actions.....	165
b.	Special Problems with Enforcement of Wetland Violations.....	168
3.	DNR and the Attorney General’s Authority to Challenge the Legislature’s Abdication of the Public Trust Is Very Limited.....	171
4.	Public Trust Beneficiaries Have Standing to Enforce the Public Trust.....	172
E.	Political Favoritism Tipping the Scales Toward Private Riparians	175
1.	Legislators Put Pressure on Water Specialists to Benefit One Constituent’s Private Interests over the Public Interest..	178
2.	Political Favoritism and Control Exerted by the Governor’s Political Appointees in the Central Office	179
III.	Recommendations: Our Way Forward	186
A.	Restore DNR Secretary Appointment by the Natural Resources Board	187
B.	Reinvigorate and Bolster DNR Water Specialists’ Training	188
C.	Secure a More Reliable Source of Funding for Water Specialists’ Positions	188
D.	Educate Riparian Landowners About How to Improve Their Property Values and Protect the Public Trust in Navigable Waters.....	189
E.	Target Water Monitoring to Assess Impact of Deregulation	189
F.	Increase Public Trust Beneficiaries’ Enforcement Efforts.....	190
Conclusion	190

INTRODUCTION

Water is the quintessential commons: it is shared by all, and is used and reused in a system of overlapping and interconnected rights. The concept of water as a shared resource is not new. “Commons were a feature of traditional societies, where people thought more of themselves as members of a community than as autonomous individuals.”¹ It is not surprising that the

1. Joseph L. Sax, *The Unfinished Agenda of Environmental Law*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1, 2 (2008).

public trust doctrine arose out of just such a traditional society when it was recognized under ancient Roman law—“the air, running water, the sea, and consequently the shores of the sea” were shared as a commons for all to use.² However, “the notion of common responsibility . . . has virtually disappeared from our consciousness.”³ The loss of a sense of common responsibility makes it all the more important to continually invigorate the public trust’s legal doctrine.

While federal common law defines some aspects of the public trust doctrine, it is primarily a state-based doctrine shaped by state institutions.⁴ Most scholars analyze the public trust doctrine by examining laws that order the many shared and sometimes competing uses of trust property.⁵ I take that approach, but add an empirical study of the daily management of the trust to this legal analysis. Through qualitative research interviews, the study shows the trust managers’ insights and provides a unique look at the implementation of the legal doctrine that court opinions, statutes, and constitutional provisions cannot offer.

This study surveys the water trustees of one state, yet it also sheds light on the water management dynamics in other states. Regardless of state boundaries, water trustees navigate the oft-contentious boundary between public and private property and must adjust to varying degrees of political pressure, limited staff, and sparse budgets. These external influences impact the effectiveness of the trustees in carrying out the public trust doctrine and, ultimately, affect the health of the public water commons.

This study builds on a similar study I conducted over a decade ago, in 1999. My original research focused on how Wisconsin’s water managers implement the public trust doctrine.⁶ The 1999 study focused on Wisconsin—a

2. Scholars can trace English constructions of the public trust doctrine back to the influence of ancient Roman law. See HELEN ALTHAUS, PUBLIC TRUST RIGHTS 23 (1978). The *Corpus Juris Civilis*, compiled almost 1500 years ago in the sixth century A.D., was a monumental codification of Roman statutes and laws. One part of the *Corpus*, the *Institutes of Justinian*, contained the origins of the public trust doctrine. This, in turn, was based on a text from the second century A.D., called the *2nd Century Institutes of Gaius*. Ancient Roman law recognized public rights in water and the seashore, which were unrestricted and common to all. These rights were considered to be part of natural law. See *id.* at 1–2. “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.” *Id.* at 2. They also recognized the right to fish as part of common rights in the sea. The Romans viewed these public rights, since they were based on natural law, as fixed and immutable. See *id.* at 3–4.

3. Sax, *supra* note 1, at 3.

4. Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 53 (2010).

5. *E.g., id.*; Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007).

6. Melissa K. Scanlan, Comment, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135 (2000).

state rich in water resources—because it has a 150-year history, grounded in the state’s constitution, of using the public trust doctrine to protect its natural heritage.⁷ Utilizing legal analysis of cases and statutes, along with extensive qualitative interviews with Department of Natural Resources (DNR) water managers, the study contrasted the legal doctrine with the daily realities of the trustees’ water management.

Additionally, the 1999 study provided insight on state management of trust resources during a politically charged time. Specifically, in 1995 Republican Governor Thompson led the effort to make two significant institutional changes: (1) transform the DNR Secretary position into a political appointment within the Governor’s Cabinet instead of a position elected by the Natural Resources Board, and (2) dismantle the Public Intervenor’s Office of Assistant Attorney Generals who had been charged with the role of legal watchdogs for the state’s natural resources.⁸ The 1999 study showed that DNR Water Specialists’ responses to these changes were dramatic. They thought DNR’s independence and integrity had plummeted.⁹ One manager described his reaction, “We are a political agency now, not a natural resource agency. There is a big difference.”¹⁰ The study concluded with a series of recommendations to improve protections of public trust resources that ranged from restoring the independence of the DNR Secretary to implementing reforms to improve enforcement and deter future damage to public trust resources.¹¹

7. Forty years earlier, Wisconsin was also one of a handful of case studies examined in Joseph Sax’s seminal article on the public trust because “[t]he Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state.” Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970) [hereinafter Sax, *Public Trust*]; see also William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 397 (1997) (identifying Wisconsin as one of the leading states to develop the public trust doctrine); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 708 (2006).

8. Scanlan, *supra* note 6, at 195–96.

1995 Wis. Sess. Laws 27 (budget bill) took away the Public Intervenor’s (PI) power to sue and its independence by transferring the PI office to DNR. Two years later, in 1997 Wis. Sess. Laws 27 (budget bill) the legislature completely eliminated the office. The PI office had been a cornerstone of environmental protection in Wisconsin since 1967. The PI office was created as a public watchdog on the state government to protect public rights in Wisconsin’s waters and other natural resources.

Id. at n.326.

9. *Id.* at 196.

10. *Id.* This Water Specialist observed that “we’re a lot more lax now that Tommy Thompson is our boss.” *Id.* at 196 n.327.

11. *Id.* at 213.

Over the past decade, despite gubernatorial campaign promises, none of the study's recommendations have been implemented.¹² Instead, Water Specialists encountered emerging threats to the public water commons that were not apparent in the late 1990s: real estate lawyers who creatively sought to privatize the state's waters by building condominiums over such waters, groundwater pumping that measurably drew down navigable waters, and widespread disregard for the value of wetlands.¹³

In 2010 and 2011, I conducted another series of qualitative research interviews to understand how Water Specialists are implementing the public trust doctrine in the face of these emerging management challenges. I interviewed current and retired DNR Water Specialists, upper managers, and lawyers.¹⁴ These data present an opportunity to compare how DNR employees experienced managing water resources as a cabinet agency for Democratic Governor James Doyle to the experience under Republican Governor Tommy Thompson.

This Article assesses the continued evolution of the laws protecting public rights in Wisconsin's waters and the chronic obstacles and constraints that the state water trustees face. Part I identifies and discusses seven core concepts of Wisconsin's public trust doctrine, based on a synthesis of constitutional, common, and statutory law. Part II assesses the application of these core public trust doctrine concepts to the management of public water. I identify and discuss how DNR Water Specialists are functioning in a time of declining state budgets, increasing hostility toward government employees, and growing political favoritism in agency decision making. Part II also highlights existing and emerging management issues the state needs to rectify to align the administration of the trust with the legal doctrine outlined in Part I. Part III considers the implications of these findings and provides several modest ideas to improve the administration of the trust and protections for Wisconsin's valuable fresh waters.

I. SEVEN CORE CONCEPTS OF THE PUBLIC TRUST DOCTRINE

At its core, the public trust doctrine describes a state's relationship to its water resources and its citizens—it is the body of law that directs the state to hold navigable waters in trust for shared use by the public.¹⁵ The contours of

12. Lee Bergquist & Patrick Marley, *Doyle Vetoes Bill to Strip Governor of Power to Appoint DNR Secretary*, MILWAUKEE J. SENTINEL, Nov. 13, 2009, <http://www.jsonline.com/news/wisconsin/70004762.html>.

13. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 856–57 (Wis. 2002) (dockominium); *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 799 N.W.2d 73, 83 (Wis. 2011) (groundwater); see *infra* Part II.D.2.b. (wetlands).

14. Part II of this article, *infra*, is supported by narratives the author obtained from research interviews with Wisconsin Department of Natural Resources staff who administer the state laws that regulate the use of navigable waters.

15. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892).

this relationship and the use of the doctrine to protect natural resources have evolved along with changing uses of water. Courts and legislatures have continually expanded what resources are covered by the public trust and the public's interest in those resources to include public rights ranging from hunting to maintaining water quality.¹⁶ Due to its elasticity, the public trust doctrine "has been one of the most useful adaptations of traditional legal doctrines for bringing the notion of public rights and responsibilities into the modern era."¹⁷

There are seven core concepts undergirding Wisconsin's public trust doctrine:

1. Like a financial trust, the public trust in water involves identifiable trustees, beneficiaries, and trust property;
2. Wisconsin law imposes a duty on trustees to protect public rights in Wisconsin's navigable water;
3. Trustees have a supervisory duty that requires adaptive management;
4. The public trust is a fluid doctrine that expands, as needed, to protect the water commons and public rights;
5. The legislature may grant lakebed title to entities other than the state, but only under certain limited conditions;
6. Private riparian property must be used in a way that does not encroach on public rights in navigable waters; and,
7. A healthy public trust requires active enforcement by the trustees and the beneficiaries.

These core concepts provide a framework to understand and interpret the emerging conflicts over the use of the public water commons. The concepts also provide a measuring stick to assess the state's management of public trust resources.

A. Core Concept 1: Trust Relationship: Trustee, Beneficiary, and Property

The public trust in navigable waters, as with financial trusts,¹⁸ involves a trustee, trust property, and beneficiaries. Under the public trust doctrine, a state

16. *R.W. Docks & Slips v. Dep't of Natural Res.*, 628 N.W.2d 781, 787–88 (Wis. 2001); *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987); *Wis.'s Envtl. Decade, Inc. v. Dep't of Natural Res.*, 271 N.W.2d 69, 74 (Wis. 1978).

17. Sax, *supra* note 1, at 9. *But see* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 631–33 (1986) (questioning the relevancy of the public trust doctrine).

18. *See generally* EDWARD JONES TRUST CO., *FUNDAMENTAL DUTIES OF A TRUSTEE: A GUIDE FOR TRUSTEES IN A POST-UNIFORM TRUST CODE WORLD* (Oct. 6, 2008), http://www.edwardjones.com/groups/ejw_content/documents/document/web043726.pdf.

is the trustee¹⁹ and holds the trust property, navigable waters and the beds beneath them, in trust for the public's use and enjoyment.²⁰

The definition of public trust property is based on the water itself.²¹ As early as the *Illinois Central* decision, the Supreme Court explained, "The ownership of the navigable waters . . . and of the lands under them, is a subject of public concern to the whole people of the state."²² Wisconsin, consistent with federal common law,²³ defined its public trust ownership to include title to the beds underlying navigable waters, up to the ordinary high water mark.²⁴ Wisconsin courts have further clarified that, irrespective of ownership of the beds under navigable waters, the public trust applies to water flowing in streams, rivers, ponds, and lakes.²⁵ Private riparians²⁶ may hold "a qualified title in the stream bed to the center thereof"²⁷ of navigable streams.²⁸ The public trust, however, burdens this title:

Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation.²⁹

19. Throughout this Article the term "trustee" in the context of Wisconsin's public trust doctrine may mean the legislature, DNR, individual legislators, DNR employees, or a combination thereof.

20. *Ill. Cent.*, 146 U.S. at 452 (stating the Illinois Legislature violated "a 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" (emphasis added)); *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 511-512 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (identifying the United States as the creator of the trust when it conveyed waters to the states). *But see* James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 534-45 (1989) (arguing against the application of trust law to the public trust doctrine because the creator of the public trust is unclear).

21. *Ill. Cent.*, 146 U.S. at 451; *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914) (recognizing the state is required to secure "to the people all the rights they would be entitled to if it owned the beds of navigable rivers" in order to fulfill "the trust imposed upon it by the organic law, which declares that all navigable waters shall be forever free").

22. *Ill. Cent.*, 146 U.S. at 455.

23. *E.g.*, *Shively v. Bowlby*, 152 U.S. 1, 13-14 (1894); *Ill. Cent.*, 146 U.S. at 451, 455-56; *Hardin v. Jordan*, 140 U.S. 371, 381 (1891).

24. For example,

The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.

Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901); *see also* *State v. Trudeau*, 408 N.W.2d 337, 342 (Wis. 1987).

25. *Diana Shooting Club*, 145 N.W. at 820.

26. Riparians are people who own land abutting water. Most of the eastern United States recognize riparian rights. JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 12-13 (4th ed. 2006).

27. *Muench v. Pub. Serv. Comm'n (Muench I)*, 53 N.W.2d 514, 517 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952).

28. *Id.*; *see infra* Part I.F (explaining in detail a riparian's qualified title).

29. *Diana Shooting Club*, 145 N.W. at 820.

The water commons are different from other forms of property: one cannot own water. Whether a riparian landowner or a public trust beneficiary, water rights are usufructuary—one has the right to use, but not own, water.³⁰ Water is to be used and reused in an ongoing cycle of shared and interconnected rights.

B. Core Concept Two: Trustees Have a Legal Duty to Protect Wisconsin's Navigable Water

States may regulate water-related activities under their police powers.³¹ Given a state's broad police powers, some have questioned the need to base water protections on the public trust doctrine.³² However, basing water protections on the public trust doctrine is important because of two critical aspects of the doctrine that the state police power lacks. First, the state trustee has a duty to take action to protect trust resources.³³ Second, individuals have legally protected public rights to use and enjoy trust resources.³⁴ In other words, a state cannot simply forego managing the water commons because it is politically expedient, or too costly, without potentially running afoul of its trustee duties.³⁵ A corollary of this concept is that a member of a public beneficiary group may bring a legal action to protect public rights if the state fails to carry out its trustee duties.³⁶

When Wisconsin entered the Union, on equal footing with the original states, it incorporated into its constitution the Northwest Ordinance of 1787's language that stated navigable waters are "common highways" and "forever free" for all inhabitants of the territory: "[T]he navigable waters leading into

30. See *R.W. Docks & Slips v. Dep't of Natural Res.*, 628 N.W.2d 781, 788–89 (Wis. 2001). New developments in water law, such as markets to transfer water rights in the Western U.S. states, are pushing the edges of concepts of property and water. However, in Wisconsin, a purely riparian law state where riparian rights are nontransferable, this concept is still on firm ground. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 868 (Wis. 2002) (overturning ALJ decision to allow dockminiums on Geneva Lake in violation of section 30.133 of the Wisconsin Statutes).

31. Lazarus, *supra* note 17, at 665–77.

32. *Id.* at 665–68. Professor Lazarus underestimated the staying power of the public trust doctrine as applied in Wisconsin. See *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 799 N.W.2d 73, 83 (Wis. 2011) ("This court has long confirmed the ongoing strength and vitality of the State's duty under the public trust doctrine to protect our valuable water resources.").

33. *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927).

34. *Gillen v. City of Neenah*, 580 N.W.2d 628, 633 (Wis. 1998).

35. Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 42 (2010). By contrast, while police powers may be a source of authority for the state to create laws to protect waters, the police powers do not place a legally enforceable affirmative duty on the state to take action to protect public waters. Generally, when a violation of police powers is alleged, the legal challenge comes in the form of a private property owner claiming a takings of property—that is, claiming that the state has exceeded its police powers—rather than a member of the public asserting harm to public waters—that is, claiming that the state has failed to exercise its police powers. See also Lazarus, *supra* note 17, at 668–77 (discussing police powers and private property).

36. *Gillen*, 580 N.W.2d at 637–38. Core Concept Seven discusses the details of enforcement of the public trust.

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 this state as to the citizens of the United States, without any tax, impost or duty therefor.”³⁷ This language firmly establishes Wisconsin’s public trust doctrine.³⁸ On the federal level, the U.S. Supreme Court recognized the public trust doctrine is a substantive restraint on a “state’s ability to alienate the beds and banks of navigable waters or to abdicate regulatory control over those waters.”³⁹ However, the Wisconsin Supreme Court has gone further by holding that the state’s constitutional mandate places a duty on trustees to protect public waters, not just refrain from harming or selling them.⁴⁰ This duty applies to the legislature, and to the Department of Natural Resources, to whom the legislature delegated trustee responsibilities.

1. Wisconsin’s Legislature Has a Constitutional Duty to Take Action to Protect Navigable Waters

The legislature, as trustee of the navigable waters of the state, has a significant role in administering the trust. As early as 1927, the Wisconsin Supreme Court identified the legislature’s duty to restrict actions that might endanger the trust and take affirmative actions to protect the trust:

The trust reposed in the state is not a passive trust; it is governmental, active and administrative. Representing the state in its legislative capacity, the legislature is fully vested with the power of control and regulation. The equitable title to those submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it. As has heretofore been shown, the condition confronting the legislature was not a theory but a fact. This condition required positive action.⁴¹

In accordance with the Wisconsin Supreme Court’s mandate, if a litigant challenges legislation as violating the public trust doctrine, courts closely scrutinize the law to determine whether the legislature carried out its duty to

37. WIS. CONST. art. IX, § 1.

38. See *State v. Bleck*, 338 N.W.2d 492, 497 (Wis. 1983) (“The public trust doctrine is rooted in art. IX, sec. 1 of the Wisconsin Constitution.”).

39. Craig, *supra* note 4, at 69–70.

40. *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927). Wisconsin’s Legislative Reference Bureau alerts legislators of their duty: “The legislature, as the state’s representative, must not only take action to prevent endangerment of the trust but it must also take affirmative steps to protect the trust.” Robin Kite, Wis. Legis. Reference Bureau, *Wisconsin Constitution, Article IX, Section 1, The Public Trust Doctrine*, 4 CONST. HIGHLIGHTS, Oct. 2004, available at <http://legis.wisconsin.gov/lrb/pubs/consthi/04consthiIV4.htm>.

41. *City of Milwaukee*, 214 N.W. at 830.

protect the public interest in trust resources.⁴² For example, in response to the legislature's attempt to convey trust property to a private developer in the late 1800s, the court in *Priewe v. Wisconsin State Land and Improvement Co.* was not bound by the legislature's statement of purpose when deciding whether the legislation benefited the public.⁴³ Rather than deferring to the stated legislative purpose of protecting public health, the court carefully scrutinized the results of legislation and determined that conveying a lake to John Reynolds so he could completely drain and profit off of land speculation was a loss to the public, rather than a benefit.⁴⁴ Since the 1800s, the courts have continued to play this role as independent check on legislative action involving trust resources.⁴⁵

2. *Wisconsin's Department of Natural Resources Has Broad Authority to Protect the Trust in Navigable Waters*

To satisfy the "state's affirmative obligations as trustee of the navigable waters,"⁴⁶ in 1965 the legislature created the Wisconsin Department of Natural Resources (DNR), an agency with the "necessary powers" to protect Wisconsin's waters.⁴⁷ The legislature established DNR as the central agency with "general supervision and control over the waters of the state," thereby delegating to DNR broad responsibility for the administration of the trust.⁴⁸

The legislature established state water policy objectives of "protect, maintain and improve the quality and management of the waters of the state."⁴⁹ Then the legislature directed DNR to create a "comprehensive action program . . . to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water."⁵⁰ The legislature mandated that future interpretation

42. Some scholars critique this aspect of the public trust doctrine as "antidemocratic," arguing the courts are thwarting majority rule within the Legislative branch. Araiza, *supra* note 7, at 388–89; Huffman, *supra* note 20, at 565. It may conversely be seen as a backstop to impede private lobbyists who have steered legislative action away from protecting the public interest.

43. *Priewe v. Wis. State Land & Improvement Co.* (*Priewe I*), 67 N.W. 918, 922 (Wis. 1896).

44. *Id.*

45. *Muench v. Pub. Serv. Comm'n (Muench II)*, 55 N.W.2d 40, 46 (Wis. 1952); *Vill. of Menomonee Falls v. Dep't of Natural Res.*, 412 N.W.2d 505, 599–601 (Wis. Ct. App. 1987).

46. *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 799 N.W.2d 73, 84 (Wis. 2011). The court concluded that the legislature accomplished this delegation through Wisconsin Statutes section 281.11 and section 281.12. *Id.* at 84.

47. See *Reuter v. Dep't of Natural Res.*, 168 N.W.2d 860, 861 (Wis. 1969) (citing 1965 Wis. Sess. Laws 614 (codified at WIS. STAT. § 144.025 (1965))); WIS. STAT. § 281.11 (2011).

48. *Wis.'s Envtl. Decade, Inc. v. Dep't of Natural Res.*, 271 N.W.2d 69, 77 (Wis. 1978) (quoting WIS. STAT. § 144.025(1), (2)(a)); WIS. STAT. § 281.11 (2011).

49. WIS. STAT. § 281.11 (2011).

50. *Reuter*, 168 N.W.2d at 861 (quoting WIS. STAT. § 144.025(1)). After creating DNR, the legislature has tried to delegate public trust responsibilities to local units of government. Upon review, courts have consistently reined in the legislature and held the public trust in water is a matter of statewide concern that "cannot be delegated by the state legislature to any group which is less broadly based." *Sax, Public Trust, supra* note 7, at 523; *Vill. of Menomonee Falls v. Dep't of Natural Res.*, 412 N.W.2d 505, 507–08 (Wis. Ct. App. 1987). Courts have rejected and invalidated legislative attempts to

of “all rules and orders promulgated under this subchapter shall be liberally construed in favor of [these] policy objectives”⁵¹ Thus, DNR has a tremendous duty as well as authority to take action to protect the state’s waters.⁵²

One way the trustees carry out their duty is by establishing protections for public rights against encroachment by private riparians. To do this, the legislature codified common riparian law and public trust rights in chapters 30, 31, and 281 of the Wisconsin Statutes.⁵³ These statutes authorize DNR to issue permits and supervise and control riparian activities to ensure they are neither “detrimental to the public interest” nor would they obstruct navigation.⁵⁴ Although some statutory provisions governing DNR’s activities do not explicitly require DNR to protect navigable waters, such as when issuing a groundwater permit, DNR still must regulate the “potential effect on navigable waters” based on a broad reading of the legislation creating DNR and delegating trustee duties.⁵⁵

DNR’s duty to administer these statutes requires its water managers to strike a balance between allowing an individual riparian to exercise his or her rights and protecting the broader public rights in those shared waters. DNR water managers are required by law to protect Wisconsin’s public trust heritage in its water commons against interference by riparian landowners who have narrower self-interests.⁵⁶ The public interest in trust resources provides the basis for DNR to choose among competing uses and deny or modify projects to minimize harm to public trust resources.⁵⁷

Based on these clear legislative mandates, courts generally defer to DNR decisions when DNR protects the trust, but view more critically and tend to overturn DNR or legislative decisions that privatize or degrade public trust resources.⁵⁸ Given Wisconsin courts’ deference to the trustees, one might

inappropriately delegate the trust to local governments without retaining significant oversight. *Muench II*, 55 N.W.2d 40, 46 (Wis. 1952); *Vill. of Menomonee Falls*, 412 N.W.2d at 514. Oversight by DNR is an essential component to ensure that the “paramount interest of the state is safeguarded.” *Cf. Muench II*, 55 N.W.2d at 46 (discussing oversight by the state Public Service Commission). Even with DNR oversight, any delegation must be limited and provide definite standards for the delegee to follow. *See Menzer v. Vill. of Elkhart Lake*, 186 N.W.2d 290, 297 (Wis. 1971).

51. WIS. STAT. § 281.11 (2011).

52. *Lake Beulah Mgmt. Dist. v. State Dep’t of Natural Res.*, 799 N.W.2d 73, 84 (Wis. 2011).

53. John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105, 117 (1994).

54. WIS. STAT. §§ 30–31 (2009–10); *ABKA Ltd. P’ship v. Wis. Dep’t of Natural Res.*, 648 N.W.2d 854, 858–59 (Wis. 2002).

55. *Lake Beulah*, 799 N.W.2d at 84.

56. *See R.W. Docks & Slips v. Dep’t of Natural Res.*, 628 N.W.2d at 788. “The public trust doctrine as an encumbrance on riparian rights is established “by judicial authority so long acquiesced in as to become a rule of property.” *Id.*

57. WIS. STAT. §§ 30–31 (2009–10).

58. Wisconsin courts tend to uphold decisions in which the trustees protected the public trust. Scanlan, *supra* note 6, at 163–169; *Hixon v. Pub. Serv. Comm’n*, 146 N.W.2d 577 (Wis. 1966) (upholding denial of permit without any explanation of conclusion that action was not in the public’s

expect this to impact DNR's water management. Part II of this Article analyzes how DNR balances riparian and public rights, and identifies key impediments to water management.

*C. Core Concept Three: The Trustees Have a Supervisory Duty
Requiring Adaptive Management*

State trustees have adapted to protect the trust in light of changes in the public's use of waters, public rights, and scientific understanding of hydrologic connections and impacts. They must adapt because state trustees have a continuing supervisory duty over trust resources.⁵⁹ Trustees' determinations are always subject to reinterpretation when hydrologic conditions or information changes.⁶⁰

The California Supreme Court's *Mono Lake* decision highlights a trustees' enduring supervisory duty over trust resources.⁶¹ The court explained that "the continuing power of the state as administrator of the public trust . . . extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust."⁶² One scholar described the decision's impact as follows:

interest); *Just v. Marinette Cnty.*, 201 N.W.2d 761 (Wis. 1972); *State v. Deetz*, 224 N.W.2d 407 (Wis. 1974); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 534 (Wis. 1996); *R.W. Docks & Slips v. Dep't of Natural Res.*, 628 N.W.2d at 788–89 (upholding agency denial of permit for completion of boat slip construction to protect emergent weed bed, and denying takings claim because riparian rights were always subordinate to public rights); *Hilton v. Dep't of Natural Res.*, 717 N.W.2d 166, 178 (Wis. 2006) (upholding agency decision to reduce the number of piers a homeowner association could reasonably maintain without impairing the public trust); *Baer v. Dep't of Natural Res.*, 724 N.W.2d 638, 644 (Wis. Ct. App. 2006) (upholding agency's argument that it had a statutory duty to protect public rights in a navigable lake); *Sterlingworth Condominium Ass'n v. Dep't of Natural Res.*, 556 N.W.2d 791, 799 (Wis. Ct. App. 1996) (upholding agency decision to limit riparian to twenty-five pier slips); *Vill. of Menomonee Falls v. Dep't of Natural Res.*, 412 N.W.2d 505, 511–12 (Wis. Ct. App. 1987) (upholding agency navigability determination).

Wisconsin courts tend to overturn decisions in which the trustees failed to protect the public trust. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 868 (Wis. 2002) (overturning ALJ decision to allow dockminiums on Geneva Lake in violation of section 30.133 of the Wisconsin Statutes); *Reuter v. Dep't of Natural Res.*, 168 N.W.2d 860 (Wis. 1969); *Muench I*, 53 N.W.2d 514, 525 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952) (holding statute unconstitutional because it delegated trust management to local authorities); *Priewe I*, 67 N.W. 918, 922 (Wis. 1896) (invalidating legislative grant of trust property to a private developer). Wisconsin's court decisions stand in contrast to California court decisions, where not one California court decision since the *Mono Lake* decision "has set aside an agency decision on public trust grounds, or has ordered an existing (or applied-for) water right re-examined." Dave Owen, *The Mono Lake Decision, the Public Trust Doctrine, and the Administrative State*, U.C. DAVIS L. REV. (forthcoming 2012) (manuscript at 23), available at <http://ssrn.com/abstract=1876039>.

59. See generally *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892) (upholding legislation revoking prior lakebed grant).

60. "Any grant . . . is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time." *Id.* at 455.

61. *Nat'l Audubon Soc'y v. Superior Court (Mono Lake)*, 658 P.2d 709, 723 (Cal. 1983).

62. *Id.*

By imposing on the state a continuous supervisory duty to attempt to preserve trust assets *Mono Lake* ruled that 1) there were no vested private rights that limited the trust, 2) private grantees' use rights were limited by the trust responsibility, and 3) the state was not confined to erroneous past decisions.⁶³

Like *Mono Lake*, several court decisions in Wisconsin articulate the trustees' continuing supervision over state waters.⁶⁴ The results may seem extreme from the perspective of the private riparian. However, the law is clear, and public trust rights in state waters have always limited riparian rights.

First, DNR may change navigability determinations at any time, even when a landowner has relied on a prior determination.⁶⁵ Navigability determinations may impact how a landowner may legally exercise riparian rights. For instance, in 1989, DNR declared navigable an artificial drainage way that the agency preceding DNR had declared not navigable.⁶⁶ The appellate court upheld the new navigability determination and DNR's order to remove the landowner's structures.⁶⁷ This decision demonstrates the continuing supervision of the trustees over public waters.

Furthermore, while rare in practice, DNR has the authority to stop projects from continuing as planned if new information requires stoppage in order to protect public rights in waters.⁶⁸ For example, DNR issued a permit to ABKA Marina that informed the permit holder that "[t]he Department may change or revoke this permit if the project . . . becomes detrimental to the public interest."⁶⁹ The court ultimately revoked ABKA's approval after it was challenged by a public trust beneficiary.⁷⁰ In another situation, after DNR issued permits for part of a marina and condominium development on Lake Superior, the agency denied a necessary dredging permit to protect an emergent weed bed that provided fish habitat.⁷¹ DNR's denial prevented the completion of seventy-one of the 201 planned boat slips.⁷² The DNR's prior decision to permit an earlier phase of marina development resulted in the growth of this new fish habitat, which then provided the basis for DNR's subsequent denial of the next phase of marina development.⁷³ Yet the court upheld DNR's

63. Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 666 (2010) (citing *Mono Lake*, 658 P.2d at 712, 721–24, 727–28).

64. *Turkow v. Wis. Dep't of Natural Res.*, 576 N.W.2d 288, 290 (Wis. Ct. App. 1998).

65. *Id.*

66. *Id.*

67. *Id.*

68. *R.W. Docks & Slips v. Dep't of Natural Res.*, 628 N.W.2d 781, 784–85 (Wis. 2001).

69. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 857 (Wis. 2002) (alteration in original).

70. *Id.* at 857.

71. *R.W. Docks & Slips*, 628 N.W.2d at 784–85.

72. *Id.*

73. *Id.*

decision.⁷⁴ This case shows DNR's adaptive management in action, and demonstrates again that courts uphold DNR actions to protect public trust resources even when it means preventing development from proceeding as initially planned.

Part II will show that, while DNR has a mandatory duty to continuously supervise trust resources and apply adaptive management, this duty is rarely actualized. DNR managers are loath to initiate legal actions or deny permits to carry out DNR's continuing supervisory duty due to a variety of factors, ranging from lack of staff resources to lack of political will.

D. Core Concept Four: Courts and Legislatures Have Expanded the Public Trust Definition of Waters and Public Rights

The definitions of navigability and public rights in waters have evolved significantly over Wisconsin's statehood. The courts and legislature have modified the public trust doctrine as water uses change to reflect the importance of water in people's lives and livelihoods. The modifications allow the law to adapt so that it can be as relevant today as it was 150 years ago, when the primary use of Wisconsin's waters was floating logs for commerce.

1. The Scope of Waters Protected by the Public Trust Doctrine Has Changed over Time

It is axiomatic that the state holds navigable waters in trust for the use and enjoyment of the public. The definition of navigability affects which waters are covered by the public trust doctrine; not only have the courts and legislature expanded which waters are considered navigable, but they have also moved beyond the traditional bounds of navigability to nonnavigable waters, shorelands, wetlands, and groundwater hydrologically connected to navigable waters.⁷⁵

Under English common law, the public trust originally only applied to tidal waters.⁷⁶ That limitation proved impracticable in the United States, and in 1871 the U.S. Supreme Court in *The Daniel Ball* held that the public trust doctrine applies to all waters, tidal or fresh, that are "navigable in fact."⁷⁷ Although Wisconsin initially followed the test established in *The Daniel Ball*, Wisconsin courts have over time modified the navigability test to reflect changing public uses and public rights in water. In the late 1800s and early

74. *Id.*

75. *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 799 N.W.2d 73, 84–85 (Wis. 2011) (focusing on groundwater); *Just v. Marinette Cnty.*, 201 N.W.2d 761, 768–69 (Wis. 1972) (focusing on wetlands and shorelands).

76. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1871).

77. *Id.* "[R]ivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* at 563.

1900s, the public trust doctrine applied to waters capable of floating the products of commerce to mill or market during a certain season, reflecting the primacy of water-based commerce at that time.⁷⁸ As early as 1914, the Wisconsin Supreme Court expanded its navigability test to include recreational boats.⁷⁹ Finally, for at least the last thirty years, the navigability test has encompassed all water bodies capable of floating any recreational boat during a certain recurrent period of the year.⁸⁰

The extent to which Wisconsin's public trust doctrine influences state management of additional, nonnavigable, artificial, or underground water is based on the interactions between these waters and navigable waters. As scientific knowledge about the interconnectedness of hydrology has increased, courts and the legislature have expanded the public trust doctrine to cover activities on shorelands, wetlands, nonnavigable waters, and groundwater adjacent to navigable waters.⁸¹ While the public trust doctrine will not suddenly convert private uplands adjacent to navigable waters into public trust property, it does limit the exercise of riparian rights.

In order to prevent harm to navigable waters, the public trust doctrine places a duty on the state to regulate riparian activities on uplands and pumping groundwater.⁸² For instance, in 1965, the legislature carried out that duty by creating shoreland regulations in Wisconsin's Water Quality Act⁸³ "[t]o aid in the fulfillment of the state's role as trustee of its navigable waters"⁸⁴ The legislature determined it was "in the public interest" to regulate human activities on lands "lying close to navigable waters."⁸⁵ The court approved this

78. If logs or rafts of lumber could float down a stream, the stream was considered navigable. See *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914); *Willow River Club v. Wade*, 76 N.W. 273, 276 (Wis. 1898); *Olson v. Merrill*, 42 Wis. 203, 204 (1877).

79. *Muench I*, 53 N.W.2d 514, 519 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952) (quoting *Diana Shooting Club*, 145 N.W. at 820).

80. *DeGayner & Co. v. Dep't of Natural Res.*, 236 N.W.2d 217, 222 (Wis. 1975); *Muench I*, 53 N.W.2d at 519 (stating that a water body is navigable in fact if it is capable of floating any "boat, skiff, or canoe, of the shallowest draft used for recreational purposes").

81. *Just v. Marinette Cnty.*, 201 N.W.2d 761, 768–69 (Wis. 1972); *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 799 N.W.2d 73, 84–85 (Wis. 2011).

82. *Just*, 201 N.W.2d at 768–69; *Lake Beulah*, 799 N.W.2d at 84–85.

83. Water Quality Act, 1965 Wis. Sess. Laws 1089.

84. WIS. STAT. § 281.31 (2011). This section provides that

[t]o aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safer and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

Application of the shoreland ordinance to lands within one thousand feet of the normal high-water elevation extended the state's trust responsibility. WIS. STAT. § 59.692(1) (2011).

85. WIS. STAT. § 281.31 (2011).

regulation of riparian rights because “[l]ands adjacent to or near navigable waters exist in a special relationship to the state.”⁸⁶ In some circumstances, the trust also applies to nonnavigable streams, again to protect downstream navigable waters.⁸⁷ Similarly, the trust applies to artificial navigable waters that are “directly and inseparably connected with natural, navigable waters.”⁸⁸

Most recently, the Wisconsin Supreme Court held the trust applies to groundwater permits for high capacity wells⁸⁹ to protect connected navigable waters.⁹⁰ The case arose out of a contested groundwater permit when the Village of East Troy sought to drill wells near Lake Beulah. In *Lake Beulah Management District v. State DNR*, the court emphasized the public trust doctrine is a “fundamental tenet” of Wisconsin’s Constitution that should be broadly construed to protect public rights in navigable waters.⁹¹ The court held DNR has both “the authority and a general duty to consider potential environmental harm to waters of the state when reviewing a high capacity well permit application.”⁹²

86. *Just*, 201 N.W.2d at 769 ; *see also* *State v. Kenosha Cnty. Bd. of Adjustment*, 577 N.W.2d 813, 818 (Wis. 1998) (confirming the state’s public trust jurisdiction over shorelands).

87. *Omernik v. State*, 218 N.W.2d 734, 739 (Wis. 1974). In certain statutorily defined situations, the trust applies to nonnavigable streams. *Id.* The legislature significantly expanded its jurisdiction over trust waters when it enacted section 30.18 of the Wisconsin Statutes to regulate diversions of water from lakes and streams. The Wisconsin Supreme Court reviewed this statute in *Omernik v. State* and concluded that the legislature expanded the statute’s application to nonnavigable waters in addition to navigable waters. *Id.* The court held that this expansion was consistent with article IX, section 1 of the Wisconsin Constitution. *See id.* Although the Constitution only applies the public trust to navigable water bodies, the court found that this was a “limitation upon the legislature to protect public rights in navigable waters from dissipation or diminution by acts of the legislature as trustee of such waters.” *Id.* The court held that the legislature can go further, as it did with section 30.18, and may permissibly extend its trust responsibilities to nonnavigable streams. *Id.* Moreover, the court reasoned that this was a logical extension to the then existing doctrine because it protects downstream waters that are navigable. *Id.* “[I]f nonnavigable tributaries upstream could be diverted or dissipated, there might be a rather dry riverbed downstream.” *Id.*

88. *Klingeisen v. Dep’t of Natural Res.*, 472 N.W.2d 603, 606 (Wis. Ct. App. 1991) (applying the trust to an artificial channel that connected to a natural navigable water); *see also* *State v. Vill. of Lake Delton*, 286 N.W.2d 622, 625 (Wis. Ct. App. 1979) (applying the trust to an artificial lake).

89. Wisconsin’s water laws regulate groundwater wells with the capacity to pump at least 100,000 gallons per day. WIS. STAT. § 281.34(1)(b), (2) (2009–10).

90. *Lake Beulah Mgmt. Dist. v. State Dep’t of Natural Res.*, 799 N.W.2d 73, 88 (Wis. 2011) (concluding legislative silence in the high capacity well statute does not mean that the legislature meant to abrogate DNR’s authority to intercede where the public trust doctrine is affected). For a focused look at applying the public trust doctrine to groundwater in the United States, see Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENVTL. L. 189 (2008).

91. *Lake Beulah*, 799 N.W.2d at 83–84.

92. *Id.* at 88; *see also id.* at 84–85 (citing WIS. STAT. § 281.34(1)(b) (2009–10)). However, the duty is not one that requires the DNR to initiate a scientific investigation of environmental impacts on every high capacity well permit. Rather, the DNR “must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state.” *Id.* at 76–77, 88. In this case, the court held that since the misfiling of a scientific affidavit resulted in the omission of the affidavit from the administrative record, DNR’s duty was not triggered. *Id.* at 77.

Hence, from the founding of the State until the current day, the courts and legislature have broadened the scope of the public trust doctrine in a way that reflects public usage of water and increased scientific understanding of the interconnectedness of all waters.

2. *The Legislature and Courts Have Broadened Public Rights Protected by the Public Trust Doctrine to Reflect the Public's Actual Use of Waters*

While expanding the scope of waters and activities regulated under the public trust doctrine, Wisconsin's courts and legislature have also continued to redefine public rights in those waters. Public rights to use waters for commercial navigation and fishing at the beginning of statehood evolved into rights to use waters for recreation,⁹³ scenic beauty,⁹⁴ water quality,⁹⁵ and other "nonpecuniary purposes."⁹⁶

Additionally, the public now has a right of access to navigable waters, without which the public may be unable to use and enjoy the state's waters.⁹⁷ In the *Town of Linn* decision, the court of appeals struck down a village and town's parking and boat launch requirements that favored local residents, recognizing "the general public certainly cannot benefit from the public trust doctrine if it is unable to access the waters."⁹⁸ Because parking, particularly boat trailer parking, and public boat launches were an integral part of accessing the lake, the court in *Town of Linn* concluded that DNR's authority under the public trust doctrine included the parking facilities and boat launches in addition to the navigable waters of the lake.⁹⁹

Clearly, public rights in navigable waters are broadly defined. However, an ongoing tension is how DNR is to balance public rights and the rights of riparians. This balance depends on several factors: laws that protect and conserve waters in their natural state, DNR water managers who adequately and appropriately implement these laws, and the beneficiaries' ability to right a wrong if faced with inaction or ineptness by the government trustee.

93. *R.W. Docks & Slips v. Dep't of Natural Res.*, 628 N.W.2d 781 (Wis. 2001); *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987); *Wis.'s Env'tl. Decade, Inc. v. Dep't of Natural Res.*, 271 N.W.2d 69, 73 (Wis. 1978).

94. *Clafflin v. Wis. Dep't of Natural Res.*, 206 N.W.2d 392, 398 (Wis. 1973); *Muench II*, 55 N.W.2d 40, 43 (Wis. 1952).

95. *Just v. Marinette Cnty.*, 201 N.W.2d 761, 768 (Wis. 1972); *Reuter v. Dep't of Natural Res.*, 168 N.W.2d 860, 861-63 (Wis. 1969).

96. *Gillen v. City of Neenah*, 580 N.W.2d 628, 633 (Wis. 1998).

97. *State v. Town of Linn*, 556 N.W.2d 394, 397 (Wis. Ct. App. 1996).

98. *Id.* at 402.

99. *Id.* at 404.

E. Core Concept Five: The Legislature May Grant Lakebed Title to Entities Other than the State, but Only Under Certain Limited Conditions

An issue that regularly resurfaces in water law is the legality of a state's attempt to grant trust property to private entities, such as individual developers, railroads, or corporations. The most famous case that illustrates the limits on the state trustee is *Illinois Central Railroad v. Illinois*.¹⁰⁰ In 1869 the Illinois Legislature granted ownership of a vast area of the bed of Lake Michigan in Chicago to the Illinois Railroad Company.¹⁰¹ The grant placed nearly the whole of the Chicago Harbor under the control of the railroad company.¹⁰² In 1873, after the Illinois Legislature attempted to repeal the grant of lakebed, the railroad's challenge to the repeal went to the U.S. Supreme Court.¹⁰³

In its analysis of the acts of the Illinois Legislature, the Court drew upon the purpose of the original grant of trust property—the beds and waters of all navigable waterbodies—to the states:

When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them.¹⁰⁴

The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.¹⁰⁵

Given that holding navigable waters and the lands beneath them in trust for the public is part of a state's sovereignty, the Court declared that such a grant “of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.”¹⁰⁶

In upholding the Illinois legislature's repeal of the lakebed grant, the Court repudiated in strong terms the attempted legislative grant of lakebed under the Chicago Harbor to a private railroad company.¹⁰⁷ The Court noted the “immense value” of the Chicago Harbor to the entire people of the state of Illinois.¹⁰⁸ The court reasoned that placing the charter “in the hands of a private corporation,” whose charter had a narrower commercial purpose than that of the government, “is a proposition that cannot be defended”.¹⁰⁹

100. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

101. *Id.* at 449–50.

102. *Id.* at 451.

103. *Id.* at 460.

104. *Id.* at 456 (quoting Chief Justice Taney in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)).

105. *Id.* (quoting Chief Justice Taney in *Martin*, 41 U.S. (16 Pet.) at 418).

106. *Id.* at 453. The U.S. Supreme Court “described the trust as essentially prohibiting a state from abdicating its general control over lands under navigable waters” Craig, *supra* note 4, at 69–70.

107. *Ill. Cent.*, 146 U.S. at 454.

108. *Id.*

109. *Id.*

It is hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held.¹¹⁰

The Court reasoned that a state may no more abdicate its public trust property “than it can abdicate its police powers in the administration of government and the preservation of the peace.”¹¹¹

The Court’s holding in *Illinois Central* should not be read, however, as an absolute prohibition against all lakebed grants. Instead, the Court limited situations where a state may make grants of trust property to situations where parcels “are used in promoting the interests of the public” or “can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”¹¹² Accordingly, the legislature may make grants of public trust property, but must delineate that the property may only be used for public purposes.¹¹³ Any grant of property for purely private purposes is void.¹¹⁴

Wisconsin courts have added important state law dimensions to the *Illinois Central* Court’s delineation of the scope and function of the public trust by providing more detail to the substantive limitation on alienation.¹¹⁵ The Wisconsin Supreme Court analyzes five factors to determine if a lakebed grant is consistent with the public trust doctrine.¹¹⁶ Under this analysis, the court considers all of the following: (1) whether public bodies will control the use of the area; (2) whether the area will be devoted to public purposes and open to the public; (3) whether the diminution of lake area will be very small when compared to the whole waterway; (4) whether any one of the public uses of the lake as a lake will be destroyed or greatly impaired; and (5) whether the impairment to the public’s right to use the lake for recreation is negligible compared to the greater convenience afforded to the public from the grant of the lake bed property.¹¹⁷

110. *Id.* at 454–55.

111. *Id.* at 453.

112. *Id.* at 452–53.

113. *Priewe v. Wis. State Land & Improvement Co. (Priewe II)*, 79 N.W. 780, 781–82 (Wis. 1899); *see also* *Kite*, *supra* note 40. The Wisconsin Supreme Court upheld a conveyance of submerged Lake Michigan land to a private company in *City of Milwaukee v. State* because it was part and parcel of a larger scheme, entirely public in nature, designed to enable the city to construct its outer harbor in aid of navigation and commerce.” Blumm, *supra* note 63, at 661 (citing *City of Milwaukee v. State*, 214 N.W.2d 820, 830 (Wis. 1923)).

114. *City of Milwaukee*, 214 N.W.2d at 830; *Priewe II*, 79 N.W. at 781–82; *see also* *Kite*, *supra* note 40.

115. *State v. Pub. Serv. Comm’n*, 81 N.W.2d 71, 73–74 (Wis. 1957).

116. *Id.*; *see also* *City of Madison v. State*, 83 N.W.2d 674, 678 (Wis. 1957) (applying the same five factors).

117. *State v. Pub. Serv. Comm’n*, 81 N.W.2d at 73–74. Additionally, the court established guidelines for when a lakebed grant and permit to fill would be clearly unconstitutional. *Id.* The court stated that the trust prevents the state from “making any substantial grant of a lake bed for a purely

However, even if a grant is valid under the five-factor analysis, a lakebed grant never transfers legal title from the state to the grantee.¹¹⁸ For instance, the legislature gave the City of Madison permission to fill a portion of lakebed under Lake Monona to build a civic center, while continuing to vest ownership and trust responsibilities in the state.¹¹⁹ Continued use of that trust property does not give the City of Madison title to the property.¹²⁰ Furthermore, the rights vested in grantees of lakebed are extremely limited.¹²¹ Like a license, the state is merely giving the grantee the ability to use the property, which is a privilege the state may revoke at any time.¹²²

The legislature has not attempted to grant the state's actual waters. However, as scholars develop the concepts of "water footprint" and "virtual water," tools to calculate how production of a good or service removes water from a watershed, one can see that some riparians are taking water out of the public domain and not returning it, without any express legislative authorization akin to what is required for a lakebed grant.¹²³ As global water availability decreases, an emerging question is whether this depletion is consistent with the public trust doctrine. The public may benefit from a critical evaluation of whether the legislature, consistent with its duty as trustee, should create legislation that authorizes water depletion under expressly articulated circumstances. One way to do this could be to adapt the court's five factor test for lakebed grants.

private purpose," and the court would not find a public purpose if the project "change[d] [the] entire lake into dry land" or destroyed "its character as a lake." *Id.* at 74.

118. *City of Madison*, 83 N.W.2d at 678.

119. *Id.*

120. *Id.* Wisconsin's law is in harmony with United States Supreme Court and scholarly conceptions of property rights; continued use of property does not give rise to anything more than usufructuary rights. *See generally* Reichelderfer v. Quinn, 287 U.S. 315, 317–19 (1932) (clarifying, in a case that did not involve the public trust, that property rights do not arise because certain expectations are formed, even if expectations are based on governmental action). "The [United States Supreme] Court's reluctance to recognize the creation of property rights by implication is founded in a concern . . . that the existence of such rights would constrain the sovereign in exercising governmental authority to achieve important public purposes." Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 948 (1993). There are, however, some limited situations where property loses its character as trust property. For example, when a river changes course due to forces of nature, the old streambed loses its trust limitations. *See Muench I*, 53 N.W.2d 514, 518 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952) (interpreting *Angelo v. R.R. Comm'n*, 217 N.W. 570, 575 (Wis. 1928)).

121. *City of Madison*, 83 N.W.2d at 678.

122. *Id.*; *see also* Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393, 396–97 (2009) (arguing [c]ourts never lose their power to revoke a transfer that they later find is not in the public interest").

123. *See generally* A. Y. Hoekstra & A. K. Chapagain, *Water Footprints of Nations: Water Use by People as a Function of Their Consumption Pattern*, 21 WATER RES. MGMT. 35 (2007).

F. Core Concept Six: Private Riparian Property Use May Not Encroach on Public Rights in Navigable Waters

Whether a riparian owner abuts a navigable stream, river or lake, the riparian's title is limited by the public trust.¹²⁴ Since the late 1800s, this has meant that the riparian holds title subject to the superior public easement for use.¹²⁵ Riparian owners take title to such lands with notice of the public trust and subject to the burdens created by it.¹²⁶ In fact, it is "beyond the power of the state to alienate [the beds of navigable waters] freed from such [public] rights."¹²⁷ In upholding riparian ownership of the beds of navigable rivers to the center point of the river, the Wisconsin Supreme Court clarified that, "[a]s long as the state secures to the people all the rights they would be entitled to if it owned the beds of navigable rivers, it fulfills the trust imposed upon it by the organic law, which declares that all navigable waters shall be forever free."¹²⁸ Hence, all navigable waters are subject to the public trust regardless of ownership of the beds under a waterbody.

The courts and legislature have delineated private property rights in water in very limited terms. There are numerous constraints on water "rights," from requirements that water be used beneficially, reasonably, and without interfering with public rights, to a recognition that the right is merely usufructuary.¹²⁹ Furthermore, water rights are use rights only; although one sometimes hears reference to ownership or sales of water, this is really a misnomer because only the state, as sovereign, holds ownership of the water itself.¹³⁰ Riparian rights, subject to regulation, include the rights to use the shoreline, access the water, use waters for reasonable domestic, agricultural,

124. See *Willow River Club v. Wade*, 76 N.W. 273, 274–75 (Wis. 1898). On a stream, a riparian holds title to the center of the stream, while on a lake a riparian holds title to the ordinary high water mark. *Id.*

125. *Id.* at 274. "Of course, such owners take and hold such title [to the middle of the stream] for the use of the public." *Id.*

126. *Diana Shooting Club v. Husting*, 145 N.W. 816, 818–19 (Wis. 1914).

127. *Id.* at 819.

128. *Id.*

129. See *R.W. Docks & Slips v. Dep't of Natural Res.*, 628 N.W.2d 781, 788–89 (Wis. 2001); Sax, *supra* note 120, at 944.

130. "The sovereign power itself, therefore, cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 456 (1892) (quoting Chief Justice Taney in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 418 (1842)). Similar to the United States Supreme Court, the Wisconsin Supreme Court declared a private riparian "has no property in the particles of water flowing in the stream, any more than it has in the air that floats over land." *Willow River Club*, 76 N.W. at 277. In California, the development of water markets to allow transfers of appropriative water rights appears inconsistent with this legal framework. ROBERT GLENNON, *UNQUENCHABLE: AMERICA'S WATER CRISIS AND WHAT TO DO ABOUT IT* 253–71 (2009) (describing transfer of water rights from agricultural to urban uses in California without mentioning public trust doctrine implications).

and recreational purposes, and construct a pier in aid of navigation.¹³¹ Unlike most states, Wisconsin does not allow a party to convey riparian rights to a nonriparian, except to allow passage across land to access water.¹³²

When riparian rights conflict with public rights protected by the public trust, the riparian rights are secondary.¹³³ This principle holds true in Wisconsin, where the public right to use navigable water limits the rights of the riparian.¹³⁴ One of the earliest pronouncements of this limitation was the Wisconsin Supreme Court's holding in *Willow River Club v. Wade*, where, in 1898, it stated that a private riparian "has no property in the particles of water flowing in the stream, any more than it has in the air that floats over land."¹³⁵ The court held that a riparian had no property in the fish swimming past his or her land, and a riparian could not interfere with a public trust beneficiary's right to fish.¹³⁶

More recently, the Wisconsin Supreme Court refused to allow a riparian to convert a marina with 407 boat slips into privately owned "dockominiums."¹³⁷ The marina previously rented boat slips to the public on an annual basis, but then attempted to create a condominium by subdividing the riparian right of dockage into 407 fractions that it would sell to individuals.¹³⁸ The court held in *ABKA v. DNR* that "ABKA's conversion of its marina to a condominium form of ownership violated the public trust doctrine . . . because it attempted to convey condominium property contrary to Wis. Stat. § 30.133 (1995–96), which prohibits certain transfers of riparian rights."¹³⁹ In other words, a riparian may not convey the riparian right of dockage without conveying the riparian land.¹⁴⁰

In summary, although a riparian holds title to his or her land and has rights to use the water adjoining that property, these rights must accommodate and not infringe upon the public's overarching rights in navigable waters.¹⁴¹ This

131. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 866 (Wis. 2002) (citing *Ellingsworth v. Swiggum*, 536 N.W.2d 112 (Wis. Ct. App. 1995); *Sea View Estates Beach Club, Inc. v. State Dep't of Natural Res.*, 588 N.W.2d 667 (Wis. Ct. App. 1998)); see Quick, *supra* note 53, at 116.

132. WIS. STAT. § 30.133 (2009–10); *ABKA*, 648 N.W.2d at 865; *Berkos v. Shipwreck Bay Condominium Ass'n*, 758 N.W.2d 215, 222–23 (Wis. Ct. App. 2008) (invalidating easement to nonriparian for pier placement).

133. *Willow River Club*, 76 N.W. at 277; see also *Nekoosa Edwards Paper Co. v. R.R. Comm'n*, 229 N.W. 631, 632 (Wis. 1930) (holding that riparian cannot obstruct navigation or public use of the waters). For a critique of the "erosion of private property," see Lazarus, *supra* note 17, at 668–74.

134. *Willow River Club*, 76 N.W. at 277; see also *Nekoosa Edwards Paper Co. v. R.R. Comm'n*, 229 N.W. 631, 632 (Wis. 1930) (holding that riparians cannot obstruct navigation or public use of the waters).

135. *Willow River Club*, 76 N.W. at 277.

136. *Id.*

137. *ABKA*, 648 N.W.2d at 857.

138. *Id.*

139. *Id.*

140. WIS. STAT. § 30.133 (2009–10).

141. *Willow River Club*, 76 N.W. at 277; see also *Nekoosa Edwards Paper Co. v. R.R. Comm'n*, 229 N.W. 631, 632 (Wis. 1930).

legal principle, however, often conflicts with the reality that “landowners want to do whatever they want with their property,” free from government interference.¹⁴² It is exactly this tension that puts DNR water managers in an inevitable and unenviable position of conflict, as described in Part II.

G. Core Concept Seven: A Healthy Public Trust Requires Active Enforcement by the Trustees and Beneficiaries

In order for the public trust doctrine to provide and protect a healthy water commons, there needs to be active public participation, transparency in decisions impacting shared resources, accountability to the public beneficiaries, and enforcement to prevent and remedy private encroachments. One could write an entire article on these topics, but here the focus is on enforcement. The best way to illuminate enforcement issues is to view them in the context of what is happening in the field. Part II.D addresses Core Concept Seven in further detail.

II. LEGAL DOCTRINE MEETS WATER MANAGEMENT REALITY

In Wisconsin, the legislature, DNR, and state courts have been instrumental in defining the scope of public rights in water as well as the responsibility of the trustee. The legislature, as the primary trustee for the state’s water resources, codified part of the common law public trust doctrine and delegated primary responsibility over the trust to DNR.¹⁴³ DNR, in turn, employs water resource managers who make daily determinations that impact public trust resources. Finally, the courts resolve concrete legal disputes concerning public trust assets and articulate the underlying legal doctrine.

To evaluate the utility of the public trust doctrine’s protections, it is valuable to understand how these three institutions interact. Scholars extensively review court decisions and legislation, but the literature is missing an understanding of how state water managers in the United States view and protect the public trust. In Part I of this article, I described how the courts and the legislature shaped the seven core concepts of the public trust doctrine. The shortcoming of analyzing court decisions alone is that published opinions cannot describe how the trust is actually administered. So in Part II, I assess the DNR’s ability to implement the doctrine. This Part illustrates how DNR applies the public trust doctrine, providing the reader with a vantage point for assessing the doctrine’s utility to protect water resources. While this study focuses on Wisconsin water managers, this Part is particularly useful for those who seek to

142. Interview with Confidential Interviewee No. One (Dec. 10, 2010) (on file with author).

143. *Lake Beulah Mgmt. Dist. v. State Dep’t of Natural Res.*, 799 N.W.2d 73, 84 (Wis. 2011). The court concluded that the legislature accomplished this delegation through Wisconsin Statutes section 281.11 and section 281.12. *Id.* at 84.

compare and contrast other states' institutional supports or barriers to public trust implementation to the Wisconsin DNR.

Part II.A explains the rationale and research methodology of this study. Part II.B outlines DNR's authority over key public trust issues and introduces the primary decision makers, whose duty it is to protect the waters of the state. Part II.C discusses systemic and institutional structures that undermine DNR's ability to function effectively as a trustee. Part II.D describes Core Concept Seven—enforcement—in further detail and the deterrence problem caused by a lack of vigorous enforcement of the public trust. Part II.E identifies the ongoing and systemic problem of excessive political interference with regulatory decisions. I conclude in Part III by offering a variety of options to better align water management with established legal doctrine.

A. *Research Rationale and Methodology*

Regulators make thousands of decisions every year about the public trust that never reach a court of law. While the entire Water Division at DNR has a trustee role over Wisconsin's navigable waters, the most immediate and regular impact comes from DNR's Water Regulation and Zoning Specialists (Water Specialists). As described more fully in Core Concept Two above, the legislature delegated trust authority to DNR and partly codified the public trust and riparian rights in chapters 30 and 31 of the Wisconsin Statutes.¹⁴⁴ Water Specialists carry out these statutes and the common law public trust mandates daily by deciding whether to issue a permit allowing a private riparian's exercise of rights, what management strategies will best balance competing uses of water, and when to initiate an enforcement action to stop private encroachment onto public trust property.

One needs to understand the Water Specialists' perspectives, the influences on their decisions, and the systems in which they work to better assess the impact of the public trust doctrine on contemporary water management issues. Through qualitative research interviews with the trustees, one can discern how Water Specialists regularly make decisions regarding the trust and the impediments to fully implementing the legal doctrine.¹⁴⁵

With this in mind, I undertook a series of qualitative research interviews with almost two-thirds of DNR's current Water Specialists, randomly selected but representing all regions of the state. I also interviewed key upper management personnel and lawyers, some of whom are retired.¹⁴⁶

144. WIS. STAT. §§ 30–31 (2009–10); WIS. STAT. §§ 281.11–.12 (2011) (creating DNR).

145. This type of research aims to describe themes in the interviewee's world. *See* STEINER KVALE, INTERVIEWS: AN INTRODUCTION TO QUALITATIVE RESEARCH INTERVIEWING 54 (1996).

146. Part II of this Article is based on narratives obtained in research interviews with DNR staff who administer the state laws regulating the use of navigable waters. This Article largely reflects the perspective of the field staff. There will always be a variety of perspectives on events, and no one person holds the truth. My primary purpose in focusing on the field staff's views is to show their motivations and influences in their decisions.

TABLE 1: Research methods

Number of water regulation and zoning specialists	30
Number of water regulation and zoning specialists interviewed	19
Number of regions ¹⁴⁷	5
Number of regions represented in study	5

I maintained the confidentiality of current DNR staff by omitting names of DNR employees from this Article and uniformly using the male pronoun when describing their responses. Two retired political appointees—former DNR Secretary George Meyer and former Water Division Administrator Todd Ambs—are notable exceptions to this procedure. I also interviewed Peter Peshek, a well-known Wisconsin environmental attorney who has had the unique experience of serving as the first Public Intervenor¹⁴⁸ prior to representing corporate clients and private riparians before DNR. An analysis of the data shows how DNR applies the public trust doctrine and, thus, provides information regarding the doctrine’s utility to protect water resources from degradation.

B. DNR Is the Central Trustee to Guard the State’s Waters Against Private Taking for Narrow Special Interests

1. Introducing the Trustees: DNR’s Water Specialists

“I stay in water regulations because this is the most important position at DNR: if we don’t have water or usable water, nothing else will survive.”¹⁴⁹

This research focuses primarily on Water Specialists who administer chapters 30 and 31 of the Wisconsin Statutes regulating riparian activities.¹⁵⁰ Every day the Water Specialists encounter conflicts that arise between competing individual interests and public interests in the near shore area. To get a better understanding of how the Water Specialists implement the public

147. DNR’s five regions are Northeast, Northern, South Central, Southeast, and West Central. There is also a Central Office in Madison; however, there are only managerial level or statewide water regulation staff in that office. *DNR Service/Satellite Center Locations by Region*, WIS. DEP’T OF NATURAL RES., <http://dnr.wi.gov/org/caer/cs/ServiceCenter/ssbyregion.html> (last visited Jan. 18, 2012).

148. Wisconsin used to have an Assistant Attorney General who acted as the Public Intervenor. This Assistant Attorney General had a statutory charge, including standing, to protect Wisconsin’s natural resources. See JODI HABUSH SINYKIN, WIS. STEWARDSHIP NETWORK, *AT A LOSS: EIGHT YEARS 6–7* (Jan. 2004), http://www.midwestadvocates.org/media/publications/PIOReport_final.pdf.

149. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

150. WIS. STAT. §§ 30–31 (2009–10).

trust doctrine, I describe the type of people who occupy such a position, their motivations, and the context in which they function.

Unlike DNR regulations that are prescribed by minimum federal standards, such as the Clean Air Act and Clean Water Act, the public trust doctrine is based on interpretations of the state constitution, statutes, and cases. Thus, the public trust doctrine is particularly malleable to more localized interests and political pressure.¹⁵¹ The sheer volume of regulated actors further complicates matters. Unlike the defined universe of the businesses and municipalities regulated by the Clean Air Act and Clean Water Act, which in Wisconsin involves a few thousand entities, the public trust doctrine involves protecting public rights for millions of individuals sharing a resource.

Moreover, compared to other DNR positions, the Water Specialist position is “high stress” because the staff interact with private property owners, navigate that sometimes contentious line between private and public property, and try to show individuals how their activities on private property impact public rights in the state’s waters.¹⁵² As one Water Specialist noted, “Landowners like . . . regulations when applied to a neighbor they think is harming shared water resources, but not when it applies to what they want to do on their land.”¹⁵³ Often landowners “want to do what they want with their land” and do not take kindly to DNR regulating them.¹⁵⁴ Another Water Specialist agreed, stating that “[P]eople want their little house in the country, but then they want to place their driveway in a wetland and drive ATVs through streams.”¹⁵⁵ One Water Specialist’s experience has shown him that “[I]andowners want to get as much out of the project as they can and they don’t care about public resource impacts. There is a lot of hatred for DNR and what it stands for.”¹⁵⁶ One upper manager observed, “This is the most difficult job in the agency because of the interactions with private property owners.”¹⁵⁷

Water Specialist conflicts extend beyond private interactions with property owners. A more experienced Water Specialist reflected, “I’ve never had a permit denial overturned, but I am bad mouthed in the local paper with distorted half truths.”¹⁵⁸ He added, “I need to be vigilant to protect against taking public resources and putting them into private hands so I’ve become a very unpopular person in my area.”¹⁵⁹

151. See Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

152. Interview with Confidential Interviewee No. Eight (Dec. 15, 2010) (on file with author); Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author); see also Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author) (asserting this is the most difficult job at the agency because of the interactions with private property owners).

153. Interview with Confidential Interviewee No. Two (Dec. 16, 2010) (on file with author).

154. Interview with Confidential Interviewee No. One (Dec. 10, 2010) (on file with author).

155. Interview with Confidential Interviewee No. Eight (Dec. 15, 2010) (on file with author).

156. Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author).

157. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author).

158. Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author).

159. *Id.*

The Water Specialist position requires someone who can understand the pertinent legal statutes and regulations and work as a generalist to bring in a variety of experts to understand the range of impacts caused by a proposal, such as historic preservation, wildlife, plants, and construction runoff.¹⁶⁰ The Water Specialist must be able to communicate clearly and comfortably with a wide variety of riparian landowners, ranging from vacation homeowners, to farmers, to big box developers.¹⁶¹ Increasingly, Water Specialists also need to explain and justify their decisions with state legislators.¹⁶²

Almost all of the interviewed Water Specialists had formal educational backgrounds of either a B.S. or M.S. in natural resource management, biology, or related fields.¹⁶³ Most of the Water Specialists came to DNR because they are avid hunters, fishers, or nature enthusiasts.¹⁶⁴ They tend to take pride in their job; one asserted, "I'm honored to be a trustee of the state's waters."¹⁶⁵ However, another Water Specialist captured the challenge: "Natural resource agencies tend to attract people who are scientific and idealistic, but these qualities don't necessarily make for a good regulator."¹⁶⁶ Thus, finding Water Specialists with this combination of skills is a more difficult than one might imagine.

2. *Educating the Public About Best Practices May Advance Water Protections*

I'm from the political right and I know that when I can explain to the public how a project, like making a pond that warms up water right next to a Class 1 trout stream, will take away your ability to have an exceptional fishing area, you understand it. But when I'm painted as a bureaucrat with this pervasive anti-government sentiment from my own political party, we all lose out.¹⁶⁷

Many Water Specialists emphasized how they educate riparians, contractors, and the public to encourage sustainable practices. One Water Specialist said, "I teach people, talk to school groups, lake associations, and others to help people understand the regulations—I explain there is a scientific reason why you can't fill a wetland."¹⁶⁸ Others try to educate people about why the regulations exist, but are not always able to deter actions that harm waterways.¹⁶⁹

160. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

161. *Id.*

162. *See infra* Table 2: Political Influence over DNR Water Decisions.

163. Interviews with Confidential Interviewees One through Nineteen (on file with author).

164. *Id.*

165. Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author).

166. Interview with Confidential Interviewee No. Eight (Dec. 15, 2010) (on file with author).

167. Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

168. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

169. Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author).

Some Water Specialists use peer pressure and competition to protect the state's public waters. One such Specialist has contractors send him photos of completed projects so that "when I see really good work, I promote it among the other contractors and riparians."¹⁷⁰

Educating the regulated public about the purpose of water laws and best practices on private property are important ways to encourage compliance and prevent problems and conflicts. As discussed below, training and encouragement of landowner education is now very limited at the DNR, so there is no systematic approach to educating the public. Instead, it is done on a piecemeal basis and is not practiced across the board by all Water Specialists as a regular part of their interactions with landowners.

3. *Landowner-Oriented Approach: Apologetic Regulators*

The interests of riparians may overly influence the focus of many Water Specialists at the expense of the overall public trust. Although one upper manager expressed concern that private riparians view Water Specialists as "antagonists," this research indicates Water Specialists view themselves as helping riparians complete their projects.¹⁷¹

Although Water Specialists are water enthusiasts, they tend to take a practical approach to balancing riparian activities with protecting water resources. "We aren't able to have zero degradation of the resources so I try to determine what degradation is acceptable and get a positive benefit for the public interest I'm trying to protect."¹⁷² One Water Specialist said he "wants to meet customer service requirements" so he makes "the experience easy for the permit applicant" and "explains the law so they understand."¹⁷³ In a similar sentiment, a Water Specialist reflected:

I try to put myself in the landowner's shoes and do my best to explain the purpose behind our water regulations. Ninety nine percent of the projects can be done right with little impact. When I get a bad project, I usually can turn it around. I go out of my way to work with people.¹⁷⁴

Another Water Specialist shared this sentiment and stated that he "tries to steer landowners into projects that fit general permit standards so they pay a lower application fee and have a quicker process."¹⁷⁵

170. Interview with Confidential Interviewee No. Six (Dec. 8, 2010) (on file with author).

171. *Compare* Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author) with Interview with Confidential Interviewee No. Eighteen (Jan. 26, 2011) (on file with author), and Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

172. Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author).

173. Interview with Confidential Interviewee No. Eighteen (Jan. 26, 2011) (on file with author).

174. Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

175. Interview with Confidential Interviewee No. Two (Dec. 16, 2010) (on file with author). General permits lay out standards in the code and "don't give discretion to the permit writer. There's no public notice and comment period, and they cost less." Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author).

At times, perhaps as result of a combination of political pressure, upper management vetoes, and inexperience, the newest Water Specialists approach being a water regulator almost apologetically. As long as people are flexible with project design, “any project can receive a permit,” according to one Water Specialist.¹⁷⁶ He added, “I’m trying not to ask so much of the landowner that someone up the ladder at DNR will oppose my decision.”¹⁷⁷ Upper management encourages this landowner-oriented approach, partly as a way to cope with budget cuts and a reduced work force.¹⁷⁸ Another way management has dealt with reduced budgets and staff is to implement a triage approach to regulating Wisconsin’s waters, as explored below.

C. Systemic Changes Undermine DNR’s Ability to Function Effectively as a Trustee of the State’s Waters

DNR Water Specialists are restricted from acting to the full extent of their legal charge. A variety of systemic factors constrain the Water Specialists, including budget cuts that reduce staff, cause high turnover, result in lack of training, and limit field work; and statutory changes that narrow DNR jurisdiction.

1. Budget Cuts, Staff Reductions, and High Turnover Undermine the Trustees’ Ability to Effectively Protect Public Resources

Staff reductions, high turnover, and retirement trouble the Water Specialist position. A Water Specialist supervisor expressed concern about the current lack of watershed staff and noted that future retirements will “further erode both their numbers and their experience.”¹⁷⁹ One Water Specialist, who plans to retire early, said he was “tired of being the fall guy for politicians who blame the economic situation on public employees.”¹⁸⁰ Yet, retirements of “the most experienced at DNR” will result in a “loss of institutional memory.”¹⁸¹ By a supervisor’s assessment, the watershed program is “working without 40 percent of needed staff . . . and after retirements positions will not be filled” due to shrinking state budgets.¹⁸² The staff perspective is similar. “Every year staff reductions have gotten worse. The geographic area I cover keeps getting larger.”¹⁸³ Another said, “we’ve lost three Water Specialists since I started, the

176. Interview with Confidential Interviewee No. Two (Dec. 16, 2010) (on file with author).

177. *Id.*

178. Water Specialists steer people toward general permits because management set a statewide goal of having “50 percent of the projects fall under general permits.” Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author).

179. Interview with Confidential Interviewee No. Twenty-one (Dec. 6, 2010) (on file with author).

180. Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author).

181. Interview with Confidential Interviewee No. Twenty-one (Dec. 6, 2010) (on file with author).

182. *Id.*

183. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author); *see also* Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author).

vacancies won't be filled, and I just keep covering more counties."¹⁸⁴ This was a familiar refrain throughout the interviews.¹⁸⁵

The Water Specialist position is also plagued with high staff turnover.¹⁸⁶ A Water Specialist observed that the program is "notorious for losing people because the job seems less stable" than other jobs at DNR.¹⁸⁷ "There is pressure to shrink or eliminate the [waterway protection] program because developers want to proceed without DNR."¹⁸⁸ The funding source for the positions also contributes to the high turnover rates. General Program Revenue (GPR) funds the Water Specialist positions, and "every time there is a budget problem the first thing that gets cut is GPR," according to former Water Division Administrator Todd Ambs.¹⁸⁹ Former Administrator Ambs explained, "The Water Specialist positions are the most reliant on GPR of any position in the Water Division. As a result, when there is a vacancy, it is hard to fill a GPR-funded position because there is no job security."¹⁹⁰

Connecting staff reductions to water impacts, a Water Specialist observed that, "when vacancies aren't being filled, things will slip through the cracks; if the new administration downsizes staff, the impact on waters could be tremendous."¹⁹¹ Water Specialists observe a domino effect of neighbors copying each other's illegal activities:

These waters are for the public. You get one individual landowner who wants to extend shoreline into the water and he can't understand the impact on the lake, but the DNR has scientists who are looking at the big picture. Once one does it, the other neighbors are going to want to do it too. With reduced staff, DNR won't have time to follow up on these smaller individual actions to look at the big picture cumulative impacts. I already see this happening because since I started the number of counties I cover has tripled.¹⁹²

Another Water Specialist shared a similar worry: "An individual may not realize the impact they're having as a single person, but because others start copying the bad behavior, cumulatively it causes harm."¹⁹³ Thus, the

184. Interview with Confidential Interviewee No. Twelve (Dec. 13, 2010) (on file with author).

185. *E.g.*, Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author).

186. As a source of comparison, the author interviewed eighteen Water Specialists in 1999. Only two of the eighteen interviewees were still Water Specialists in 2010 when the author conducted the interviews for this study. *Compare* Interviews with Confidential Interviewees One through Eighteen (1999) *with* Interviews with Confidential Interviewees One through Twenty-Three (2010) (on file with author).

187. Interview with Confidential Interviewee No. Six (Dec. 8, 2010) (on file with author).

188. *Id.*

189. Interview with Todd Ambs, former Water Div. Adm'r, Wis. Dep't of Natural Res (July 6, 2011).

190. *Id.*

191. Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author).

192. *Id.*

193. Interview with Confidential Interviewee No. Two (Dec. 16, 2010) (on file with author).

interviews emphasized the potential for degrading shared water resources due to reduced staff and experience.

2. *Workload Reductions and Their Impact on the Waters*

As the old saying goes, necessity is the mother of invention. So it has been for DNR, which has creatively addressed budget and staffing reductions in an attempt to avoid sacrificing water resource protections. Staffing reductions led DNR management to streamline and reduce workloads for staff: “We have to figure out how to get the same work accomplished with less time and still protect waters.”¹⁹⁴ Some of these changes have had positive results, by creating efficiencies that do not appear to sacrifice water quality. But other changes have made it more difficult for Water Specialists to protect the public trust.

Workload reductions combined with Act 118,¹⁹⁵ which increased the number of permit exemptions and general permits, have changed the Water Specialist position to one that is “more focused on paper pushing than onsite field work.”¹⁹⁶ Management has eliminated preapplication site visits and wetland delineations for landowners.¹⁹⁷ The elimination of preapplication site visits is a dramatic change from the role of a Water Specialist as captured by the author’s first round of 1999 interviews, which showed Water Specialists typically shaped projects to avoid the impacts to water resources during preapplication site visits.¹⁹⁸

However, eliminating site visits has had positive as well as negative results. One Water Specialist captured this tension: “While I could guide landowners in the right direction with a preapplication site visit, I did waste a lot of time with people to shape a project and, then once they got the bids on the cost, they would drop it.”¹⁹⁹ The downside to not having a preapplication site visit is that “sometimes I get blindsided by an application and I wish the landowner had met with me prior to committing a bad idea to paper.”²⁰⁰ These changes are also burdensome on project applicants with limited means because more project applicants have to hire consultants to do work that DNR previously provided for free.²⁰¹ Some property owners may forego these up front costs and forge ahead with projects that harm water resources.

Water Specialists are still able to meet with individuals before they commit to an application, but this meeting has to happen at DNR’s office rather

194. Interview with Confidential Interviewee No. Eight (Dec. 15, 2010) (on file with author).

195. 2003 Wis. Act 118, *available at* <https://docs.legis.wisconsin.gov/2003/related/acts/118>.

196. Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author).

197. *E.g.*, Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author).

198. Scanlan, *supra* note 6, at 181.

199. Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author).

200. *Id.*

201. *See* Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author) (discussing DNR no longer delineates wetlands for free so landowners need to hire private consultants to do this work).

than onsite.²⁰² One Water Specialist said this meeting allows him to give input ahead of time to “design a project DNR would be able to permit.”²⁰³ In rural areas, requiring a meeting at the DNR office is a barrier to communication because landowners need to drive fifty or more miles to get to a DNR office.²⁰⁴ “I think this feeds into hostility from landowners,”²⁰⁵ which thus makes it more difficult for DNR to do its job as a trustee.

A Water Specialist who has been in the job since before workload reductions was concerned because he is not able to do his job as well as he used to. “I cannot get into the field, and I have to make decisions on inadequate information.”²⁰⁶ For example, a Water Specialist explained that the wetland maps are very inaccurate, so he looks at aerial photos since he is no longer able to assess property in person.²⁰⁷ Similarly, another Water Specialist said, “I have to rely on a computer review, but this doesn’t always answer the questions.”²⁰⁸ An upper manager concurred: “[W]e know we can give better advice if field staff can see the project site,” but DNR can “no longer afford to do this.”²⁰⁹

Despite the challenges of desk reviews, DNR now has better computer tools to aid in efficient and accurate water management decisions. A Water Specialist said, “Some of the tools we have now—surface water data viewer—allow me to spatially understand the situation better. It helps me know whether a site visit is necessary. The tool just gets better and better with more layers of information.”²¹⁰

Another streamlining innovation is that DNR routes all initial permit applications through two intake specialists in Green Bay and Madison. The intake specialists process whole categories of permit applications without ever sending them to a Water Specialist for review.²¹¹ For instance, DNR management set a statewide goal of having “50 percent of the projects fall under general permits.”²¹² DNR Management then directed the intake specialists to take a “triage” approach to processing these general permits; for activities that DNR designates as “high compliance and low environmental risk,” the intake specialist processes the application based on a self-certification by the applicant.²¹³ Thus, the applicant self-certifies that the project meets all

202. Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

203. Interview with Confidential Interviewee No. Eight (Dec. 15, 2010) (on file with author).

204. Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author).

205. Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

206. Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author).

207. Interview with Confidential Interviewee No. Twelve (Dec. 13, 2010) (on file with author).

208. Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author).

209. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author).

210. Interview with Confidential Interviewee No. Six (Dec. 8, 2010) (on file with author).

211. Memorandum from DNR Waterways Pol’y and Mgmt. Team to Water Mgmt. Specialists, Reg’l Watershed Supervisors, & Waterway Prot. Section Staff 1 (Nov. 3, 2009) (on file with author).

212. Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author).

213. Memorandum from DNR Waterways Pol’y and Mgmt. Team to Water Mgmt. Specialists, Reg’l Watershed Supervisors, & Waterway Prot. Section Staff 1 (Nov. 3, 2009) (on file with author).

permit “eligibility criteria and will meet all permit conditions.”²¹⁴ This triage directive appears to help Water Specialists work smarter and faster, and allows them to focus their attention on the biggest problem areas. While DNR is for the first time tracking compliance statewide for general categories of waterway permits,²¹⁵ DNR is not tracking the impact of these changes on water resources, and that missing information is essential to understanding the ecological impacts.

Additionally, a critical legal question is whether DNR is abdicating its trustee duty by delegating some regulatory power to riparian landowners. Self-regulation may run afoul of the state’s constitutional public trust responsibilities. The legislature has occasionally tried to delegate public trust responsibilities to local units of government, instead of DNR.²¹⁶ Wisconsin courts have consistently reined in this legislative action and have held that the public trust in water is a matter of statewide concern that requires DNR oversight.²¹⁷ Yet, this DNR management directive appears to go even further than these invalid legislative actions because the DNR is delegating trust responsibilities to individual riparian landowners whom DNR is charged by statute to regulate. A practical problem with DNR’s approach is that the trustees are relying on the riparian to know the relevant legal requirements and ecosystem impacts of their projects. Another problem is people could be “lying on their applications,”²¹⁸ which may result in an underestimation of the scope of the impact on water resources.

In their efforts to streamline regulations and respond to an ever shrinking workforce, DNR is tapping into greater efficiencies by relying on better computer technology. They have stopped providing free consulting services to landowners and are focusing intake of permit applications to a couple of locations. However, by allowing riparians to self-certify their compliance with the law, DNR may have gone too far by delegating their trust responsibilities to those DNR is supposed to be regulating. Ultimately, targeted water resources monitoring is needed to assess the actual impact of streamlining and self-regulation.

For instance, the DNR intake specialist accepts self-certification of compliance for general permits for biological shore erosion control structures, clear span bridges, some types of dredging, pilings, landscape ponds not in wetlands, etc. *Id.* tbl.1.

214. *Id.*

215. Email to author from Todd Ambs (Feb. 27, 2012) (on file with author).

216. *Muench II*, 55 N.W.2d 40, 46 (Wis. 1952); *Vill. of Menomonee Falls v. Dep’t of Natural Res.*, 412 N.W.2d 505, 514 (Wis. Ct. App. 1987); *Menzer v. Vill. of Elkhart Lake*, 186 N.W.2d 290, 297 (Wis. 1971).

217. Courts have rejected and invalidated legislative attempts to inappropriately delegate trustee responsibilities to local governments without retaining significant oversight. *Muench II*, 55 N.W.2d at 46; *Vill. of Menomonee Falls*, 412 N.W.2d at 514. DNR oversight is an essential component to ensure that the “paramount interest of the state is safeguarded.” *Muench II*, 55 N.W.2d at 46. Even with DNR oversight, any delegation must be limited and provide definite standards for the delegee to follow. *See Menzer*, 186 N.W.2d at 297; *see also Sax, Public Trust, supra* note 7, at 523.

218. Interview with Confidential Interviewee No. Six (Dec. 8, 2010) (on file with author).

3. DNR Has Eliminated Essential Training for Water Specialists

Training Water Specialists is essential to produce confident staff, consistency across the state, and high-quality decisions based on law and science.²¹⁹ However, training has been significantly cut in the past three years, leading to confounding effects on the trustees and public waters.

Ten years ago, orientation training was systematic and extensive; it involved week-long modules on every section of statutes the Water Specialists implement.²²⁰ A Water Specialist noted, “We had a week of training just on dredging, and another week just on piers.”²²¹ Continued professional development was regular and ongoing, and included quarterly statewide meetings.²²² Training continued within offices on an informal basis: “We were fully staffed in my Basin so I had experienced people who mentored me.”²²³

Around 2007, formal training ceased.²²⁴ DNR had reduced its legal staff and the remaining attorneys no longer had “time to train field staff or do much enforcement.”²²⁵ A Water Specialist who was hired in 2007 said he “received no formal training.”²²⁶ One Water Specialist, who started work after the training cuts, explained, “I have to research topics on my own rather than having been trained. It makes me less confident that I’m doing the right thing. I spend a lot more time trying to consult with people and figure out the right thing to do.”²²⁷ In response to training cuts, one experienced Water Specialist stated that he “started training new people” in his region on his own.²²⁸ He added, “We have to do it. Training strikes at the heart of consistency, which is what the public wants.”²²⁹ This approach, however, is not one that other regions are taking, nor is it coordinated through the Central Office for consistency statewide.

Additionally, DNR management eliminated statewide quarterly meetings, where Water Specialists obtained ongoing professional development and legal updates.²³⁰ Water Specialists had also used those meetings to share information

219. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

220. Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author).

221. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author).

222. *Id.*

223. *Id.*

224. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author). Similarly, there is no formal training program for DNR managers. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author).

225. *Id.*

226. Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author).

227. Interview with Confidential Interviewee No. Eleven (Dec. 13, 2010) (on file with author).

228. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

229. *Id.*

230. *E.g.*, Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author); Email to author from Todd Ambs (Feb. 27, 2012) (on file with author) (clarifying that each DNR program determined what they could still afford to do given budget cuts, and the Water Specialists’ Management Teams made the decision to eliminate these meetings).

about the implementation of the law to encourage consistency across the state.²³¹ As a result, one Water Specialist said, “I’m losing a sense of what’s happening around the state because we so rarely gather as a group of Water Specialists now.”²³²

Due to a lack of initial and ongoing formal training, many Water Specialists are not adequately prepared to implement the public trust doctrine. This directly impacts the management of the public’s water resources because untrained, inexperienced Water Specialists are less able to understand when an action violates the law or how to navigate the complex world of enforcement than those with training. This is a particularly serious issue for wetlands protection. For example, one Water Specialist explained how he used word of mouth to reduce requests to put ponds in wetlands; these requests are prevalent in other parts of the state.²³³ He spreads the word that he will not issue a permit because he assumes whoever undertakes the activity will place some of the dredged materials back in the wetland, which is prohibited.²³⁴ “I discourage this behavior in order to protect the resources.”²³⁵ It takes a high degree of confidence, born by training and experience, to take these steps to protect water resources, and this particular Water Specialist had such confidence because he came on when training was in full force.²³⁶ Below, in Part II.D, I describe how this lack of training and inexperience is connected to a cranberry grower that has illegally altered 150 acres of wetlands.

4. *Recent Statutory Changes Weaken Water Protections*

*“Our ability to be a trustee keeps getting taken away with so-called ‘streamlining’ of the laws.”*²³⁷

According to the Water Specialists, Wisconsin’s existing laws do not adequately protect public rights in navigable waters from common threats, such as shoreland development, congested waterways, and wetland destruction, and from emerging threats, like water privatization and diversions.²³⁸ This Part examines two commonplace activities that exemplify the Water Specialists’

231. Interview with Confidential Interviewee No. Seven (Dec. 9, 2010) (on file with author).

232. *Id.*

233. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author).

234. *Id.* Wisconsin law prohibits the discharge of dredge and fill material into a wetland. WIS. STAT. § 281.36(2) (2009–10).

235. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author).

236. *Id.*

237. Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

238. The Great Lakes Compact governs water management in the Great Lakes. The first likely application of the Great Lakes Compact to a diversion of water out of the Great Lakes Basin will come from Waukesha, Wisconsin. For details on the issues related to this potential diversion, see Melissa Kwaterski Scanlan et al., *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 VT. J. ENVTL. L. 39, 85–97 (2006). It remains to be seen how Wisconsin’s public trust doctrine will be applied to this diversion application.

concerns: placing piers in navigable waters and grading on the banks of navigable waters.

a. Conflicts Between the Riparian Right to Build a Pier and Public Rights in Navigable Waters

Private riparians' placement of piers illustrates the clash of riparian rights and public rights in navigable waters. This controversy also highlights the disconnect between Water Specialists, who are civil servants trained in natural resource management and science, and the Governor's political appointees in DNR upper management.

Piers are ubiquitous yet controversial in a water-rich state like Wisconsin. On the Water Specialist side of the controversy, one Water Specialist complained that people fail to understand an "unauthorized pier is an extension of private property into public waters."²³⁹ As such, regulating piers cannot result in a taking of private property;²⁴⁰ however, from the riparian perspective, a pier is a right that comes with ownership of land adjacent to a waterbody.

By statute, pier structures need to be consistent with riparian navigational needs.²⁴¹ DNR used a Pier Planner that presumed a dock six feet wide was reasonable.²⁴² This six-foot standard was a compromise between what was reasonable for the riparian right of navigation and what was reasonable to manage multiple uses of navigable waters.²⁴³

Yet thousands of riparians pushed the limit on what is considered reasonable, and built larger and more permanent structures into public waters than allowed by law.²⁴⁴ Some of Wisconsin's well known public trust court decisions revolve around DNR's attempt to protect public rights by limiting a riparian's placement of piers and docks in order to prevent damage to public rights in clean, habitat-rich navigable waters.²⁴⁵ DNR's study of the issue "showed that 85% of all existing piers" complied with the six foot standard.²⁴⁶ Non-conforming piers, though making up a small percentage of all piers, have been so controversial that a Water Specialist involved in a successful public

239. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

240. *R.W. Docks & Slips v. Dep't of Natural Res.*, 628 N.W.2d 781, 788–89 (Wis. 2001) (upholding agency denial of permit for completion of boat slip construction to protect emergent weed bed, and denying takings claim because riparian rights are always subordinate to public rights).

241. WIS. STAT. §§ 30.12–.13 (2009–10).

242. Memorandum from N. Region Water Mgmt. Staff to Martin Griffin and Tom Jerow (Feb. 5, 2008) [hereinafter *N. Region Staff Memorandum*].

243. *See id.*

244. Interview with Todd Ambs, former Water Div. Adm'r, Wis. Dep't of Natural Res. (July 6, 2011) (on file with author).

245. *E.g., R.W. Docks & Slips*, 628 N.W.2d 781; *Hilton v. Dep't of Natural Res.*, 717 N.W.2d 166 (Wis. 2006); *Sterlingworth Condominium Ass'n v. Dep't of Natural Res.*, 556 N.W.2d 791, 798 (Wis. Ct. App. 1996).

246. *N. Region Staff Memorandum*, *supra* note 242.

trust lawsuit on one pier had to be transferred out of the region “because he was persona non grata.”²⁴⁷

Throughout the decade of 2000–10, a vocal group of riparians pushed to change the law to allow oversized piers and grandfather in existing non-compliant piers.²⁴⁸ In 2008, state legislators responded by advancing Assembly Bill 297 and Senate Bill 169.²⁴⁹ In an unusual display of organized assertion of the public trust doctrine, DNR’s Northern Region Water Specialists sent a strongly worded memorandum to DNR supervisors, including the Water Division Administrator Todd Ambs.²⁵⁰ They started the letter by calling on public servants and officials to “have the courage to put the needs of the next generation ahead of the next election cycle.”²⁵¹ The Water Specialists expressed their concern that these bills, contrary to case law, “give more rights to the riparian owner than to the public.”²⁵² They argued that these laws would “[a]llow each riparian to ‘stake out a claim’ on public lakebed, with additional rights of the riparian to put out multiple docks, a loading platform, a swim raft, and/or a water trampoline. Waterways will become increasingly congested and water use conflicts will increase.”²⁵³ The Water Specialists opposed the bills because they thought the low standards in the bills would permit actions that compromise “natural scenic beauty, water quality, and fish and wildlife habitat that we all work so hard to protect.”²⁵⁴

Despite the Northern Water Specialists’ efforts, “the law just went through and the Water Administrator never responded to [their] concerns.”²⁵⁵ One of the Water Specialists involved in this memo thought the Water Administrator ignored them because the Administrator was a political appointee sensitive to heightened public scrutiny and criticism.²⁵⁶ In reflecting on the controversy, the former Water Administrator said, “I needed wardens with me at this time because I had death threats about the pier rules.”²⁵⁷ He remembered the Water Specialists’ Memo and responded that the conflict over nonconforming piers was just “too high of a political cost for DNR because we did not have the votes in the legislature. If we had taken a position of no change to the rules they would have just done what they wanted and the result would have been much

247. Interview with Todd Ambs, former Water Div. Adm’r, Wis. Dep’t of Natural Res. (July 6, 2011) (on file with author).

248. *Id.*

249. *N. Region Staff Memorandum, supra* note 242.

250. *Id.*; Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author) (stating he sent memorandum to Water Division Director).

251. *N. Region Staff Memorandum, supra* note 242 (quoting David M. Walker, U.S. Comptroller Gen., *The Privilege of Public Service* (Oct. 24, 2006)).

252. *Id.*

253. *Id.*

254. *Id.*

255. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author).

256. *Id.*

257. Interview with Todd Ambs, former Water Div. Adm’r, Wis. Dep’t of Natural Res. (July 6, 2011) (on file with author).

worse for the resource.”²⁵⁸ According to Former Administrator Ambs, “The problem is that in general people don’t understand and don’t care about the negative impacts from oversized piers. We had to grandfather in some of the nonconforming piers in order to get the new rules passed that more clearly prohibit new oversized platforms.”²⁵⁹

The controversy around the pier rules underscores the disconnect between Water Specialists in the field and the Governor’s political appointees. They work in vastly different worlds, one focused on navigating public opinion, political power, and making judgments about acceptable tradeoffs to protect resources, and the other focused on protecting scenic beauty, water quality, and fish habitat without an inside understanding of the legislative dynamics. This is partly a problem of clear communication across DNR and with the wider public. It is not entirely clear how the DNR will bridge these divides in the future, but it should aim to strike a better balance.

b. Water Protection Consequences of Act 118’s Changes to Grading Regulations

In 2004, the Wisconsin Legislature passed Act 118, which among other things reduced DNR jurisdiction over grading projects on the banks of navigable waters.²⁶⁰ Prior to Act 118, DNR regulated the removal of topsoil or grading of 10,000 square feet or more on the banks of navigable waterways.²⁶¹ Additionally, the law had broadly defined the bank of a waterway “to include any area where water can drain ‘without complete interruption into the waterway.’”²⁶² Act 118 changed that definition to limit DNR’s jurisdiction.²⁶³

A retired DNR staffer, who was involved in the negotiations leading up to the passage of Act 118, described how the Department of Administration Secretary, not DNR, ultimately “called the shots” on changing DNR’s jurisdiction.²⁶⁴ Another person involved in the negotiations recalled that “the Department of Administration Secretary did not know what the public trust doctrine was and wasn’t willing to ask for advice.”²⁶⁵ This retired staffer

258. *Id.*; Email to author from Todd Ambs (Feb. 27, 2012) (on file with author) (explaining he thought the legislature would have had a veto-proof vote).

259. Email to author from Todd Ambs (Feb. 27, 2012) (on file with author); Interview with Todd Ambs, former Water Div. Adm’r, Wis. Dep’t of Natural Res. (July 6, 2011) (on file with author). As Ambs put it, the new rules tell people that “It is not OK to take your living room and move it onto public waters.” *Id.*

260. 2003 Wis. Act 118, § 89.

261. PAUL KENT & TAMARA DUDIAK, WISCONSIN WATER LAW: GUIDE TO WATER RIGHTS AND REGULATIONS 44 (2001), available at <http://learningstore.uwex.edu/assets/pdfs/g3622.pdf>. Water Specialists were only to issue permits for grading on riparian lands when the project would not injure public rights in waters, among other factors. *Id.*

262. *Id.* (quoting WIS. ADMIN. CODE NR 340.02(2)).

263. WIS. STAT. § 30.19 (2009–10).

264. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author).

265. Interview with Confidential Interviewee No. Twenty-Three (2010) (on file with author).

reflected that the changed definition of “bank” allowed more grading to occur on shorelines without triggering DNR’s jurisdiction; he also noted that the Act changed the hearing process to put a greater burden on public parties who sought to protect the water commons and changed the burden of proof and standard to get a stay, making it more difficult to stop a harmful project from going forward.²⁶⁶ These provisions undermine public trust protections, as evidenced by a couple of examples below.

Act 118 also created exemptions and general permits that cover a wide variety of projects.²⁶⁷ These exemptions include activities that have a reasonable likelihood of harming public rights in waterways. For instance, a permit is no longer required to remove topsoil or grade 10,000 or more square feet on the bank of a navigable waterway if the project is agricultural.²⁶⁸ Projects in highly urbanized areas are also exempt; if the project is in a county with 750,000 people or more, it is free to proceed without a permit.²⁶⁹ Further, DNR’s inability to review grading projects that meet the general permit criteria “lightens the work load, but dilutes our ability to protect the public trust.”²⁷⁰ In one case, a person applied for a general permit and then graded a larger area that would have required an individual permit.²⁷¹ The Water Specialist noted, “they were issued a \$1300 citation and a \$1000 after-the-fact permit,” but the Specialist questioned the deterrent effect when “this costs less than some of the doors on those places.”²⁷²

A Water Specialist compared DNR’s pre-to-post Act 118 jurisdiction for building projects that involve grading on a Class 1 trout stream:

I would like to assert jurisdiction on grading projects, but the definition of “banks” limits what I can do. I’m working on a condominium project on the last remaining Class 1 trout stream in one of my counties and half of the project is covered by a general permit for grading and the rest isn’t. I’m concerned that the area outside my jurisdiction should be looked at in its entirety to prevent cumulative impacts on the trout stream. If I could, I would reduce thermal impacts and put in better buffers, but I can’t because of Act 118. Prior to Act 118, I know that a residential development along the same trout stream required 300 feet of upland buffer, compared to just a 75-foot setback from wetlands near the stream for this new condo development. I think the standards are inadequate, and I’d like to do more,

266. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author).

267. WIS. STAT. § 30.19 (2009–10). General permits are applicable statewide. An applicant simply files a notice with DNR that the project fits under the general permit. If DNR fails to respond otherwise within thirty days, the activity is automatically covered by the general permit. WIS. STAT. § 30.206.

268. WIS. STAT. § 30.19(1m) (2009–10).

269. *Id.*

270. Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author).

271. *Id.*

272. *Id.*

but as long as the project meets certain requirements for a general permit, I can't do what needs to be done to protect the trout stream.²⁷³

In another region, a Water Specialist observed where a riparian landowner graded all the way to the water on a steep bank, resulting in erosion that deposited sediment into a large hole in the lake and killed fish.²⁷⁴ This Water Specialist said that under Act 118 he no longer had jurisdiction to address the erosion, and the county "didn't do anything about it."²⁷⁵ DNR could have brought an enforcement action under section 30.03(4) of Wisconsin's Statutes, which authorizes DNR to bring a legal action to stop "a possible infringement of the public rights relating to navigable waters" even when the action is not regulated by chapter 30.²⁷⁶ But DNR did not enforce this codified common law public trust protection because its Water Specialist did not understand DNR's broad authority. He had only been on the job a few years so he lacked experience and had started just as DNR was cutting its formal training program.²⁷⁷ However, even if the Water Specialist understood the statutory enforcement authority, reduced resources or interference by upper management could also limit DNR's effectiveness, as discussed in Parts II.D and II.E below.

D. Enforcement and the Deterrence Problem in a State with Weak Enforcement of Water Laws

Public trust protections are only as good as the trustees' enforcement of those constitutional, common law, and statutory provisions. To have a healthy water commons, there must be active enforcement to prevent and remedy private encroachments and trustee neglect.

In Wisconsin, DNR has broad authority to enforce the public trust.²⁷⁸ Beneficiaries of the trust likewise have the authority to bring legal actions to enforce the trust under certain circumstances.²⁷⁹ I outline the special enforcement role of DNR and explore how enforcement is actually being carried out. I then highlight the increasingly important enforcement role of the beneficiaries of the trust.

1. DNR Has Broad Legal Authority to Enforce the Public Trust in Navigable Waters

Chapters 30 and 31 of the Wisconsin Statutes codify some riparian and public trust rights to use the state's navigable waters.²⁸⁰ DNR may enforce

273. Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author).

274. Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author).

275. *Id.*

276. WIS. STAT. § 30.03(4)(a) (2009–10); *see also infra* Part II.D.

277. Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author).

278. WIS. STAT. § 30.03(4) (2009–10).

279. *Gillen v. City of Neenah*, 580 N.W.2d 628, 636 (Wis. 1998); *State v. Deetz*, 224 N.W.2d 407, 413 (Wis. 1974).

280. WIS. STAT. §§ 30–31 (2009–10).

violations of chapters 30 and 31 through the process described by chapter 23.²⁸¹ Under this process, DNR Conservation Wardens are empowered to issue citations, make arrests with or without warrants, and file complaints and summons to violators of any aspect of chapters 30 and 31.²⁸² Either the District Attorney or the Attorney General then prosecutes these matters.²⁸³

Additionally, chapter 30 provides separate enforcement authority. In *ABKA v. DNR*, the Wisconsin Supreme Court held that section 30.03(4) of the Wisconsin Statutes provided DNR with “jurisdiction to pursue any ‘possible violation’ of the public trust doctrine as embodied in [chapter] 30.”²⁸⁴ In *ABKA*, the court reviewed an attempt to convert a marina into privately-owned condominiums. The developers stretched the bounds of imagination when they invented these condominiums, which the court ultimately saw as a legal fiction. The condominium units consisted of a lock box about the size of a Post Office box,²⁸⁵ which came with the use of a boat slip for residential purposes.²⁸⁶ Clearly, people were purchasing the boat slip to be used as a “dockominium” because the lock box had no independent use. Rejecting an argument that DNR lacked jurisdiction, the court held DNR had broad jurisdiction under section 30.03(4) because *ABKA*’s conversion of the marina to condos “presented several possible violations of the public trust doctrine.”²⁸⁷ Further, the court held the dockominium scheme violated the public trust doctrine.²⁸⁸

In addition to violations of chapter 30, the plain language of the statute also authorizes DNR to enforce any infringement of public rights:

If the department learns of . . . a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the department may . . . order a hearing under [chapter] 227 concerning the possible . . . infringement . . . in order to fully protect the interests of the public in navigable waters.²⁸⁹

Hence, if DNR learns of a “possible infringement” of public rights in navigable waters, even if chapter 30 does not specifically prohibit the offending actions,

281. WIS. STAT. § 23.50-62 (2011).

282. WIS. STAT. § 23.50 (2011) (procedure in forfeiture actions); WIS. STAT. § 23.55 (2011) (complaint and summons); WIS. STAT. §§ 23.56-23.57 (2011) (arrest with and without warrant); WIS. STAT. § 23.62 (2011) (issuance of citation).

283. E-mail from Confidential Interviewee No. Twenty-Two to author (May 18, 2011, 14:17 CST) (on file with author). The Attorney General prosecutes in rare cases where the District Attorney so requests based on staff limitations or case complexity. *Id.*

284. *ABKA Ltd. P’ship v. Wis. Dep’t of Natural Res.*, 648 N.W.2d 854, 859 (Wis. 2002).

285. *Id.* at 857.

286. *Id.* at 857-58.

287. *Id.* at 861.

288. *Id.* at 857.

289. WIS. STAT. § 30.03(4)(a) (2009-10).

DNR has jurisdiction under section 30.03(4) to take enforcement action to protect public interests in navigable waters.²⁹⁰

2. *Does DNR Have the Adequate Funding, Staffing and Training to Enforce the Public Trust Doctrine?*

Despite DNR's broad enforcement authority, the implementation of that authority lags, in part, due to insufficient staff to enforce the law. In addition to the Water Specialist staff reductions discussed above, between 2007 and 2010, DNR reduced its number of staff attorneys, enforcement specialists, and wardens, all of whom take part in the enforcement of public rights in the state's waters.²⁹¹ Additionally, a lack of adequate training and high turnover—two of the structural problems identified above in Part II.C—compound problems with any complicated enforcement actions. Thus, I explain below how this relates to the rise in voluntary enforcement actions in Part II.D.2.a and explain widespread problems with illegal wetland filling in Part II.D.2.b.

a. *A Rise in Voluntary Instead of Formal Enforcement Actions*

Due to staff reductions and an increase in each Water Specialist's territory, many Water Specialists attempt voluntary enforcement efforts before pursuing formal actions.²⁹² This means a Water Specialist asks a landowner to remedy the violation. The request can range from applying for an after-the-fact permit to taking remedial action such as "remove the illegal wetland fill" to let the wetland recover.²⁹³ These voluntary enforcement actions do not involve

290. WIS. STAT. § 30.03(4)(a) (2009–10). While not an enforcement action, the Wisconsin Supreme Court's decision on the public trust duty and authority of DNR reinforces this plain language reading of chapter 30.03(4). *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 799 N.W.2d 73, 84–86 (Wis. 2011) (explaining broad delegation of authority and duty to "manage, protect, and maintain the waters of the state.")

291. See Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author) (noting there are only 1.5 Full Time Equivalent enforcement staff for his whole region on all environmental media "so things languish" with enforcement staff). As of January 2012, there are two Environmental Enforcement positions that have been vacant since 2007, and there are thirty-six vacant conservation wardens; however, staffing problems for vacant attorney positions may soon be resolved by new hires that will increase the number of attorneys. Email from Steven Sisbach, DNR Bureau of Law Enforcement, to author (Jan. 28, 2012, 12:57 CST). In a recent article on enforcement actions decreasing dramatically in 2011, "DNR officials say the decrease is partly caused by an enforcement staff that's been hit hard by budget cuts." Further, according to Steven Sisbach, section chief in the Department of Environmental Enforcement, "seven enforcement positions are vacant out of a full-time enforcement staff of 20.5. The agency has approval to fill four of the positions and is recruiting for the jobs." Ron Seely, "Shift in Philosophy: DNR Writing Fewer Tickets," *Wis. St. J.*, April 30, 2012, http://host.madison.com/wsj/news/local/environment/shift-in-philosophy-dnr-writing-fewer-tickets/article_dbfe52f6-91f8-11e1-9e2b-001a4bcf887a.html.

292. E.g., Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author); Interview with Confidential Interviewee No. Eleven (Dec. 13, 2010) (on file with author).

293. Some find voluntary enforcement necessary because they lack the authority to issue a citation without a warden and a referral to an attorney is "too time consuming." Interview with Confidential

payment of any penalties or fines, and often are not committed to writing, but one Water Specialist explained, “I pursue voluntary enforcement because the quicker I can get restoration done, the better chance I have for success on the landscape.”²⁹⁴

While voluntary enforcement may be faster, it is often problematic. In one situation, a landowner dug ponds in about an acre of “pristine wetland that had been completely dominated by native species” and left a pile of dredged materials. Yet, the Water Specialist simply told the landowner he needed to restore the wetlands and left it up to the landowner as to how to do that.²⁹⁵ The Water Specialist did not suggest a restoration completion date, did not require a wetland restoration specialist to do the work, and did not put anything in writing; “I just verbally instructed him to put the wetland back the way it was, and I’ll check back in half a year to see if restoration is complete.”²⁹⁶

If a landowner refuses to take voluntary action, however, DNR’s only recourse is to move for formal enforcement. This typically involves requesting that a warden issue a citation, then going through DNR’s “stepped enforcement” process with multiple DNR employees, and convincing the District Attorney or the Attorney General to prosecute the violation.²⁹⁷ Many Water Specialists do not view formal enforcement as a favorable course of action because it is time consuming and often cases are never referred to the Attorney General for enforcement, sometimes for unstated reasons and other times for political reasons.²⁹⁸ Seeing water law violations go unprosecuted discourages Water Specialists and reduces their ability to be effective regulators because private riparians know they can get away with violations.²⁹⁹

A lack of enforcement and the mimic effect—where one neighbor copies another when they see their neighbor filling a wetland or extending a shoreline without prosecution—is a tremendous barrier to landowner compliance with the law and thus a barrier to protection of the water commons. The dynamics are common sense: think about a “speed trap” versus an area of highway the police rarely patrol. Imagine if people knew that in addition to rarely patrolling,

Interviewee No. Eleven (Dec. 13, 2010); *see also* Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author) (noting lack of citation authority).

294. Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author).

295. Interview with Confidential Interviewee No. Eleven (Dec. 13, 2010) (on file with author).

296. *Id.*

297. E-mail from Confidential Interviewee No. Twenty-Two to author (May 18, 2011, 14:17 CST) (on file with author); *see also* *Environmental Enforcement*, DEP’T OF NATURAL RES, <http://dnr.wi.gov/org/es/enforcement/envenf.htm> (last visited Nov. 9, 2011) (explaining stepped enforcement process).

298. *E.g.*, Interview with Confidential Interviewee No. Eleven (Dec. 13, 2010) (referral to an attorney is too time consuming); Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author) (during referral process state legislator contacted DNR and upper managers stopped the referral because potential defendant was a “job creator”); Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author) (discussing people who work their political connections “get off without paying a fine”).

299. Interview with Confidential Interviewee No. Twelve (Dec. 13, 2010) (on file with author).

the police were unable to issue citations for speeding or prosecute violations without going through a number of other people and time-consuming steps. The expected results are obvious: increased speeding and potentially increased accidents.

Similarly, another Water Specialist described how he was losing his ability to get voluntary enforcement because riparians knew that formal enforcement was “floundering and not resulting in referrals” for prosecution.³⁰⁰ “This started a few years back with an Enforcement Specialist who didn’t seem to want to enforce wetland violations. Now the word has gotten out that DNR doesn’t follow through so people just ignore me when I try to get them to do voluntary enforcement.”³⁰¹ He described a specific example where a group of developers put three hundred feet of road through forested wetlands and subdivided lots without a permit.³⁰² DNR held an enforcement conference and told the developers to apply for an after-the-fact permit and remove the road.³⁰³ The developers ignored DNR, did not apply for a permit, and did not remove the road.³⁰⁴ But, despite this continuing noncompliance, “DNR’s Enforcement Specialist just rolled over” and took no further action.³⁰⁵ As a result, “people will take a chance and violate the law because DNR doesn’t follow through.”³⁰⁶

By contrast, a Water Specialist who saw an enforcement referral through to a win in the Wisconsin Supreme Court has seen a contagious deterrent effect on other landowners.³⁰⁷ The lawsuit “sent the right message.”³⁰⁸

One anomalous Water Specialist who was particularly knowledgeable about enforcement conducted compliance inspections of the permits he issued; he attributed his efforts to the “gung ho” Enforcement Specialist in his office who “encourages and supports staff.”³⁰⁹ This Water Specialist’s focus was on preventing problems by meeting with contractors before construction and then conducting an inspection during construction to ensure that grading was “being done right.”³¹⁰ Even with his active onsite presence, he estimated that he could achieve voluntary compliance without formal enforcement only “about 50 percent of the time.”³¹¹

Moreover, a Water Specialist from another region said he is not supposed to do the kind of compliance investigations described by his colleague in the

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

308. *Id.*

309. Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author).

310. *Id.*

311. *Id.*

preceding paragraph, with the exception of “looking at the ones Madison [Central Office] selects through annual compliance monitoring and the ones on which they get complaints.”³¹² This change in enforcement, he thought, was due to budget cuts, as compliance investigations used to be a routine Water Specialist duty: “When I started, I might follow up on any of the permits I issued, but I’m told not to do this now.”³¹³ An upper manager confirmed, “while staff used to go out and inspect almost all of the general permits they issued, now site inspections should be rare.”³¹⁴

Many Water Specialists commented on the change in DNR’s mode of enforcement. Due to budget cuts, formal enforcement is circumscribed by the Central Office, which selects specific sites for compliance reviews. On one hand, for the first time the Central Office is analyzing compliance to determine which types of activities are most prone to abuse, and some Water Specialists may be doing more systemic compliance reviews as a result.³¹⁵ However, since it is difficult for DNR to pursue formal enforcement, Water Specialists often attempt to achieve compliance through voluntary enforcement, which is typically not documented. If a lawbreaker fails to complete DNR’s requested voluntary efforts, Water Specialists have limited abilities to seek recourse without initiating formal enforcement. Because of the barriers they perceive to formal enforcement, many violations are unaddressed.³¹⁶ This cycle undermines the deterrent effect of enforcement actions, and Water Specialists are seeing an increasing number of water law violations.

b. Special Problems with Enforcement of Wetland Violations

Because wetlands are vital to water quality, wildlife habitat, and flood prevention, wetland protection has widespread implications for public rights in navigable waters.³¹⁷ Wisconsin’s legal protections for wetlands cover all wetlands, even those that are determined to be “nonfederal” and unregulated by the Clean Water Act.³¹⁸ DNR regulates wetlands based on “common law ‘public trust doctrine’ principles which have evolved from our Wisconsin Constitution, statutory provisions which have codified those principles, and on

312. Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author).

313. *Id.*

314. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author).

315. Email to author from Todd Ambs (Feb. 27, 2012) (on file with author).

316. Perception is, of course, in the eye of the beholder; former Water Division Administrator Ambs, contrary to the Water Specialists, thought the Doyle Administration did more water enforcement than prior administrations. However, he cited to things like stormwater violations and groundwater wells that are outside the purview of the Water Specialists who are enforcing chapters 30 and 31 of the Wisconsin Statutes. Email to author from Todd Ambs (Feb. 27, 2012) (on file with author).

317. Michael Cain, *Wisconsin’s Wetland Regulatory Program*, in WETLANDS LAW AND REGULATION 677, 680 (Am. Law Inst.–Am. Bar Assoc. ed., 2008), available at SN076 ALI-ABA 677 (Westlaw).

318. *Id.* at 679.

Sections 404 and 401 of the Clean Water Act.”³¹⁹ In essence, DNR approval is required to “discharge dredge or fill material” in a wetland.³²⁰ Additionally, Wisconsin has a Shoreland Wetland Zoning program, “which requires county, village and city ordinances to prohibit fill in wetlands. This is a state-mandated, but locally administered, program which covers areas within 1000 feet of lakes and 300 feet of streams or rivers.”³²¹

Legal protections for wetlands are only meaningful if they are implemented and enforced. In most parts of the state, Water Specialists said illegal filling of wetlands was a big problem.³²² Water Specialists described illegal wetland fills that ranged from very small, less than an acre, to large, seven acres, to extreme, 150 acres.³²³ A seasoned Water Specialist observed in his region filling wetlands is “prevalent in riparian areas along lakes and rivers for houses and roads.”³²⁴ He suspected he did not “know about half of them.”³²⁵ Similarly, a Water Specialist from another region reflected that he had a few wetland fill cases that were “very visible to the public, and if those kind of blatant violations take place, imagine how many hidden ones exist.”³²⁶ For instance, he recalled: “A guy put in [a] 130-foot-long driveway through an obvious wetland area, an alder swamp, that was visible from a main highway with thousands of people driving by in a week and no one called to report it. I discovered it when I drove on that road.”³²⁷

Enforcing wetland violations can be time-consuming and technical. Without experienced and well-trained Water Specialists, the supply of which is dwindling, finding and enforcing wetland violations is unlikely. For example, a county zoning administrator noticed a cranberry grower altering a large tract of land with heavy equipment, and asked a newly minted Water Specialist if this required a wetland permit.³²⁸ The Water Specialist, in turn, asked someone

319. *Id.*

320. WIS. STAT. § 281.36(2) (2011).

321. Cain, *supra* note 317, at 687 (citing WIS. STAT. §§ 281.31, 59.692, 61.351, 62.231).

322. *E.g.*, Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author) (describing filling as a consistent problem throughout his region). Only a couple of Water Specialists reported illegal wetland filling was not a substantial problem. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author) (observing people of greater wealth in his region are “pretty good about asking for permits”); Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author) (“Since we got enforcement authority in 2001 and have done wetland education with the Realtors Association, I see fewer big wetland cases.”).

323. Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Eleven (July 27, 2011) (on file with author).

324. Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author).

325. *Id.*

326. Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author).

327. *Id.*

328. Interview with Confidential Interviewee No. Eleven (Dec. 13, 2010) (on file with author). This water specialist joined DNR shortly after training had been cut. He said, “I was supposed to get about a dozen units of training, but I’ve been on the job three years and have only gone through about six to eight of these.” *Id.*

from the U.S. Army Corps of Engineers what he should do, “but we were both brand new on the job, so we dropped it.”³²⁹ None of the regulators, local, state, or federal, had enough training to identify this wetland violation and take appropriate action at the early stages. Later, the U.S. Army Corps of Engineers took the lead on the investigation and found a “huge violation—*fifty acres of wetlands* where the grower cleared all the trees and wetland vegetation, bulldozed land, brought in fill and built up the surface.”³³⁰

Nor was this an isolated incident; this case arose in late 2008, when the U.S. Army Corps of Engineers uncovered a cluster of wetland violations by cranberry growers.³³¹ This Water Specialist later reported that the Army Corps had uncovered impacts to *150 acres of wetlands* spread across four different sites.³³² If the government regulators had been more experienced, they might have taken swifter action to stop these unpermitted wetland alterations before they grew to such an extreme level.

Similarly, another Water Specialist described a landowner who impacted six to seven acres of wet meadow wetlands to build a house, driveway, garage, and two ponds.³³³ Because the Water Specialist was inexperienced when he initiated the action, he had to work on the case for over ten years before he saw any results.³³⁴ In 2010, the landowner finally signed a settlement agreement with DNR where the landowner agreed to restore four to five acres of wetland.³³⁵

By contrast, a very experienced Water Specialist took a more proactive approach when he learned of a landowner who built almost two thousand feet of recreational roads through wetlands (bogs dominated by black spruce and tamarack) contiguous to a small lake.³³⁶ The landowner constructed the roads without permits over a period of two years. DNR caught him when a DNR pilot flew over this land during a wolf count; the pilot then gave the Water Specialist photos of wetland fills.³³⁷ The Water Specialist described how he handled the situation:

You need to know what you’re looking for. I saw these photos and then compared them to historical aerial photos to determine what had happened and when. I had to go to the courthouse and determine ownership. I then had to confront the landowner and delineate the wetlands and the illegal

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author).

334. *Id.* He faced multiple delays and obstacles, partly because these wetlands were not on DNR’s maps. *Id.*

335. *Id.*

336. Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author).

337. *Id.*

fill. After that I had to work through the formal enforcement process. This took three years, but he has paid a fine and removed the fill.³³⁸

As this example illustrates, DNR must have experienced and knowledgeable staff who can identify violations and effectively enforce the law in order to realize wetland protection. Voluntary enforcement would be more useful if DNR Water Specialists could memorialize the agreements in an enforceable contract or pursue formal enforcement when quicker, less formal methods fail. Without those options, DNR's Water Specialists currently struggle to deter future violations and enforce protections for Wisconsin's valuable wetlands.

3. *DNR and the Attorney General's Authority to Challenge the Legislature's Abdication of the Public Trust Is Very Limited*

Under section 30.03(4), the Wisconsin legislature granted DNR broad authority to bring an enforcement action against any possible violation of public rights by riparian landowners, as discussed above.³³⁹ What is questionable, however, is DNR's authority to protect public rights from harm caused by the legislature.

As explained in Core Concept Two, the legislature, as the primary trustee of the state's waters, has a duty to take positive action to protect the public trust. This duty is grounded in common and constitutional law.³⁴⁰ When the legislature passes a law that may violate the public trust doctrine, an initial matter is whether DNR or the Attorney General has standing to challenge the statute's constitutionality.

DNR, acting without a private litigant, does not have standing to challenge the constitutionality of a state statute regarding an alleged violation of the public trust doctrine.³⁴¹ The court issued this holding in a case that arose out of a dispute about setting the Ordinary High Water Mark (OHWM) for Big Silver Lake. After DNR set the level for the OHWM, the Silver Lake Sanitary District sued.³⁴² With litigation pending, the legislature passed two statutes: one set a different OHWM for that lake and another delegated the task of setting the OHWM for lakes to sanitary districts instead of DNR.³⁴³ DNR challenged the constitutionality of these statutes on several grounds, including a violation of

338. *Id.*

339. WIS. STAT. § 30.03(4) (2009–10).

340. *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927). The State of Wisconsin's Legislative Reference Bureau alerts legislators of their duty: "The legislature, as the state's representative, must not only take action to prevent endangerment of the trust but it must also take affirmative steps to protect the trust." Kite, *supra* note 40.

341. *Silver Lake Sanitary Dist. v. Dep't of Natural Res.*, 607 N.W.2d 50, 54–55 (Wis. 1999), *review denied*, 612 N.W.2d 734 (Wis. 2000).

342. *Id.* at 51.

343. *Id.*

the public trust doctrine.³⁴⁴ In *Silver Lake Sanitary District v. Wisconsin DNR*, the court of appeals rejected DNR's claims, holding that DNR could not challenge the constitutionality of a state statute without the involvement of a private litigant.³⁴⁵ The court noted that generally agencies, such as DNR, "have no standing to challenge the actions of their creator," such as challenging the constitutionality of a state statute.³⁴⁶ While there is a "great public concern" exception to this general rule, the court held that invoking that exception requires the participation of a private litigant.³⁴⁷ Thus, DNR did not have standing to sue.³⁴⁸

Nor does Wisconsin's Attorney General typically have standing to challenge the constitutionality of a statute, even when alleging a violation of the public trust doctrine.³⁴⁹ The Attorney General has standing to challenge "a perceived violation of the public trust" if the specific statute grants that authority, if the governor or legislature directs the Attorney General to do so, or if the Wisconsin Supreme Court grants a petition for original jurisdiction.³⁵⁰ The Wisconsin Supreme Court held that none of these exceptions were present in *State v. City of Oak Creek*, where the Attorney General brought a legal challenge to the constitutionality of a statute that exempted Oak Creek from laws designed to protect the state's navigable waters.³⁵¹ Since the court rejected the Attorney General's standing, the statute exempting Oak Creek from some public trust protections remained in place.³⁵²

In sum, DNR and the Attorney General have a limited ability to challenge the legislature when it passes a law that potentially violates the public trust doctrine. The standing limitations place a large burden on the beneficiaries of the public trust to finance and bring legal challenges to unconstitutional actions by the legislature.

4. *Public Trust Beneficiaries Have Standing to Enforce the Public Trust*

Given the significant systemic barriers to DNR's ability to carry out its trustee duties, trust beneficiaries have turned to the courts to protect the public trust. The courts have played a key role in rectifying shortsighted, sometimes politically motivated, attempts to convey parts of the public water commons to private hands.³⁵³ Moreover, given what appears to be an anemic state

344. *Id.* at 51–52.

345. *Id.* at 54–55.

346. *Id.* at 52.

347. *Id.* at 54–55.

348. *Id.*

349. *State v. City of Oak Creek*, 605 N.W.2d 526, 541–42 (Wis. 2000).

350. *Id.* at 539.

351. *Id.* at 528, 541–42.

352. *Id.* at 541.

353. *See, e.g., ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854 (Wis. 2002).

enforcement of the trust, it is essential to have an engaged citizenry empowered to enforce public rights in common waters.

Beneficiaries of the trust have standing to sue; the public trust doctrine “establishes standing for . . . any person suing in the name of the state for the purpose of vindicating the public trust, to assert a cause of action recognized by the existing law of Wisconsin.”³⁵⁴ In order to allege standing in a public trust case, a plaintiff needs to allege injury to navigable waters, not just to the environment generally.³⁵⁵ Also, litigants must assert a viable cause of action.³⁵⁶

In *Gillen v. City of Neenah*, the Wisconsin Supreme Court upheld a cause of action because the court found that the plaintiffs stated a claim for a violation of the public trust doctrine.³⁵⁷ The dispute in this case centered on land the legislature granted to the City of Neenah via a Legislative Lakebed Grant in 1951 to be used “for a public purpose.”³⁵⁸ The City leased this land for several decades to Bergstrom Paper Company (predecessor to Gladfelter Company). The city allowed the paper company to fill the lakebed grant area with paper waste sludge and construct and operate a paper wastewater treatment plant and parking lot. The City subsequently leased another five acres of the lakebed grant area to Minergy Corporation for a commercial paper sludge incineration operation.³⁵⁹ DNR, however, declined to enforce the law even though it admitted in a settlement agreement that these leases violated the public trust doctrine.³⁶⁰ In pertinent part, the December 1995 settlement agreement between DNR, City of Neenah, Gladfelter Company, and Minergy Corporation provided the following:

(1) DNR asserted that both the proposed Minergy facility and the existing operations of Gladfelter Company are impermissible public trust uses and violate the Legislative Lakebed Grant, relevant portions of Chapter 30 including Wis. Stat. § 30.03 and the public trust doctrine as developed under Wisconsin law.

(2) Regardless of the foregoing, based on the historical development of the Grant Area, to which DNR failed to object, and based on DNR’s enforcement discretion, DNR agreed that it would not pursue enforcement action under its authority relating to the public trust laws and that it would

354. *Gillen v. City of Neenah*, 580 N.W.2d 628, 636 (Wis. 1998) (quoting *State v. Deetz*, 224 N.W.2d 407, 413 (Wis. 1974)).

355. *Wis.’s Envtl. Decade, Inc. v. Pub. Serv. Comm’n*, 230 N.W.2d 243, 250 (Wis. 1975).

356. *Deetz*, 224 N.W.2d at 417. In *State v. Deetz*, while the court held that DNR had standing to sue, it remanded the case to the trial court to determine if there was a viable cause of action (i.e., whether the defendants had violated the newly-adopted reasonable use doctrine when erosion from their land deposited materials into Lake Wisconsin). *Id.*

357. *Gillen*, 580 N.W.2d at 636–38.

358. *Id.* at 630 & n.3 (quoting the title to chapter 52, Laws of 1951).

359. *Id.* at 629–31.

360. *Id.*

not seek equitable relief, including removal of existing facilities and activities, during the term of the Settlement Agreement.³⁶¹

Faced with refusal by the trustee to protect the public trust, the *Gillen* plaintiffs brought suit to enforce the public interest in navigable waters.³⁶²

The *Gillen* plaintiffs alleged a public nuisance based on Minergy's violation of section 30.12, which is "a codification of the common law restriction against encroachments on publicly held lakebeds."³⁶³ The court rejected the defendant's argument that a claim under section 30.294 to abate a public nuisance cannot be brought by citizen plaintiffs if DNR decided to forego enforcement and signed a settlement agreement to that effect.³⁶⁴ Instead, the court held that the *Gillen* plaintiffs stated a claim by bringing their suit under section 30.294, which provides: "Every violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person."³⁶⁵ The court cited the plain language of the statute and its legislative history to support its holding.³⁶⁶ "As far back as 1917, the legislature provided that public nuisances may be enjoined and abated by citizen suits."³⁶⁷ Twenty years after the legislature created DNR, it enacted the current form of the public nuisance provision in chapter 30, and the court found no indication that a citizen's right to abate public nuisances was limited by DNR enforcement action or inaction.³⁶⁸ Thus, the court concluded "that DNR's decision stated in the Settlement Agreement to forego enforcement of the public trust claims does not defeat the plaintiffs' public nuisance claim under Wis. Stat. ch. 30."³⁶⁹

Another case, *ABKA Limited Partnership v. DNR*, likewise reveals the important role beneficiaries play in enforcement when faced with the trustees' failure to vigorously assert public rights.³⁷⁰ In *ABKA*, a DNR attorney told ABKA, in no uncertain terms, that its dockminium proposal violated the public trust, and that DNR had referred the matter to the Attorney General for enforcement "to stop the purported sale of public trust waters to private individuals and to have any transactions which may have already occurred invalidated."³⁷¹ However, DNR later approved the proposal, and during an administrative hearing on ABKA's permit "DNR did not take the position that ABKA's dockminium project violated § 30.133," but Wisconsin Association

361. *Id.*

362. *Id.*

363. *Id.* at 636.

364. *Id.* at 638.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 860-61 (Wis. 2002).

371. *Id.* at 860 (quoting letter from a DNR attorney to ABKA).

of Lakes, an intervening party, did.³⁷² Upon review, the Supreme Court, persuaded by the intervening lake association's arguments, held that the project violated the public trust by running afoul of section 30.133's prohibition on conveying riparian rights to nonriparians.³⁷³ Without the leadership of Wisconsin Association of Lakes in litigating this claim all the way to the supreme court, the trustees would have allowed ABKA to convert public lakebed to private condominiums.

Wisconsin law affords trust beneficiaries the ability to demonstrate standing and a cause of action under section 30.294 to litigate violations of chapter 30 despite government inaction or complicity with violations of the public trust. Beneficiary legal actions are becoming more important given the state's limited enforcement of water laws. Similarly, given DNR and the Attorney General's limited ability to challenge legislation, beneficiary legal actions are essential to challenge unconstitutional actions by the legislative trustees.

E. Political Favoritism Tipping the Scales Toward Private Riparians

I have worked through four secretaries and four governors, and things have changed radically since I started. We're no longer doing any training. We're no longer meeting. We are asked to give input after upper management has already made a decision. And political interference is now commonplace.³⁷⁴

Some scholars critique the public trust doctrine as embodying antidemocratic principles—courts thwart majority rule within the legislative branch by closely scrutinizing statutes to independently determine whether the legislature is carrying out its duty to protect the public interest in trust resources.³⁷⁵ But others argue the courts are necessary to correct flaws in democracy.³⁷⁶

Professor James Huffman critiques a resort to “nondemocratic courts” in public trust cases.³⁷⁷ Other commentators too have criticized the doctrine on the grounds that it involves “antidemocratic judicial interference in matters properly left to the political branches.”³⁷⁸ However, the general argument that judges are “democratically unaccountable” in public trust cases is unconvincing

372. *Id.* at 860–61.

373. *Id.* at 857.

374. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

375. Araiza, *supra* note 7, at 388–89; Huffman, *supra* note 20, at 565.

376. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970).

377. Huffman, *supra* note 20, at 565.

378. Araiza, *supra* note 7, at 404.

in states where voters elect judges.³⁷⁹ In Wisconsin, public trust cases are litigated in state court, where the judges are democratically elected.³⁸⁰

Further, Professor Huffman argues against grounding the public trust doctrine in the law of trusts, claiming that “[t]he trust concept contradicts democratic theory by separating the state, as trustee, from the public, as beneficiary, as if they are two distinct entities.”³⁸¹ He ascribes to a theory of democracy in which “the people act as an entity through the democratic legislature.”³⁸² Hence, using his rubric, the state and people are one and the same, meaning the trustee and beneficiary are similarly unified. As will be discussed below, this empirical study indicates that Professor Huffman’s theories are based on foundations that do not match reality in Wisconsin. When elected officials advocate for increasing private riparian rights in shared water, it is difficult to see how the state and public rights in the water commons are unified.

By contrast, Professor Joseph Sax acknowledges the potential for implementation problems and argues for strict judicial review to correct “perceived imperfections in the legislative and administrative process.”³⁸³ He cites Wisconsin’s court decisions as examples of appropriate judicial intervention to correct systemic defects.³⁸⁴ He describes Wisconsin’s courts as necessary to “identify and correct those situations in which it is most likely that there has been an inequality of access to, and influence with, decision makers so that there is a grave danger that the democratic processes are not working effectively.”³⁸⁵ This article builds on Professor Sax’s work by showing, through an empirical study, the flaws in democracy that are exacerbated when systems provide for political favoritism and special treatment over evenhandedness in decision making. In this context, judicial review is critical to provide an objective balancing of private and public rights in water.

In addition to judicial review, DNR’s administration of the trust should be improved not to insulate it entirely from politics, but to place science and the law at the center of decision making about public waters. To maintain legitimacy as a trustee, DNR must apply law and science evenhandedly to decisions, despite pressure to the contrary. According to former DNR Secretary George Meyer, “unpopular decisions are inevitable with natural resource management, and especially with water management.”³⁸⁶ This occurs because “there are riparian property owners who want to develop their property on one

379. *Id.* at 388–89.

380. *Judicial Selection in the States: Wisconsin*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=WI (last visited Jan. 20, 2012).

381. Huffman, *supra* note 20, at 567.

382. *Id.* at 566–67.

383. Sax, *Public Trust*, *supra* note 7, at 509.

384. *Id.* at 509–23.

385. *Id.* at 514.

386. Interview with George Meyer, Former Sec’y, Wis. Dep’t of Natural Res. (July 12, 2011).

end of spectrum and the common public resource on the other, and these interests tend to meet on the shoreline.”³⁸⁷ Former Secretary Meyer concluded, “There is incredible tension between short-term individual interests and the common good. The shoreline where these tensions meet is the most sensitive area and improper activities can have serious damage.”³⁸⁸ In his view, Water Specialists need to be protected from political pressure so they can apply law and science to “make the tough resource decisions.”³⁸⁹

This is not to say that administrative agencies are or should be “apolitical bodies applying specialized expertise to essentially technical problems.”³⁹⁰ However, former Secretary Meyer’s point is that political influence over agency decisions undermines fairness and agency credibility when the rule of law and application of science are secondary to political connections.³⁹¹ This research shows that many Water Specialists perceive they are not being protected from excessive political pressure, and that there is an inequality in access to and influence over decision makers that weakens DNR’s credibility in serving as a trustee.

External political pressure comes in a variety of forms, from legislators or their aides, to the Governor’s appointees and top managers. When DNR is influenced by the acts of these parties on behalf of an individual’s private interest at the expense of the public’s interest, DNR’s actions run afoul of its duty to the beneficiaries of the trust and undermines credibility of the agency’s decisions.

As shown in Table 2 and described more fully below, legislators or their aides have contacted a majority of Water Specialists interviewed on behalf of a private property owner. Similarly, DNR upper management or the Governor’s Office has tried to influence a majority of Water Specialists based on political favoritism. However, most striking is that all upper management and political appointee interviewees, who see the statewide impact of actions and are in regular contact with elected officials, described this favoritism as undesirable and problematic for sound natural resource management.

TABLE 2: Political influence over DNR water decisions

Number of water specialists interviewed	19
Number of water specialists who had been contacted by a legislator or aide on behalf of a private riparian ³⁹²	12

387. *Id.*

388. *Id.*

389. *Id.*

390. Araiza, *supra* note 7, at 419.

391. Interview with George Meyer, Former Sec’y, Wis. Dep’t of Natural Res. (July 12, 2011).

392. Interview with Confidential Interviewee No. Six (Dec. 8, 2010) (on file with author); Interview with Confidential Interviewee No. Eleven (Dec. 13, 2010) (on file with author); Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author); Interview with Confidential

Number of water specialists who identified a problem with political favoritism ³⁹³	10
Percentage of upper management who identified a problem with political favoritism ³⁹⁴	100

Part II.E describes the founding structure of DNR leadership and compares it to today's structure, which was put in place in 1995 when Governor Thompson and the legislature made the Secretary a gubernatorial appointee. My empirical study indicates this structural change has allowed an increasing amount of political influence over agency decisions regarding public waters. Moreover, this political influence has impacted Water Specialists, who are responding to pressure from legislators and the Governor's Office, further distancing legal theory—what should happen under the law—from reality—what does happen under the law.

1. Legislators Put Pressure on Water Specialists to Benefit One Constituent's Private Interests over the Public Interest

According to Wisconsin's public trust law, the legislature is the primary trustee of the state's navigable waters.³⁹⁵ Individual legislators, accordingly, have a constitutional duty to protect the public's interest in Wisconsin's waters.³⁹⁶ However, this constitutional duty bumps up against the responsibility legislators feel to promote the interests of their private riparian constituents.

Interviewee No. Nine (Dec. 13, 2010) (on file with author); Interview with Confidential Interviewee No. Eight (Dec. 15, 2010) (on file with author); Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author); Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Two (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Seven (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Fourteen (Dec. 9, 2010) (on file with author).

393. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author); Interview with Confidential Interviewee No. Seven (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Fourteen (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author); Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author); Interview with Confidential Interviewee No. Ten (Dec. 8, 2010) (on file with author); Interview with Confidential Interviewee No. Fourteen (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Thirteen (Dec. 8, 2010) (on file with author); Interview with Confidential Interviewee No. One (Dec. 10, 2010) (on file with author).

394. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author); Interview with George Meyer (July 12, 2011); Interview with Todd Ams (July 6, 2011).

395. *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927).

396. *Id.* The Legislative Reference Bureau, a non-partisan resource for Wisconsin legislators, puts them on notice of their trust responsibilities. "The legislature, as the state's representative, must not only take action to prevent endangerment of the trust but it must also take affirmative steps to protect the trust." Kite, *supra* note 40.

A majority of Water Specialists have had legislators or their aides contact them on behalf of a private riparian.³⁹⁷ One new Water Specialist noted legislators have tried to influence up to twelve of his decisions over the past two and half years.³⁹⁸ Sometimes, these contacts merely seek more information from DNR. More often, however, elected officials or their aides are actively trying to influence the Water Specialist's permit decision or enforcement action to favor private individual interests over the broader public interest in waters.³⁹⁹ In one case, a state legislator yelled at a Water Specialist and "ordered DNR to fire me, but the Water Division Administrator stood up for me" and told the legislator that "[you] can't harass public employees."⁴⁰⁰

Another Water Specialist observed that legislative pressure on individual permit decisions is "the norm now so I am used to dealing with it. I don't think it impacts my decisions, but it does get a lot more people involved and makes things more time consuming."⁴⁰¹ This is not a minor consideration when the agency is focused on time management to remedy a shrinking workforce.

2. *Political Favoritism and Control Exerted by the Governor's Political Appointees in the Central Office*

*"I lack support from management to back my decisions. The Secretary is appointed by the Governor and that plays big into how the DNR operates. I have worked under three secretaries and this last one has been the worst."*⁴⁰²

According to accounts by a majority of the DNR staff interviewed and all upper managers interviewed in this study, some politically connected people get special treatment during the permit process or an enforcement action.⁴⁰³ A Water Specialist observed that permit applicants know they "should contact the Governor because that will get a response."⁴⁰⁴ Sometimes this special treatment

397. See *supra* Table 2.

398. E.g., Interview with Confidential Interviewee No. Two (Dec. 16, 2010) (on file with author); see also *supra* Table 2.

399. For examples of information-seeking contacts by legislators or their aides, see Interview with Confidential Interviewee No. Six (Dec. 8, 2010) (on file with author); Interview with Confidential Interviewee No. Eleven (Dec. 13, 2010) (on file with author); Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author). For examples of advocacy contacts by legislators or their aides, see Interview with Confidential Interviewee No. Seventeen (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author); Interview with Confidential Interviewee No. Eight (Dec. 15, 2010) (on file with author); Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author); Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author); Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author); Interview with Confidential Interviewee No. Two (Dec. 16, 2010) (on file with author) (stating that in the last two-and-a-half years, legislators or aides have tried to influence up to twelve decisions).

400. Interview with Confidential Interviewee No. Fifteen (Dec. 9, 2010) (on file with author).

401. Interview with Confidential Interviewee No. Nine (Dec. 13, 2010) (on file with author).

402. Interview with Confidential Interviewee No. Sixteen (Dec. 16, 2010) (on file with author) (referring to Secretary Matt Frank).

403. E.g., Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author).

404. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

stems from a relationship between a riparian landowner and an elected official; other times it is because the entity is another government entity, and increasingly, because the entity is a “job creator.”⁴⁰⁵ Moreover, these strong accounts of political influence are likely linked to the politicized position of the DNR Secretary. One Water Specialist highlighted that “we haven’t had a lot of experienced natural resource managers as Secretary of DNR” since Governor Thompson made the Secretary a political appointee.⁴⁰⁶ Secretary George Meyer, who was the last Secretary appointed by the Natural Resources Board, was also the last Secretary who had “come up through the ranks.”⁴⁰⁷

In 1995, Governor Thompson made the DNR Secretary a political appointee in the Governor’s Cabinet. From the creation of DNR in 1965 until 1995, a seven-member Natural Resources Board had selected the head of DNR.⁴⁰⁸ While the Governor appointed the members of the Natural Resources Board, they had staggered terms, so a typical board was composed of appointees from different governors.⁴⁰⁹ This structure made the Natural Resources Board more politically balanced in its composition, and arguably a better reflection of democracy.⁴¹⁰

Attorney Peter Peshek recalled that the theory behind a Natural Resources Board appointment was that “natural resources were so important to citizens that they needed to be treated differently. We needed to create a check and balance system that separated DNR decisions from immediate political concerns of the moment.”⁴¹¹ Peshek added, “that rationale is still sound.”⁴¹²

One retired DNR staffer also reflected on the agency’s founding. He joined DNR when the agency was just beginning, and remembered that the legislature designed the original structure to focus attention on sound management of natural resources based on science and the law.⁴¹³ Originally, the Natural Resources Board managed the agency, and were somewhat insulated from political interference.⁴¹⁴ He noted that Wisconsin’s legislature had strong bipartisan support for establishing this appointment structure and creating the DNR.⁴¹⁵

405. Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author).

406. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

407. *Id.*

408. Interview with Peter Peshek, Attorney, DeWitt Ross & Stevens S.C. (July 25, 2011) (on file with author).

409. *Id.*

410. *Id.*

411. *Id.* Mr. Peshek served as the Wisconsin Public Intervenor from 1976 to 1983. *Id.* For a full biography, see *Peter A. Peshek*, DeWitt Ross & Stevens S.C., <http://www.dewittross.com/Staff/Peter-A-Peshek.aspx> (last visited July 26, 2011).

412. Interview with Peter Peshek, Attorney, DeWitt Ross & Stevens S.C. (July 25, 2011) (on file with author).

413. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author).

414. *Id.*

415. *Id.*

Former DNR Secretary Meyer added another layer of understanding to the significance of having a Governor-appointed Secretary rather than a Natural Resources Board appointment. Secretary Meyer served as DNR Secretary from 1993 to 2001.⁴¹⁶ He is the only Secretary who was appointed by the Natural Resources Board and then reappointed by a governor as a cabinet member, so he offers this unique perspective: DNR Secretaries work within a political world regardless of whether appointed by a Board or a Governor.⁴¹⁷ “The Natural Resources Board only appointed people who they thought could weather that political storm.”⁴¹⁸ However, under a Natural Resources Board appointment, there was a higher level of stability, and the leadership was experienced and competent, according to Former Secretary Meyer.⁴¹⁹ To underscore his point, he noted that from 1953 to 1995, under Natural Resources Board appointments, there were only four secretaries.⁴²⁰ While Governor Thompson reappointed and retained the Secretary Meyer in 1995, he was the last Secretary with any longevity. After Secretary Meyer left, between 2001 and 2011, governors have appointed four secretaries.⁴²¹

Critics of the Natural Resource Board appointment system argued that this appointment structure made DNR unaccountable. Governor Thompson moved the head of the agency into the Governor’s Cabinet and made DNR answer to a statewide elected official—the Governor—to mitigate this criticism. DNR’s new accountability to the Governor cuts both ways. It can lead to political favoritism that damages trust resources and it can lead to greater protections for the public trust, depending on how the power is wielded.

Governor Doyle’s administration’s actions fell at both ends of the spectrum. He entered office with a campaign promise to restore the independence of the DNR Secretary and return to a Natural Resources Board appointment, but changed his mind and ultimately vetoed a bill aimed at making the Secretary an appointee of the Natural Resources Board.⁴²² When asked about the Governor’s change of position, his top Water Division Administrator Todd Ambs observed, “the Governor found he could do a lot of good things for the environment by being able to tell the Secretary ‘do this.’”⁴²³ For example, Governor Doyle was instrumental in pushing DNR to

416. Interview with George Meyer, Former Sec’y, Wis. Dep’t of Natural Res. (July 12, 2011).

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. Todd Richmond, *Wisconsin Governor Vetoes DNR Secretary Bill*, DAILY REP. (Milwaukee), Nov. 13, 2009, <http://dailyreporter.com/2009/11/13/wisconsin-governor-vetoes-dnr-secretary-bill-602-pm-111309>.

423. Interview with Todd Ambs, Former Water Division Administrator (July 6, 2011) (on file with author).

consider the public trust when issuing groundwater permits.⁴²⁴ Prior to Governor Doyle's administration, DNR's position when issuing high-capacity well groundwater permits was that it could not investigate or protect against harm to navigable waters.⁴²⁵ Governor Doyle's position was that the public trust doctrine extended to decisions about high-capacity well groundwater permits, and DNR took this position for the first time in the *Lake Beulah* case.⁴²⁶

On balance, however, former Water Division Administrator Todd Ambs supports restoring the original system of a Natural Resources Board appointed Secretary.⁴²⁷ He noted that with such a change the Governor will still have power, but the control will be staggered and muted, which will be positive for water protections.⁴²⁸

A retired DNR staffer who worked through seven different administrations and secretaries experienced firsthand the significance of the change in management structure to a Governor-appointed DNR Secretary and a dismantled Public Intervenor's Office.⁴²⁹ Upon reflection about what motivated decisions at DNR in the late 1990s compared to a decade later, he observed that there used to be a "dialogue"; the vast majority of decisions were within parameters of what statutes required and only a handful of cases were determined based on political pressure.⁴³⁰ He further stated that now there is "a pervasive problem at DNR that goes well beyond the water program"; DNR is abandoning reasonable interpretations of the law and science for politically connected applicants.⁴³¹

This longtime staffer saw political interference with natural resource management as a bipartisan issue.⁴³² Former Secretary Meyer likewise observed, "The Governor's influence over DNR is bipartisan; the only difference is they have different friends asking for favors."⁴³³ He added, "If you're a business that wants permits issued when they shouldn't be issued, there are a lot of benefits to having the Governor control DNR."⁴³⁴ Attorney Peter Peshek, who has represented numerous permit applicants before DNR,

424. E-mail from Todd Ambs, Former Water Division Administrator, to author (July 7, 2011, 11:13 CST) (on file with author).

425. *See id.*

426. *Id.*

427. Interview with Todd Ambs, Former Water Division Administrator (July 6, 2011) (on file with author).

428. *Id.*

429. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author). The author also interviewed this retired DNR staffer during the author's original 1999 study, at which time the interviewee was on staff.

430. *Id.*

431. *Id.*

432. *See id.*

433. Interview with George Meyer, Former Sec'y, Wis. Dep't of Natural Res. (July 12, 2011) (on file with author).

434. *Id.*

could not agree more. He reflected, “Our experience since 1995 under both political parties demonstrates without question that we need to go back to a board-appointed secretary. This is [a] paramount driver to ensure quality regulatory decision making.”⁴³⁵

Additionally, this research revealed that Water Specialists were troubled and embarrassed about the unfairness with which DNR management was treating “mom-and-pop” applicants as compared to politically connected people.⁴³⁶ There are two processes: regular applicants must send their permit applications to an intake specialist in Green Bay or Madison, forego an onsite meeting with field staff prior to filing an application, and follow the law; politically connected applicants can simply meet directly with the Secretary or Governor’s office to get management’s support for their project on their terms.⁴³⁷ Put simply, “Mom-and-pop applicants are going to have a harder time.”⁴³⁸

Some Water Specialists are concerned that Central Office political appointees and upper management are trying to regularly issue permits to politically connected applicants.⁴³⁹ An upper manager within the Central Office defended this move as “helping” staff review “wetland decisions that are controversial.”⁴⁴⁰ He followed this explanation with an honest assessment that “managers feel they need to be more involved with a particular project when they’re being asked about it by the Secretary or Governor’s Offices.”⁴⁴¹ But when one Water Specialist opposed the “we’re here to help you” approach because he thought it was “code word for issuing permits for projects the scientific field staff would not allow,” he said an upper manager in the Central Office sent him a strongly worded rebuke.⁴⁴²

Peter Peshek discussed that this type of politicization may cause decreased morale and increased turnover:

I’ve known senior managers who have left the agency over this issue because it undermines maintaining professionalism. It is a frustrating situation that causes a lot of staff turnover. While people have a right to petition their government, we need to filter petitioning the government in a way that creates appropriate and reasonable standards and then allows application of the standards to individual facts. Removing DNR Secretary

435. Interview with Peter Peshek, Attorney, DeWitt Ross & Stevens S.C. (July 25, 2011) (on file with author).

436. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

437. Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author).

438. *Id.*

439. *Id.* “Political connections—who you are—makes it easier to get a permit in our region.” *Id.*

440. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author).

441. *Id.*

442. Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author).

from the Governor's cabinet and returning to a Natural Resources Board appointment would minimize this type of permitting by upper managers.⁴⁴³

For example, political overreaching and favoritism influenced the permit process for the Title Town Development in Green Bay. There the field staff refused to issue a permit to fill approximately 1.65 acres of wetlands because the developer owned another site where it could build the development without filling wetlands.⁴⁴⁴ Similarly, when an applicant has "practical alternatives" to filling wetlands, that applicant generally works with a Water Specialist to redesign the project to comply with public trust regulations, but this applicant refused to redesign the project and "went to the Secretary's office" to get the project approved.⁴⁴⁵ The applicant never met the "practical alternatives" test.⁴⁴⁶ Instead, the Water Division Administrator, Bruce Baker, approved the project over the objection of the Water Specialist, DNR legal staff, and another upper manager, and applied a nonexistent legal standard that looked at the "net environmental benefit" of the project.⁴⁴⁷ Even an upper manager found it "disturbing that the Secretary's Office approved something that didn't meet state standards."⁴⁴⁸ He also noted: "[T]he impact of this on staff was serious. The Secretary's Office cut staff off at the knees. This harms morale and retention."⁴⁴⁹

After Wisconsin's Wetland Association, a public trust beneficiary, challenged the Title Town Development wetland filling approval, one of Governor Walker's first acts as a new Governor was to sign a law retroactively exempting this project from state wetland laws, which made the legal challenge moot.⁴⁵⁰ However, Bass Pro Shops, which was going to be the anchor tenant of the new development, then took its business elsewhere because it did not want to be located on a filled wetland.⁴⁵¹

Reflecting on the Title Town controversy, a senior retired staffer said, "While people had concerns about the [Republican] Thompson Administration, we still had administrators who were capable, competent and committed to

443. Interview with Peter Peshek, Attorney, DeWitt Ross & Stevens S.C. (July 25, 2011) (on file with author).

444. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author).

445. *Id.*

446. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author).

447. *Id.*

448. *Id.* "They were just told they needed to approve it—not based on any science or standards," he recalled. *Id.*

449. *Id.*

450. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author) (talking about lawsuit); Lee Bergquist & Patrick Marley, *Walker Signs Wetland Bill, Site near Lambeau Field Exempt from DNR Review*, MILWAUKEE J. SENTINEL, Feb. 4, 2011, <http://www.jsonline.com/news/statepolitics/115308189.html>.

451. Wes Johnson, *Bass Pro Shops Rejects Wetlands Site near Lambeau Field*, GREEN BAY PRESS GAZETTE, Jan. 28, 2011, <http://www.greenbaypressgazette.com/article/20110128/GPG0101,20101280534/Bass-Pro-Shops-rejects-wetlands-site-near-Lambeau-Field>.

carrying out statutes.”⁴⁵² He added that under the [Democratic] Doyle Administration, “there was significant erosion of having DNR staff carry out the law. This was accomplished by reducing field and legal staff participation in decision making, especially if they had the temerity to object to something the Administration wanted.”⁴⁵³ Thus, the political pressures are likely bipartisan and resonate from the political status of the Secretary’s position rather than from the party that happens to be in power.

Some Governor appointees have also pushed DNR to shift its focus from protecting natural resources to creating jobs. For example, under Governor Doyle, in the summer of 2010 DNR created a committee to review the wetland program to “see if there was any flexibility in the rules to allow them to consider job creation.”⁴⁵⁴ All the while “legal staff have been saying there is no explicit authorization for DNR to even consider jobs.”⁴⁵⁵ An upper manager was also concerned about having DNR focus on jobs and economics “when this is not [DNR’s] area of expertise.”⁴⁵⁶ He explained DNR would need very clear standards if they were to consider jobs when evaluating a problem; “without standards, our decisions are more easily subjected to political pressure.”⁴⁵⁷

Finally, political favoritism influences some enforcement decisions. One Water Specialist noted that “people feel they’re not being treated equally when they see others with political connections get off without paying a fine.”⁴⁵⁸ An experienced Water Specialist said that he recently experienced this favoritism for the first time, but hoped it “doesn’t become the new norm.”⁴⁵⁹ This Water Specialist commenced a formal enforcement and referral process against a business that filled wetlands without a permit.⁴⁶⁰ After a state legislator met with upper management, he said that “they told me this wasn’t a good candidate for referral because this is a business that is supporting jobs and DNR doesn’t want to be seen as going after a job creator.”⁴⁶¹

In an urban part of the state, a Water Specialist experienced this favoritism toward another governmental entity that hired contractors who damaged water resources. The contractors excavated the foundation of a building that was a known source of hazardous material, which released polychlorinated biphenyls

452. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author).

453. *Id.*

454. Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author); Interview with Confidential Interviewee No. Five (Feb. 21, 2012) (on file with author).

455. Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author).

456. Interview with Confidential Interviewee No. Twenty (Dec. 9, 2010) (on file with author).

457. *Id.*

458. Interview with Confidential Interviewee No. Three (Dec. 10, 2010) (on file with author).

459. Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author); *see also* Interview with Confidential Interviewee No. Four (Dec. 15, 2010) (on file with author) (discussing an enforcement action that was dropped after a state legislator intervened and called a meeting with DNR upper management).

460. Interview with Confidential Interviewee No. Five (Dec. 16, 2010) (on file with author).

461. *Id.*

into the river.⁴⁶² The contractor did not report the spill, but the Water Specialist found the violations during a regular inspection.⁴⁶³ He also commenced a formal enforcement referral when his “regional manager said we couldn’t enforce because this was one of our partners.”⁴⁶⁴ This unusual Water Specialist ignored upper management and went directly to a DNR attorney to move the enforcement forward, an action for which he was reprimanded by upper management.⁴⁶⁵

The system of having the Governor appoint the DNR Secretary, and with no Public Intervenor’s Office to serve as a counterbalance, puts DNR staff in a situation where DNR employees ask whether their job will be jeopardized if they make a decision that does not promote job growth.⁴⁶⁶ Excessive political influence “is being done by people who are bright, ambitious, and loyal to their political bosses. The problem is that their perspective is a two- to four-year election cycle and making sure their boss/party remains in power.”⁴⁶⁷ Political manipulation of DNR is a nonpartisan endeavor; while present under Republican Governor Thompson, it was at an all time high under Democratic Governor Doyle, and the start of Republican Governor Walker’s administration is on track to break all past records.⁴⁶⁸ A retired staffer emphasized, “[Political favoritism] should concern everyone because when you come to DNR you should have confidence that there is a principled review of a project.”⁴⁶⁹ Systemic changes are needed to counter this trend in order to protect the public trust in Wisconsin’s waters.

III. RECOMMENDATIONS: OUR WAY FORWARD⁴⁷⁰

Part II shows that, despite court opinions granting wide latitude to the trustees to protect public waters in accordance with a well-developed public trust doctrine, there are significant systemic barriers to DNR’s ability to act as a vigilant trustee. I recommend a variety of options focused on combating these problems to protect public trust waters. Some require legislative action, others require DNR internal action, and still others require strategic partnerships, targeted philanthropy, and an active role by the public beneficiaries of the trust.

462. Interview with Confidential Interviewee No. Nineteen (Dec. 10, 2010) (on file with author).

463. *Id.*

464. *Id.*

465. *Id.*

466. *See* Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author).

467. *Id.*

468. *Id.* (talking about lawsuit); Bergquist & Marley, *supra* note 450; Interview with Confidential Interviewee No. Five (Feb. 21, 2012) (on file with author).

469. Interview with Confidential Interviewee No. Twenty-Two (Dec. 15, 2010) (on file with author).

470. Since 1851, Wisconsin’s state motto has been “Forward.” This reflects the state’s “continuous drive to be a national leader.” *Wisconsin State Symbols*, STATE OF WIS., http://www.wisconsin.gov/state/core/wisconsin_state_symbols.html (last visited July 15, 2011).

A. *Restore DNR Secretary Appointment by the Natural Resources Board*

DNR needs to have leadership that is experienced in natural resource management, accountable to the public, stable, and evenhanded. In my earlier work on this subject, I recommended restoring DNR Secretary appointment by the Natural Resources Board in order to provide this type of leadership.⁴⁷¹ I hesitate to recommend this again because it was not implemented during the preceding decade.⁴⁷² Yet, the 2010–11 research interviews underscore the importance of this structural change so much so that these recommendations would be incomplete without it. The DNR Secretary’s appointment should be conducted consistent with the founding structure of DNR. The Secretary should once again be appointed by the Natural Resources Board and serve regardless of short-term gubernatorial election cycles.

While some may argue this is undemocratic,⁴⁷³ reverting to the original appointment structure will actually aid in making the implementation of the public trust more democratic and representative of the public as a whole; the current system allows so much political favoritism that it thwarts the public interest in upholding the rule of law. While the water trustees’ decisions should not be made in an apolitical bubble, water management decisions must first and foremost be based on science and fact-specific, evenhanded applications of the law. By returning the appointment of the DNR Secretary to the Natural Resources Board, the leadership structure will be better aligned with DNR’s trustee duties to act on behalf of the interests of the broad-based public rather than individuals with political connections.

Former Water Administrator Todd Ambs and DNR Secretary George Meyer both reflected the desire that the position of DNR Secretary be removed from the Governor’s Cabinet and, instead, be appointed by the Natural Resources Board.⁴⁷⁴ “Governors want power; this is what they are made out of, but they can still influence policy without getting directly involved in permit decisions. We need to protect water managers from politics because unpopular decisions are inevitable with natural resource management,” said former Secretary Meyer. This imperative was echoed by veteran attorney Peter Peshek, who declared:

It is without question that the public trust doctrine, over generations, will be best advanced if the DNR Secretary is appointed by the Natural Resources Board. It was a terrible mistake to have the Governor appoint the Secretary. We need to return to a Natural Resources Board appointment in order to

471. Scanlan, *supra* note 6, at 213.

472. *Id.*

473. Given Professors Huffman’s and Araiza’s description of state court judges as undemocratic despite that they are elected officials, these scholars may also describe the Natural Resources Board as undemocratic. See Araiza, *supra* note 7, at 388–89; Huffman, *supra* note 20, at 565.

474. Interview with Todd Ambs, former Water Div. Adm’r, Wis. Dep’t of Natural Res. (July 6, 2011) (on file with author); Interview with George Meyer, Former Sec’y, Wis. Dep’t of Natural Res. (July 12, 2011) (on file with author).

avoid excess in both directions—regulated interests versus environmental advocates.⁴⁷⁵

Restoring the selection and removal of the DNR Secretary to the Natural Resources Board is necessary so DNR staff are able to act as trustees of the state's waters and make tough natural resource decisions on an evenhanded basis.⁴⁷⁶

B. Reinvigorate and Bolster DNR Water Specialists' Training

The recent move by DNR to eliminate rigorous training of the Water Specialists should be remedied by prioritizing and shifting resources into training. Placing poorly trained Water Specialists into the field to apply a complex system of statutes and regulations to the often contentious line between public waters and private property is shortsighted. According to former DNR Secretary George Meyer, "Cutting training is a mistake no matter what people's philosophies are about water protections. You end up with inefficient and poor decision making without substantial training of employees."⁴⁷⁷ He added that any business or organizational leader "knows that training staff is the best money you can spend."⁴⁷⁸ To increase the ability of Water Specialists to make sound permit decisions, identify violations, and know how to efficiently enforce the law, DNR needs to focus on staff training.

C. Secure a More Reliable Source of Funding for Water Specialists' Positions

Water Specialists are funded by General Program Revenue, and thus, when the state cuts budgets, these positions are the first ones to go. This job instability adds to the undesirability of this position within the agency, contributes to high turnover, and increases the difficulty of filling vacancies. According to former Water Division Administrator Ambs, "90 percent of all the problems I saw with poor protections for water were budget problems."⁴⁷⁹

Former Administrator Ambs and Former DNR Secretary Meyer support the idea of placing a real estate transfer tax on residential riparian properties to fund DNR's water protections.⁴⁸⁰ Yet both recognize the political difficulties of obtaining this funding source unless riparian property owners and realtors see

475. Interview with Peter Peshek, Attorney, DeWitt Ross & Stevens S.C. (July 25, 2011) (on file with author).

476. This change may also bolster staff morale and help to slow the high turnover that plagues the Water Specialist position. *See id.*

477. Interview with George Meyer, Former Sec'y, Wis. Dep't of Natural Res. (July 12, 2011) (on file with author).

478. *Id.*

479. Interview with Todd Ambs, former Water Div. Adm'r, Wis. Dep't of Natural Res. (July 6, 2011) (on file with author).

480. *Id.*; Interview with George Meyer, Former Sec'y, Wis. Dep't of Natural Res. (July 12, 2011) (on file with author).

the financial benefits of clean and well-managed waters via increased property values. “It is in land owners’ interest to do this, but we need to show them the way,” said former Secretary Meyer.⁴⁸¹ Education efforts, drawing on peer-reviewed research about the link between well managed waters and riparian property values, are needed to build a base of support for water regulations generally, and new sources of revenue to support DNR’s water program specifically.

D. Educate Riparian Landowners About How to Improve Their Property Values and Protect the Public Trust in Navigable Waters

Water Specialists emphasized the importance of educating riparian landowners about how riparians impact public waters, why water protections exist, and how riparian and public rights can coexist within a shared water resources system. However, Water Specialists conducted this education on a piecemeal basis when meeting a riparian applicant, if at all.

Nongovernmental and trade organizations with riparian landowner members have an important role to play in protecting the public trust by educating their members. A partnership between groups like the Wisconsin Association of Lakes, the Wisconsin River Alliance, the Wisconsin Realtors Association, University of Wisconsin–Extension, and DNR, focused on educating riparian landowners, could have positive benefits for the state’s shared waters.

One method for achieving this goal is for these organizations to produce an “Owner’s Manual” that agents could provide to a riparian property owner at the closing of any transfer of riparian property.⁴⁸² The Manual could serve to educate property owners about the value of clean water to their property, best management practices, the purpose of existing laws, and the activities that require permits. According to attorney Peter Peshek, “This would have a very positive impact, make it easier on riparian landowners to understand best management practices, and take away riparian excuses that they didn’t understand what they were supposed to do.”⁴⁸³ A Riparian Owner’s Manual could serve to educate and encourage voluntary efforts to protect shared waters across the state.

E. Target Water Monitoring to Assess Impact of Deregulation

Recently Wisconsin has deregulated activities on and around the water, increased DNR’s use of self-certified general permits, and reduced the number of DNR staff involved in compliance evaluations. Former Secretary Meyer

481. Interview with George Meyer, Former Sec’y, Wis. Dep’t of Natural Res. (July 12, 2011) (on file with author).

482. *Id.*

483. Interview with Peter Peshek, Attorney, DeWitt Ross & Stevens S.C. (July 25, 2011) (on file with author).

underscored the importance of increasing monitoring of waterways in a time of deregulation: “We need to increase monitoring to see what’s going on with all the exemptions and general permits so we can see if we’ve gone too far.”⁴⁸⁴ He added, “We need a feedback loop to see whether the decisions to deregulate are working well for everyone or whether we are having an adverse long-term impact on water.”⁴⁸⁵ Universities, the United States Geological Survey, DNR’s Bureau of Research, and other entities that engage in water-related research should coordinate research agendas to leverage their abilities to measure and assess impacts of deregulation on lakes and rivers. Peer-reviewed publications of this research could help inform future policy decisions about the level of regulatory protection needed to manage public waters. Coordinated research is needed to assess the ecological impacts of DNR’s reduced management of water resources.

F. Increase Public Trust Beneficiaries’ Enforcement Efforts

Although DNR should take corrective actions to increase enforcement of water protections, given current budget cuts, public trust beneficiaries—members of the public who use and enjoy the state’s waters—need to get more involved in enforcing water protections. Beneficiaries’ active enforcement of these laws can help to promote compliance by private riparian property owners and legislation with public trust requirements. Philanthropists with an eye toward water protections should build the capacity of nonprofit environmental groups to engage in legal actions to protect public rights in navigable waters. Private party enforcement should serve as a counterbalance to the “wild west” attitude that has emerged in response to DNR’s reduced enforcement capacity. Given the limited ability of DNR or the Attorney General to challenge unconstitutional legislation, private enforcement is also essential to stop the legislature from enacting laws abdicating their trustee responsibilities over the state’s waters.

CONCLUSION

Grounded in its constitution, Wisconsin’s public trust doctrine continues to provide a vibrant overarching legal framework for managing Wisconsin’s shared waters as trust to be used and enjoyed by the public. However, this study has shown that budget cuts, high staff turnover, lack of training, weak enforcement, and decisions based on politics instead of law and science hamper DNR’s implementation of the law. While not a panacea, my recommendations for remedying these implementation obstacles provide a range of options for protecting the water commons: from voluntary educational partnerships aimed

484. Interview with George Meyer, Former Sec’y, Wis. Dep’t of Natural Res. (July 12, 2011) (on file with author).

485. *Id.*

at riparian landowners to new funding mechanisms and more vigorous private enforcement, everyone has a role to play in moving Wisconsin forward. Without these or other positive changes, the public trust doctrine will continue to be disconnected from water management reality, and the state will continue to fall short of adequately protecting that which is held in trust for all: Wisconsin's waters.

