

## SURFACE WATER, GROUNDWATER AND THEIR INTERPLAY WITH THE PUBLIC TRUST DOCTRINE IN WISCONSIN

October 26, 2016

By:

Donald P. Gallo  
Husch Blackwell LLP  
20800 Swenson Drive, Suite 300  
Waukesha, WI 53186  
Donald.Gallo@huschblackwell.com  
(262) 956-6224

13130449

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## CURRENT ANALYSIS

- Reconciling AG Schimel's Formal Opinion regarding the application of 2011 Wisconsin Act 21 to the issuance of high capacity groundwater well withdrawal permits by DNR
- The AG's opinion concludes that ACT 21 was not a factor and was not considered in the Wisconsin Supreme Court's Lake Beulah Management District v. DNR decision based on the fact that the Act could not be applied to a DNR decision on issuance of the permit retroactively.
- The AG's opinion; however, concludes that neither Wis. Stat. s. 281 nor the public trust doctrine gives the DNR the authority to impose any condition not explicitly allowed in state statute or rule per 2011 Wisconsin ACT 21.

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

- Did the AG get this right?
- Does the AG have it partially right, i.e. no authority to order monitoring wells; but as to the authority granted in Wis. Stat. ss. 281. 11, 12, 34, and 35 along with the legislature's delegation of the State's public trust duties does DNR have authority and a "general duty."
- FN 7, "We use "general duty" to describe the DNR's broad obligation to protect waters of the state, which does not demand that the DNR take any particular action unless that duty is triggered by a proposed high capacity well permit application." Lake Beulah.
- Does DNR have authority under the public trust doctrine to consider well interferences via cumulative impact and limit withdrawal on proposed and even existing high capacity wells? See Wis. Stats. S 281.34(5m).

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## WIS. STAT. § 281.34 - Groundwater Withdrawals

- Wis. Stat. § 281.34(5m) — "No person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells."

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## PUBLIC TRUST DOCTRINE History

- 530 – The Institutes of Justinian
- 1215 – The Magna Carta
- 1600's/1700's – The American Colonies – Wharfs on the Coast
- 1787 – The Northwest Ordinance
- 1848 – Wisconsin Constitution

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## PUBLIC TRUST DOCTRINE - Wisconsin Constitution

The increasing scarcity of water in certain areas of the state has created a disagreement between the Wisconsin legislature and the Wisconsin Administration via the Wisconsin Department of Natural Resources (WDNR) on the authority granted by the legislature to the WDNR regarding high capacity well permitting, i. e. whether Wis. Stat. Section 281.11.12 gives WDNR authority to impose permit conditions or to require cumulative impact evaluations for high capacity well permits.

Recent court and administrative law decisions have created water policy questions on how water quantity is administered in Wisconsin and who has jurisdiction to exercise such authority. Is it the legislature, the administration via the administrative agencies, or is it the courts?

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## PUBLIC TRUST DOCTRINE - Wisconsin Constitution

### Article IX, § 1

- "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to this state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefore."

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## PUBLIC TRUST DOCTRINE - Commerce, Recreation, Scenic Beauty

- Saw Log Test - "[S]treams of sufficient capacity to float logs to market are navigable." And we deem it essential to the public interest . . . Olson v. Merrill, 42 Wis. 203, 212 (1877).
- Recreation Test - "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." Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816 (1914).
- Scenic Beauty Test - "The right to fish and hunt, or to enjoy scenic beauty, as an incident to the right to navigate the navigable waters of this state ... is an example of a type of legislation which affects the interests of the people of the entire state ..." Muench v. Pub. Serv. Commit?, 261 Wis. 492, 515f-515g, 55 N.W.2d 40 (1952).

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## PUBLIC TRUST DOCTRINE - Cumulative Impact

- "A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist." *Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577 (1966).
- "Although nine additional boat slips may seem inconsequential ... we approach it differently. Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public's interest in the lakes. The potential ecological impacts include direct impacts on water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of 'cumulative impact' must be taken into account." *Sterlingworth Condo. Ass'n v. Dep't of Nat. Res.*, 205 Wis. 2d 710, 721, 556 N.W. 2d 791 (Ct. App. 1996).

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## GROUNDWATER DOCTRINES

- English/Common Law - The person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## WISCONSIN GROUNDWATER CASES

- "[T]he appellant had a clear right at common law, resulting from his ownership of land, to sink a well thereon, and use the water therefrom as he chose, or allow it to flow away, regardless of the effect of such use upon his neighbors' wells, and that such right is not affected by malicious intent." *Huber v. Merkel*, 117 Wis. 357, 363, 94 N.W. 354 (1903).

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## WISCONSIN GROUNDWATER CASES (cont'd)

- "A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless (a) The withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure, (b) The ground water forms an underground stream . . . or (c) The withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake . . . ." *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 302-3, 217 N.W.2d 339 (1974) (citation omitted).

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## The New Groundwater Law - 2003 Wisconsin Act 310

- DNR Bureau of Drinking  
•Water and Groundwater



### Current well regulation

- >800,000 private residential wells
- >11,000 high capacity wells
- 17,000 new wells drilled every year
- Private well construction must follow Well Code
- High capacity wells need approval
- Public water systems must undergo additional plan review

## Environmental reviews of high capacity wells

- Groundwater Protection Areas (GPAs)
  - within 1200 feet of ORW, ERW, and trout streams
- Consumptive uses (withdrawals that result in water loss of >95%)
- Significant impacts on high flow springs (>1 cubic foot per second)

## Environmental reviews



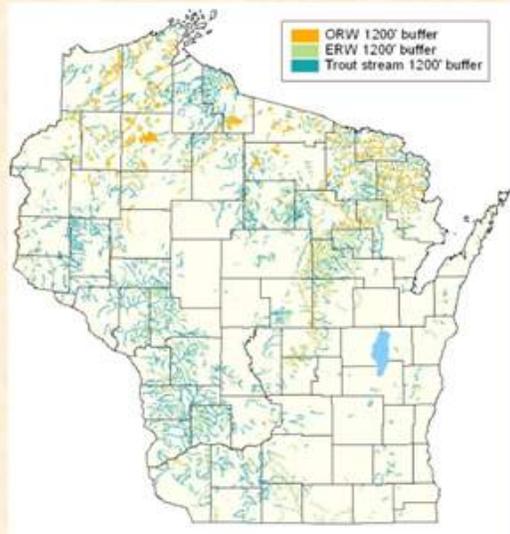
- If a proposed well meets any of these conditions, an environmental analysis may be needed
- Balance test for public water supply wells

**GPAs:**

ORW =  
Outstanding  
Resource Water

ERW =  
Exceptional  
Resource Water

Trout Streams  
include Class I,  
II, and III

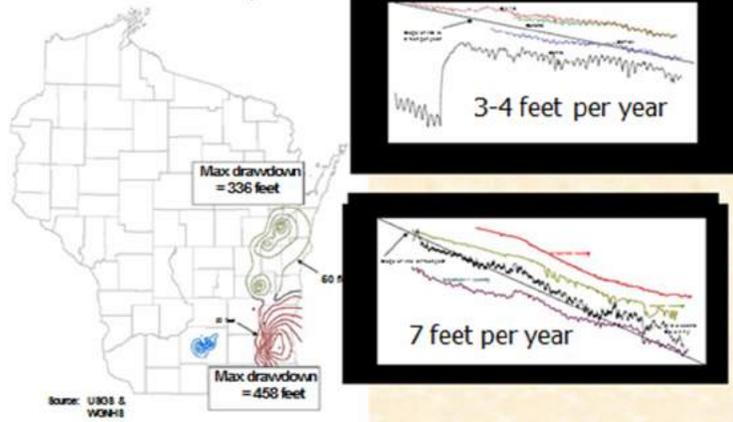


## Task #2: Evaluation of high cap regulations

- Changes regarding regulation of wells within GPAs, near springs, or with >95% water loss
- Better definition of springs
  - Potential for use of general permits
  - Factors to be considered in determining "significant environmental impact"
- Adaptive management approaches

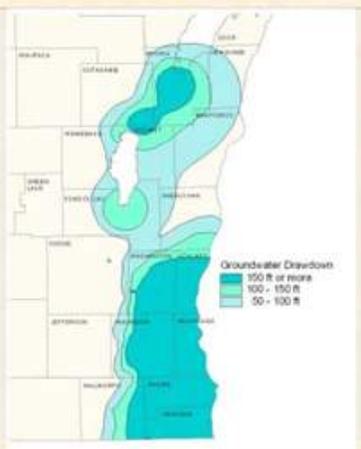
Resource concern #2:  
Overpumping of Deep Sandstone Aquifer

Drawdown in the Sandstone Aquifer



Groundwater Management Areas

- Centered on Waukesha and Brown County
- Areas of significant drawdowns and over-pumping
- Water quality problems (arsenic, radium, salinity)
- Need for a coordinated management strategy
- 150-ft contour





## Water Use in Wisconsin:

### Wisconsin DNR Water Use Program




Water Use Program was created to implement the Great Lakes Compact in Wisconsin

- Act 227 passed by Wisconsin Legislature in 2007
- Compact supported by congress and signed by President G.W. Bush in 2008
  
- Water use registration and reporting statewide
- Water use fees statewide
- Water use permitting in the Great Lakes Basin
  
- Applies to:
  - Surface water sources > 100 gpd in capacity
  - High capacity wells

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## WISCONSIN GROUNDWATER CASES (cont'd)

Lake Beulah Mgmt. Dist. v. Dep't of Nat. Res., 2011 WI 54, III 3-4, 335 Wis. 2d 47, 799 N.W.2d 73

- "We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 ... along with the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state."
  
- "We further hold that to comply with this general duty, 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. The DNR should use both its expertise in water resources management and its discretion to determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application, such that it must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit."

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

The state intended to create a comprehensive program for well construction supervision through the DNR. Under a liberal construction of its powers, the DNR cannot be limited to regulating how groundwater is obtained. If a municipal body could make well construction contingent upon its own permit, based on its own standards, a DNR permit would be wholly insignificant, and the legislature's stated goal of creating a uniform scheme to supervise the extraction of groundwater would be eviscerated. The state legislature's explicit grant of authority to the DNR preempts a municipal ordinance regulating the withdrawal of groundwater. *Lake Beulah Management District v. Village of East Troy*, 2010 WI App 127, 329 Wis. 2d 641, 791 N.W.2d 385, 09-2021.

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

Through ss. 281.11 and 281.12, the legislature has delegated the state's public trust duties to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters. For all proposed high capacity wells, the legislature has expressly granted the DNR the authority and a general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application which provides the DNR with the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state. *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W. 2d 73, 08-3170.

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## WISCONSIN GROUNDWATER CASES (cont'd)

*In re Conditional High Capacity Well Approval for Two Potable Wells, Case Nos. IH-12-03, 1H-12-05, DNR-13-021, DNR-13-027 (Sept. 3, 2014)*

- "The DNR possesses the authority to consider cumulative impacts to waters of the State cause by high capacity well pumping, climate, and other factors when assessing applications for high capacity wells. The failure to consider these impacts is a gap in public trust enforcement...."
- "Whether evaluated under the specific high capacity well permitting statutory scheme and the clear and direct language of the Wisconsin Supreme Court in the Lake Beulah decision or the more general common law principles set forth in the modified reasonable use doctrine, the focus is the same — a landowner's rights to the use of groundwater for a beneficial use may not result in a 'direct or substantial effect upon the water of a water course of a lake.' Nor may it 'cause harm to the waters of the State'." (citations omitted).

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## WISCONSIN GROUNDWATER CASES (cont'd)

*In re Conditional High Capacity Well Approval for Two Potable Wells, Case No. DNR-13-011 (Sept. 18, 2014)*

- Affirmed the DNR's ability to include conditions in high capacity well approvals when necessary to fulfill its duty to protect the waters of the state.

*In re Wisconsin Pollutant Discharge Elimination System Permit No. WI-0059536-03-0 (WPDES Permit) Issued to Kinnard Farms, Inc., Town of Lincoln, Kewaunee County, Case No.: IH-12-071 (Oct. 29, 2014)*

- The DNR's obligation to include conditions in a WPDES permit that assure compliance with groundwater protection standards may be met through its authority to require groundwater monitoring in a WPDES permit, when necessary.

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

## WIS. STAT. § 281.34 - Groundwater Withdrawals

- Wisconsin's Groundwater Protection Act, 2003 Wisconsin Act 310, expanded the state's authority to consider the environmental impacts of high capacity wells and established a framework for addressing water quantity issues in rapidly growing areas of the state. Act 310 recognizes the link between surface water and groundwater, and the impact wells may have on groundwater quality and quantity. Wisconsin Groundwater Coordinating Council *FY 2013 Report to the Legislature* (August 2013), <http://dnr.wi.gov/topic/groundwater/documents/GCC/Report/gccReport2013.pdf>.

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## WIS. STAT. § 281.34 - Groundwater Withdrawals (cont'd)

- Wis. Stat. § 281.34(2) — "An owner shall apply to the department for approval before construction of a high capacity well begins. No person may construct or withdraw water from a high capacity well without the approval of the department..."

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## WIS. STAT. § 281.34 - Groundwater Withdrawals (cont'd)

- Wis. Stat. § 281.34(3)(a) — "An owner shall notify the department of the location of a well that is not a high capacity well before construction of the well begins."

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## WIS. STAT. § 281.34 - Groundwater Withdrawals (cont'd)

- Wis. Stat. § 281.34(5) — Standards and Conditions for Approval
  - (a) Public water supply.
  - (b) Groundwater protection area.
  - (c) High water loss.
  - (d) Impact on a spring.
  - (dm) Water supply service area plan.
  - (e) All high capacity wells.
- Wis. Stat. § 281.34(5m) — "No person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells."

HUSCH BLACKWELL

© 2015 Husch Blackwell LLP

## WIS. ADMIN. CODE CH. 281 - Groundwater Quantity Protection

- Wis. Admin. Code NR § 820.10 — "The purpose of this chapter is to designate areas of the state ... in which impacts from groundwater drawdown and pumpage are such that regional planning and management is necessary to avoid, minimize and manage future impacts. This chapter also establishes review criteria applicable to [certain] high capacity well applications ...."
- Wis. Admin. Code NR § 820.11 — "This chapter applies to all counties, cities, towns, villages, utility districts ... that provide water, public inland lake protection and rehabilitation districts ... and municipal water districts ... This chapter also applies to persons who are owners of high capacity wells and high capacity well systems including persons that propose to construct a high capacity well."

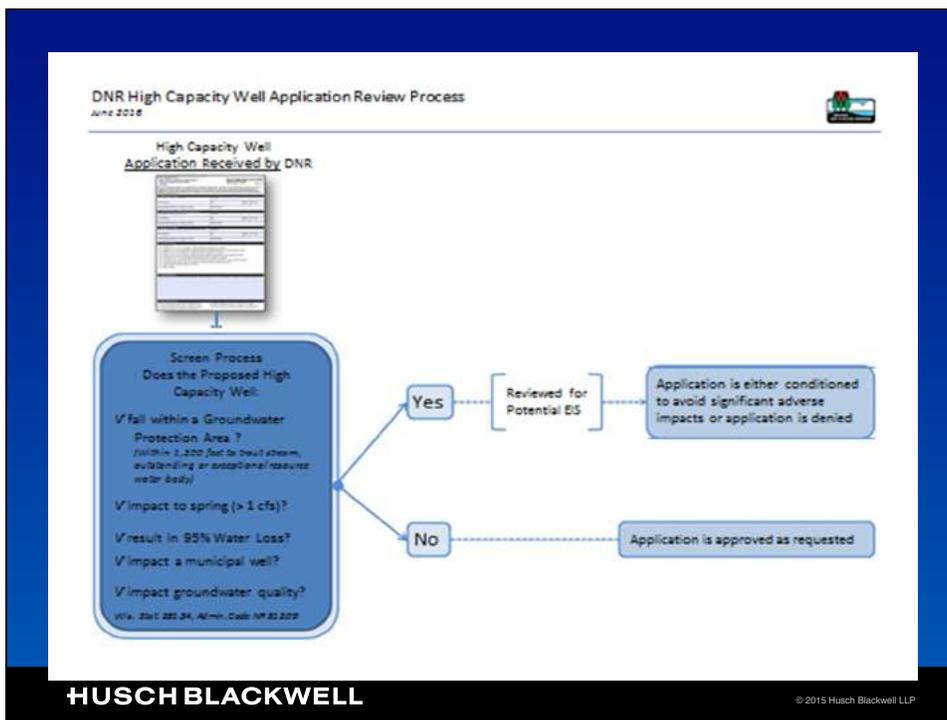
**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

- Although DNR's public trust authority has been expanded by the courts beyond the plain language of the Wisconsin Constitution, s. 227.10 (2m) restricts that authority by withdrawing DNR's ability to implement or enforce any standard, requirement, or threshold, including as a term or condition of a permit issued by the agency, unless explicitly permitted in statute or rule. Neither s. 281.11 and 281.12 do not give DNR the authority to require or impose any term or condition absent explicit statutory or rule-based language sanctioning that specific term or condition. OAG 1-16.

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP



What are the alternatives for resolution of this internal conflict in the statutes; including the ambiguity re: cumulative impact challenge during the comment period versus review by the agency?

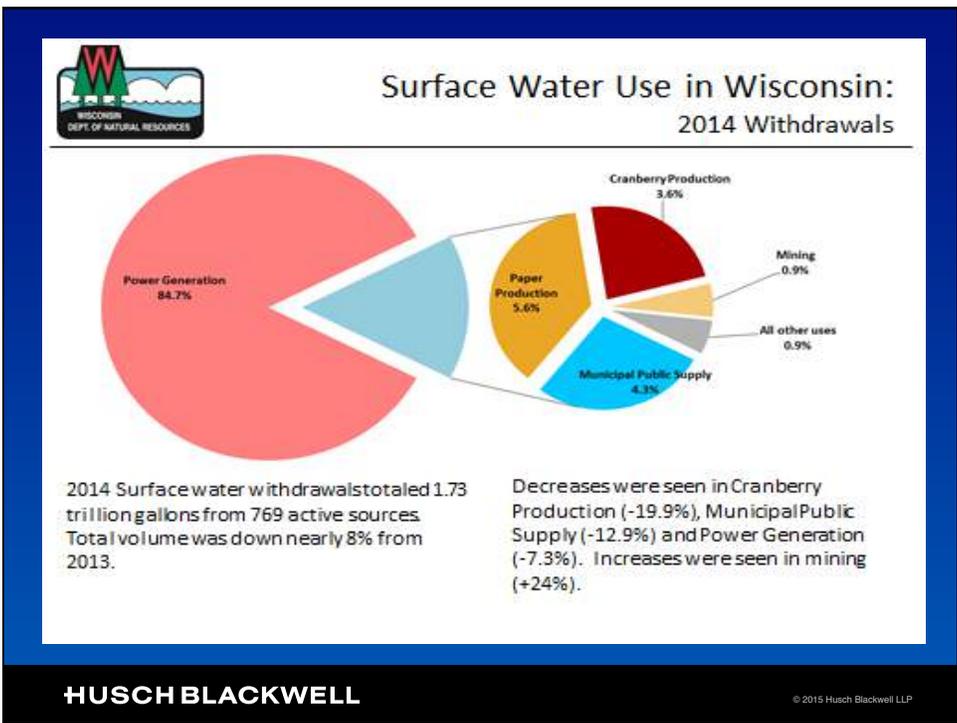
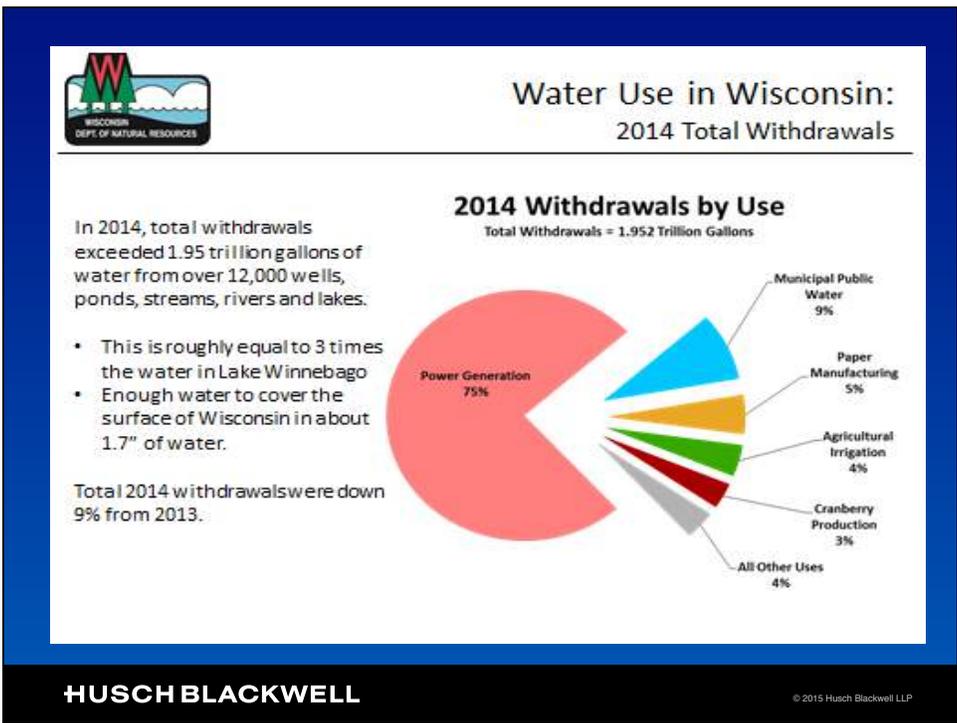
The Legislature could clear this up or it could go before the courts under the right circumstances.

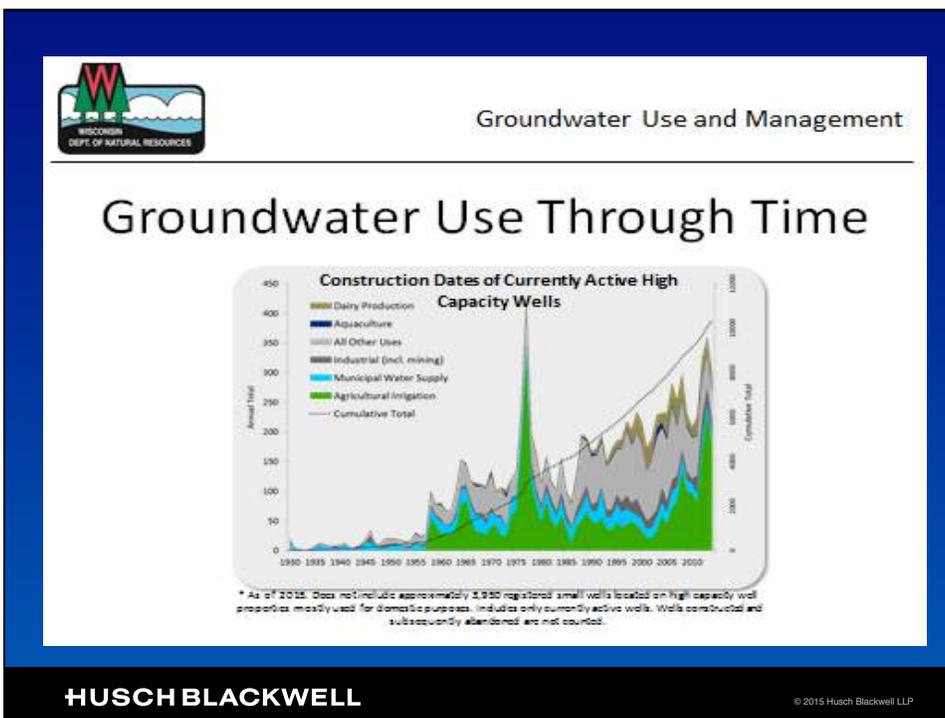
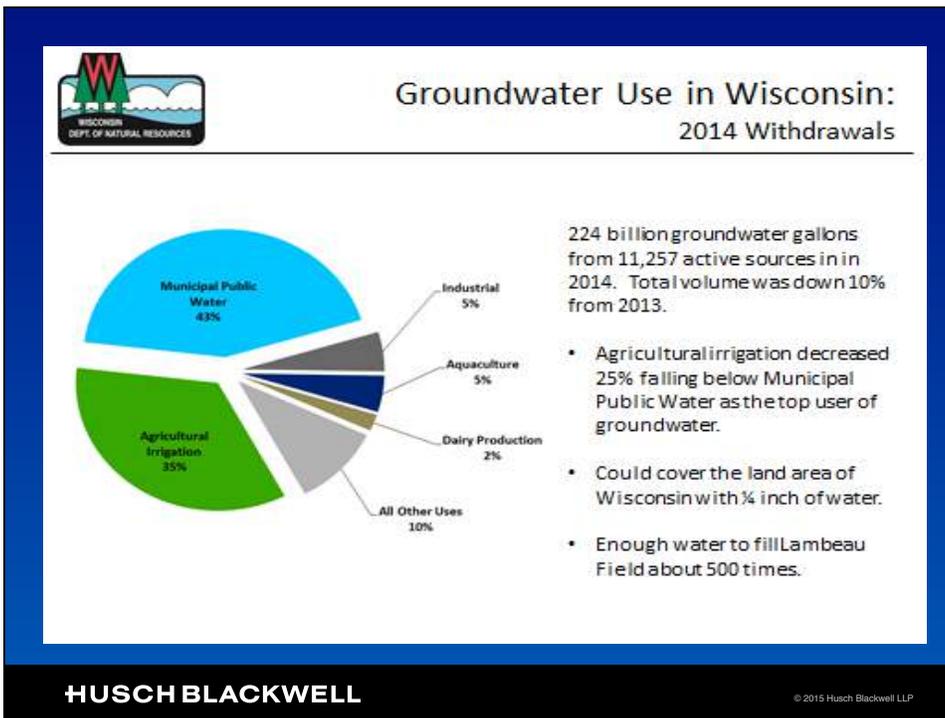
The courts alternative is expensive and uncertain.

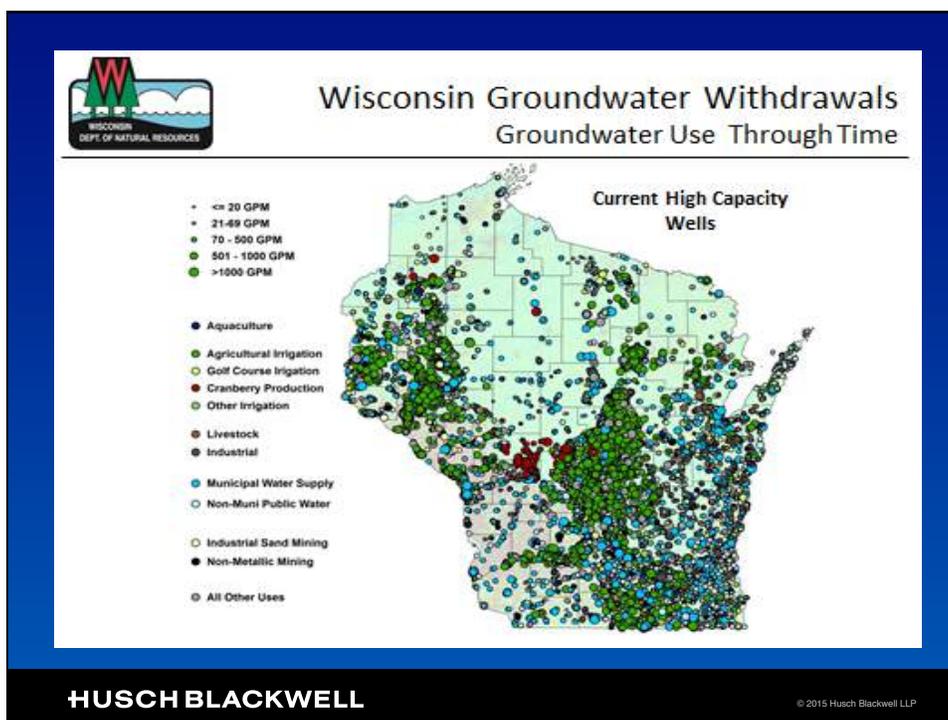
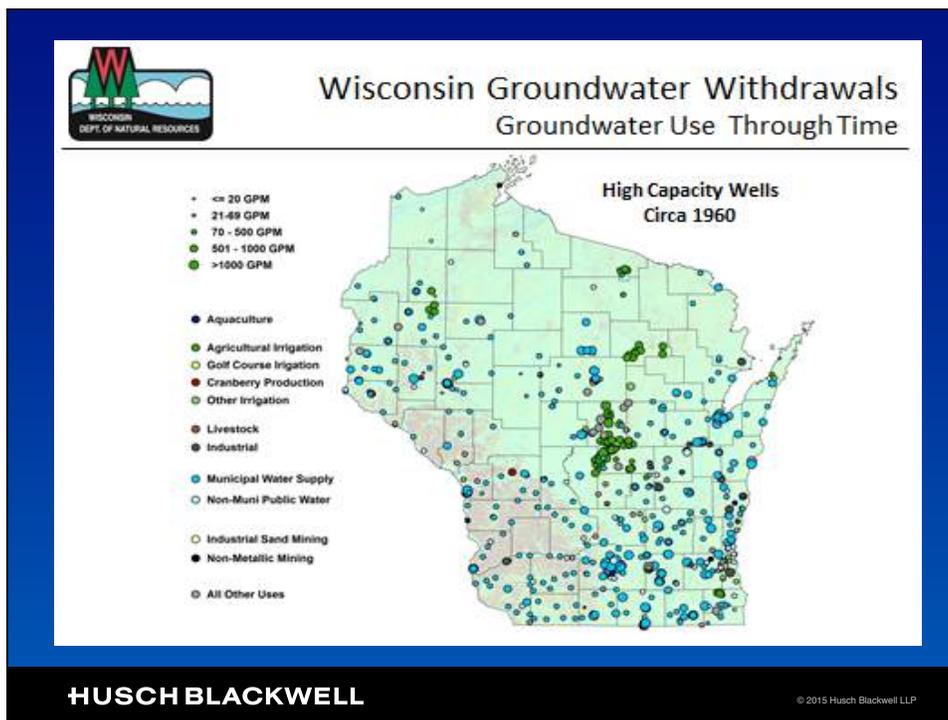
A legislative fix is less expensive and more certain provided they get it right.

To get it right does the legislature have to address the issue of conflicting water use (municipal use versus irrigation), allocation and ownership of water rights, priority and the basic high capacity well application review process.

Does the correct high capacity well application review process include the evaluation of cumulative impacts in certain case by case instances?







- There are three main water rights doctrines in use in the United States at the state level, Florida and Georgia are *riparian rights* states; generally, most eastern states have adopted a riparian system. Most western states have adopted some form of *prior appropriation*. And several states have developed newer, *hybrid* systems. These labels are becoming increasingly less useful as states develop and refine individually their water law in response to increasing demand and supply challenges.

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

- Under prior appropriation, the right to use water for “beneficial use” attaches “first in time, first in right,” and the user must “use it or lose it.” Beneficial use historically was a domestic or an economic use, but now also includes aesthetic, recreational, and ecological uses. Definitions differ from state to state, with quirks and idiosyncrasies developed in some state laws over a hundred years. Most states require prior appropriation users to get a permit or decree before the right is fully vested, and the states can apply restrictions to protect downstream users.

**HUSCH BLACKWELL**

© 2015 Husch Blackwell LLP

- In the East, the states adopted a “reasonable use” riparian system. A person owning real property bordering a natural watercourse can make any reasonable use of that water, so long as the user does not adversely affect the rights of other riparian owners.

## GROUNDWATER DOCTRINES

- Reasonable Use - The right of a landowner to percolating water in his land is limited to such an amount of water as may be necessary for some useful or beneficial purpose in connection with the land from which it is taken, not restricting his right to use the water for any useful purpose on his own land, and not restricting his right to use it elsewhere in the absence of proof of injury to adjoining landowners.

- Hybrid systems have sprung up in states that are experiencing more recent scarcity. They blend the reasonable-use riparian system with elements of prior appropriation. The particulars vary from state to state, but generally, hybrid systems recognize riparian rights and also implement a permit mechanism for new demands placed on water resources.

## GROUNDWATER DOCTRINES

- Correlative Rights - The rights of all landowners over a common basin, saturated strata, or underground reservoir are coequal or correlative, and one cannot extract more than his share of the water, even for use on his own land, where others' rights are injured thereby.