

Paul Oscar Husting ...Defender of the Public Waters Trust

Paul Husting is probably best known in Wisconsin natural resources circles as the vindicated defendant in the 1914 state supreme court Diana Shooting Club case (145 N.W. 816-821, 1914). That case, in which the club sought damages for Husting's alleged trespass on its exclusive hunting preserve, remains significant today for at least two reasons. First, it established hunting as a right incident to public rights of navigation and second, it provides the legal definition of the term "ordinary highwater mark" which prescribes the geographic bounds of the public trust in navigable waters.

An examination of Husting's family and personal history, well founded speculation about his personality and some investigation of state and national political context during the early 1900s show that the outcome of the Diana case was likely not the result of some quirk of fate or historical aberration. It was exactly what one would have expected from the junior U.S. Senator from the state of Wisconsin (an impressive enough title considering Robert M. LaFollette was the senior Senator).

After Husting's premature death in 1917, Senator La Follette and a cast of others reported some of the facts of his life and his accomplishments in memorial addresses before the U.S. Senate and House of Representatives (La Follette 1919).

Paul Husting was born in Fond du Lac, Wisconsin on April 25, 1866. His father emigrated from Luxembourg in 1855 and continued his trade as watchmaker and jeweler, settling eventually in Mayville in Dodge County at the eastern side of the Horicon Marsh (1876). His mother's side of the family was illustrious. Maternal grandfather Solomon Juneau is credited with founding Milwaukee in 1818 when he

established a trading post there as representative for the American Fur Company and John Jacob Astor. Soloman was that city's first postmaster (1835) and mayor (1846). He was French Canadian from near Toronto and his wife, Josette, was Menominee. The family moved to eastern Dodge County (1852 or '53) where they founded the village of Theresa, named for their eldest daughter. Juneau, the Dodge County seat, was named for a cousin. Soloman Juneau died in Shawano County while on a mission for the federal government to make payments to the native american tribes (1856). His funeral and burial on the reservation at Keshena were reportedly well attended by native americans (700) and included among the chiefs were Oshkosh and Keshena (Theresa Historical Society, undated). This recount of the family history may provide some insight into Paul Husting's view of his own place in Wisconsin history.

Husting was one of eight children. He was short and some references suggest he had a back deformity (a hunch back). He was educated in the public schools though he withdrew early because he felt the high school principal had treated him unfairly (another insight into Husting's reputedly "black or white," "champion of the underdog" personality). After stints as clerk in the general store in Mayville and mail clerk in the Wisconsin state prison at Waupun, he is said to have approached Governor George W. Peck asking for a job in Madison which would allow him to attend the University Law School. He was appointed as bookkeeper in the Secretary of State's office. After passing the state bar exams (1895) he returned to Mayville to practice law and in 1902 was elected to the first of two terms as Dodge County District Attorney. Husting became enamored of the progressive democrats, that philosophy being a good match for his own, and in 1906 was elected to the Wisconsin state Senate where he served 8 years being "conspicuous in the drafting and passage of laws conserving the natural resources of the state" (Democratic State Central Committee 1914).

On the national front, in May of 1908 President Theodore Roosevelt convened a milestone "Governor's Conference on Conservation of Natural Resources" attended by Wisconsin Governor James O. Davidson who led a delegation which included state forester Edward M. Griffith. Other Wisconsin notables such as C. R. Van Hise of the University in Madison, addressed the conference, urging conservation of natural resources for public benefit.

Soon after the conference in July of that year, Governor Davidson appointed a State Conservation Commission consisting mostly of those from the conference delegation and Professor E. H. Birge. The new commission consolidated a number of separate state resource commissions of the time. State Senator Husting chaired a legislative committee investigating water power, forestry and drainage (Scott 1965). Years of hearings and debate produced water power bills in 1911 and 1913, both aimed at protecting public interests in navigable waters including reserving the benefits of hydro power production for the public. These bills addressed "recapture" of existing private hydro power facilities for the public and because of this issue and procedural difficulties, were found to be unconstitutional by the courts. However, subsequent legislation in 1915 provided many of the public rights safeguards found in the earlier bills. In addition, approval of franchises for dams was removed from the legislature (where 849 dams had been authorized

between 1836 and 1909) and assigned to the Railroad Commission. The commission was directed to protect public rights in navigable waters and even to be concerned with the scenic beauty of flowages created by new dams (Anderson 1920).

Paul Husting was an effective advocate for the 1911 and 1913 Water Powers legislation. During the debate he remarked that "each individual is the trustee of these highways (the state's navigable waters) and it is its (sic) duty to safeguard them for the best interests of all the people" (Wisconsin Senate 1913). He evidently took his own advice in repeatedly testing the exclusionary Diana Shooting Club franchise on the Horicon Marsh. In addition to protection of public rights in waters, Husting showed a similar tendency to champion social and public concerns in other areas. He supported a progressive state income tax, workmen's compensation laws, laws protecting women and child labor, a corrupt practices act, the 2-cent-per-mile railroad rate fare, state initiative and referendum provisions and the election of U.S. senators by popular vote. He argued often in his career against the "bunching" of bills which he felt obscured their purpose and prevented legislative consideration of individual issues. As an example, on the floor of the U.S. Senate, in debate over the Cummins Amendment Prohibiting Use of Grain for Manufacture of Intoxicating Liquors he admonished, "The question of national prohibition is too big and vital a question to be fastened as a tail to another legislative kite" (Husting 1917). Throughout his career Husting was respected as an independent minded and powerful debater whose opinions were the product of careful consideration and investigation of the issues (Hubbell 1913). His independence was notable almost to a fault. He spoke at length in the U.S. Senate in support of a joint resolution declaring war on Germany and blasted German-American groups for their lobbying efforts aimed at keeping the U.S. out of the 1917 war (Husting 1917). In fact many of his Dodge County and Wisconsin constituents were German-American and he paid a certain price for his stand as noted in the following excerpt from the Milwaukee Free Press (April 29, 1916).

Little Paul is neither diplomat or a good politician," says one. A few days ago United States Senator Paul O. Husting, who is temporarily representing Wisconsin at Washington, told an American born citizen of the United States to appeal to the German ambassador to keep the United States out of the European War. Fred Pabst and several other Americans had wired their senator urging him to use his influence for peace. Mr. Pabst promptly resented the advice as an insult.

The debate over U.S. entry into the war went on for some time and saw Husting quoted at length in major newspapers across the nation. Wisconsin's senior senator, La Follette, who disagreed with Husting on this issue, nonetheless stated that he respected his colleague's opinion as a well considered one. The evidence is that Husting enjoyed his notoriety and at the same time the support of a constituency which had elected him as one of only six democratic U.S. senators to have served from Wisconsin (at the time of his election).

In summary of his character, it appears that Paul Husting, though diminutive in height and somewhat disfigured in appearance, had compensated with independent inquiry, a dogged persistence, powerful oratorical skills, a sense of his family's place in Wisconsin history and perhaps a view of himself as champion of public causes over private monied interests.

Against the backdrop of state and national conservation movements and with some insight to Paul Husting's character, a discussion of the Diana Shooting Club case is more meaningful. The discussion should begin with an understanding of the history of the Horicon Marsh and waterfowling at the close of the nineteenth century. The Marsh had been flooded to form a shallow 55 square-mile lake by construction of a dam on the Rock River in the city of Horicon in 1846. After the dam was removed in 1869, wetland vegetation including wild rice and flag four to five feet tall reinvaded the old lake bed. This condition lasted until the main ditch and lateral ditches were dug in the period 1911 to 1914. The Horicon Marsh had always been good waterfowl habitat with appreciable breeding populations and impressive migrant flocks spring and fall (Personius 1973). In the last half of the nineteenth century Wisconsin waterfowl populations were hunted hard spring and fall. What state regulations there were, were not effectively enforced and market hunting was just then succumbing to a dwindling resource and other opportunities for making a livelihood.

Two shooting clubs, the Horicon Club on the northern 9,000 acres and the Diana Club on the southern 5,000 acres, leased exclusive hunting rights on most of the Marsh from 1883 to about 1920. Some locals were included in the club's membership (50 for Diana and 60 for Horicon) but controlling interests were from Milwaukee, Chicago, and as far away as New York. The clubs were viewed as wealthy outsiders who had confiscated a local heritage. One record notes that even Husting was a club member for a time...apparently not concurrent with his alleged trespass (Personius 1973). In fact, the shooting clubs by excluding the general public and by self-imposed seasons and bag limits, did function to conserve waterfowl albeit for their exclusive use. In many conservation circles of the time private hunt clubs were regarded as necessary for protection of wildlife resources.

Paul Husting, a Mayville native from the Marsh's east side and an avid hunter, apparently had tested the Diana Club's exclusive franchise for some years. Interestingly, a 1902 State Supreme Court Case, *Diana Shooting Club v. Lamoreaux* (89 N.W. 880-886) describes a trespass action where the defendant argued that the old Horicon lakebed (now exposed after breach of the dam in 1869) was public trust land and could not be leased to the exclusion of the public. Lamoreaux was the name of Husting's Mayville law office partner and one wonders whether they were the same or simply related. The later Husting case simply narrowed the geographic scope of Lamoreaux's argument to the bed of the Rock River as it flowed through the abandoned Horicon Lake flowage. In this case the court determined that the exposed flowage was not public trust land and found in favor of the plaintiff Diana Club. The actual trespass by Lamoreaux occurred in September of 1900 though, as the matter progressed through the courts, Husting may have chosen to avoid direct involvement and controversy as he made his first try for political office (elected Dodge County District Attorney in 1902). Husting

did collaborate in defense of another Diana trespasser in a 1914 state Supreme Court case contemporary to his own (Diana Shooting Club v. Kohl, 145 N.W. 815-816).

On September 24, 1911 state senator Paul Husting at the age of 45 paddled his skiff downstream to a widening of the Rock River still known as Malzahn's Bay where it flows through the Horicon Marsh. There he poled it into shallow waters and a stand of flag for the purpose of hunting waterfowl. He was arrested for trespass by a Diana Club "watchman." The resulting state Supreme Court decision contains some of the most powerful language in support of the public trust doctrine (145 N.W. 816-821, 1914).

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters, and as such they should enure 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. Only by so construing the provision of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged with the faithful execution of the trust created for their benefit. Riparian owners, therefore, took title to lands under navigable waters with notice of such trust, and subject to the burdens created by it. It was intended that navigable waters should be public navigable waters, and only by giving members of the public equal rights thereon so far as navigation and its incidents are concerned can they be said to be truly public.

Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

This court recognized that in Wisconsin, unlike some states in the former Northwest Territory, the title to river and stream beds is held by the riparian owner. Nonetheless, it found for the first time in Wisconsin that hunting within the confines of navigable waters was a public right incident to public rights of navigation.

The second important pronouncement in this case defines the geographic extent of the public trust in navigable waters, i.e. it is bounded by the ordinary highwater mark (OHWM). The application of that concept continues to define state Department of Natural Resources permit jurisdiction and public waters protection for many activities under Chapter 30. Stats. In fact, in DNR technical and law enforcement circles OHWM determination is still occasionally referred to as the "prudent duck-hunter" test after the facts of the Diana case. The case law language about "recourse... to other places on the bank or shore" for the purpose of determining the OHWM remains important in agency enforcement cases or on high energy shorelines where OHWM indicators may have been destroyed or are not easily discernable. As an aside the court stated:

Whether the right exists in the public to hunt on a navigable stream, between ordinary high-water marks, which, owing to a low state of water, is unnavigable, or on land between such marks which has become dry or exposed, is not involved in this case and is not decided.

Later decisions established that a riparian owner retains exclusive use of exposed lake or river bed located below the ordinary high water mark for the purpose of access to navigable waters.

Comparing the beginnings of the twentieth century and the issues of Husting's day with today's assaults on the public waters trust, not much appears to have changed. John Lathrop Mathews may as well have spoken of current times when in 1908 he observed "the public domain is a public grab-bag." Federal and state agencies are now in the process of relicensing dams of the Wisconsin Valley Improvement Company spawned just prior to Husting's 1911 and 1913 Water Powers Acts. Much of that effort involves striking a better balance in favor of public rights in waters. Cranberry growers continue to assert their exemption from a number of state water laws and various agricultural, development and municipal drainage interests argue for a revamped definition of navigability to narrow the extent of the public trust and afford greater private advantage. All these and more were debated in Husting's day. There are changes though. Fisheries and wildfowl populations are depleted and water quality is diminished by comparison with those times. New technologies (jet skis, tunnel boats) and powerful watercraft compete for a lane on the public water raceway. Affluent riparians demand a closer and closer view of the water from a deck or living room window as well as opulent shoreline housing for their water toys. Wisconsinites have grown more numerous but not their waters trust. Perhaps we should discover in each of us a later day Paul O. Husting to defend our public waters endowment.

At the close of the federal legislative session in the fall of 1917, Paul Husting returned to Wisconsin where he was killed by an accidental shot fired by his brother during a hunting excursion at Rush Lake on October 21. He was eulogized and widely praised on the floor of the United States Senate and House of Representatives as well as in his home state.

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