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Waterfowl hunting on the Horicon Marsh in the early 1900s was largely under the control of private hunting clubs. A landmark decision by the Wisconsin Supreme Court in 1915 gave rights to navigable waterways to the public.

DNR File Photo

October
2012

**A historic
hunt
protects
public
water
rights**

The story behind the precedent-setting *Diana Shooting Club v. Husting* case.

Bill Volkert

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[Common highways and forever free](#)

On an autumn day in 1913, Paul Husting went hunting on Horicon Marsh. He launched at the Greenhead Boat Landing at the site of a local hunting club where he had been president. He followed the meandering river course of the east branch of the Rock River to where it opened onto the vast marsh at Malzahn's Bay. He continued from there to the newly-created main ditch, which was being dug to drain this vast wetland. The lateral ditches were yet to be dug, but this effort would change the marsh forever. It turns out that Husting's hunting trip would forever change the way we use Wisconsin waterways.

As he approached the west side of the marsh he entered the "private" land of the largest and most prominent hunting club on the marsh, the Diana Shooting Club. Here, he was arrested by the club's private wardens and charged with trespass. He appeared in Dodge County court where he prevailed and the case was then appealed to the Wisconsin Supreme Court. Husting, an attorney, defended himself against the charges and argued for free public access and use of navigable waters. The outcome of this case defined public water rights in Wisconsin for all of us.

Private clubs in control

During the late 1800s and early 1900s, Horicon Marsh was largely under the control of private hunting clubs. While vast marsh areas were open to not only public hunting, but also unregulated market hunting, private hunting clubs existed for a relatively regulated waterfowl harvest in order to secure some of the birds for private use.

Market hunters aimed to take all of the ducks they could shoot during the migration and sell them as food, a practice which devastated the waterfowl population. The hunting clubs established the first hunting regulations on the marsh at a time when conservation was still largely a foreign concept to the general public.

According to the hunting clubs' rules, members could not shoot ducks in spring so that the birds could nest, and they set the first bag limits; members were not allowed to shoot more than 25 ducks per day. This may not seem like conservation to us today, but it was an attempt to restrict the waterfowl harvest.

Six major hunting clubs were established on Horicon Marsh during these years: the Kaw Kaw Club, Fond du Lac Shooting Club, Horicon Shooting Club, Strook's Club, Greenhead Hunting Club and the Diana Shooting Club. These clubs were divided into local clubs and out-of-towner clubs, and each had restricted membership.

The local clubs set a limit on the number of members they would allow, while the out-of-towner clubs restricted membership based on steep membership fees. Like exclusive country clubs today, membership fees were set so high that only the wealthiest of the local members could afford to join and they largely catered to businessmen from Milwaukee, Chicago and Madison.

Of all of these clubs, only one remains today – the Greenhead Hunting Club – located on the east side of the marsh where the east branch of the Rock River flows into Horicon Marsh. According to its charter, the Greenhead Club originally limited its membership by stock ownership and only so many shares were sold. Eventually, members voted to allow new hunters to join, but this truly was a "good-old-boys club" and they wanted to keep membership to a few friends and family members.

By contrast, the Diana Shooting Club was an exclusive hunting club reserved for the wealthy. It took its name from the Roman goddess of hunting and was located on the west side of the marsh on the Miescke farm where it existed from 1883 until 1915. Among the members and club president was Willard Van Brunt, owner of the Van Brunt Factory, a Horicon farm implement manufacturing plant specializing in grain drill production. This company eventually sold out to John Deere.

A few honorary memberships were given to the Miescke family but most members came from Fond du Lac, Milwaukee and Chicago. Those members traveling from Milwaukee or Chicago took the train to Horicon, which was the same line that went from Milwaukee to the Twin Cities and is now the Wild Goose Recreational Trail. This rail line passed along the western edge of Horicon Marsh and the Diana Shooting Club actually had its own rail stop on Swan Road. Hunters could literally board the train in the big cities and be dropped off at Swan Road where a horse-drawn wagon would pick them up for the short ride to the hunting club.

The Diana Shooting Club leased several thousand acres of the marsh for its members and eventually purchased a section for their clubhouse. The club built a dam on the west bay channel in the marsh to flood the nearby wetland to enhance duck habitat and hunting opportunities. The club even employed private wardens charged with arresting anyone who dared to hunt on their part of the marsh.

On the other side of the marsh, at the Greenhead Hunting Club, was a group of local hunters who were used to sharing the marsh with others. While the Greenhead Hunting Club also had limited membership and private use of the clubhouse with access to the river, they did not control land on the marsh. Their clubhouse was located up the east branch of the Rock River and members had to paddle downstream some distance to hunt on Horicon Marsh, meaning that they were obligated to share this with the public. This club was



Diana Shooting Club hunting shack.
© Mayville Historical Society

founded in 1903 and was therefore a late-comer to Horicon Marsh. Husting was among the club's officers and served as its president for the first six years.

Putting his law degree to work

Paul Husting was born in Fond du Lac on April 25, 1866. His mother was the daughter of Solomon Juneau who founded Milwaukee. Husting's family moved to Mayville, located just east of Horicon Marsh in 1875, and he soon became interested in duck hunting.

Even as a young man, Husting was stubbornly independent. Refusing to wear the required school uniform, he quit after the eighth grade and went to work in Mayville as a store clerk and as postmaster before moving to Madison in 1895 to attend the university to study law.

He passed the state bar exam and returned to Mayville two years later. He was elected district attorney in 1902 and in 1906 he was elected to the State Senate where he served for eight years. Among his many priorities were issues of citizen rights and natural resources protection. He also was involved in water power legislation and chaired a legislative committee investigating water power, forestry and drainage. In 1911 and 1913 water power bills passed that reflected the work of that committee and Husting's advocacy for public water rights.

He co-authored three Water Power Acts that gave the state compensation and rights to recapture water power improvements after a determined period. Water power interests fought these efforts in the legislature and the courts, but Husting and others were able to develop laws that stood up in court and served the public interest.

It appears that these experiences motivated him to test the rights of access to public waterways.

On that autumn day in 1913, Husting paddled his skiff onto the portion of the marsh claimed by the Diana Shooting Club as a private hunting reserve for the exclusive use of its elite membership and thereby claimed the rights to access and use the waters there.

Husting saw this as an effort by the club to privatize a portion of the Horicon Marsh. As he approached the club grounds, he made certain to remain in the original river channel and that's where he was arrested for trespassing.

Defining full and free use

Appearing before the Wisconsin Supreme Court, Husting challenged his arrest on the grounds that he was on a publicly navigable waterway.

Based on the Northwest Ordinance of 1792, which controlled the Northwest Territory, of which Wisconsin was a part, this early regulation provided for free travel along any navigable waterway, since these were the public highways. Language of the Northwest Ordinance was incorporated into the Wisconsin Constitution. The decision strengthened emerging law in Wisconsin that established the Public Trust Doctrine, giving rights to Wisconsin's navigable waterways to the public.

In its ruling, the court stated, "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 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 the mainly certain forms of recreation."

Husting also led efforts to change Wisconsin's system of choosing U.S. senators, removing that power from political parties and putting it before the people through direct vote. On March 4, 1915, he was elected U.S. Senator, but he was to spend only 2 ½ years in the U.S. Senate. His work at the national level also focused on protecting the rights of working people and protecting natural resources.

A hunting accident silences a hero

On Sunday, Oct. 21, 1917, Husting and his brother Gustav were duck hunt hunting on Rush Lake in western Fond du Lac County. Around 4:30 p.m. a flock of eight mallards came into their decoys. It appears that Paul stood up to shoot and Gustav swung his gun and accidentally shot Paul in the shoulder. Paul was taken to the nearest house on Rush Lake, the Blackburn home, where he was cared for before doctors could arrive.



Paul Husting.
© U.S. Library of Congress

The family was notified and came to be by his side. Attending were his brothers Gustav, Berthold and Bonduel, plus several area doctors. His sister Bella Lamoreux and brothers Otto, Max and Leo were not able to be there. At 10:45 p.m. Paul Husting died from his wounds. His last words were, "Tell them I did the best I knew."

A funeral was held in Mayville where 3,000 people attended. President Woodrow Wilson sent a letter to the family stating, "Your son's death has come to me as a great personal grief. He was one of the most conscientious public servants I have ever known and had entered upon a career of usefulness to his state and to his country which was of the highest promise. I grieve with you with

all my heart."

Thus ended Husting's short life. But he left his mark on Wisconsin water rights through his insights and bold actions. He challenged the rich and powerful interests who tried to privatize our natural resources. Today, the precedent-setting case of *Diana Shooting Club v. Husting* is cited in nearly all wetland and water resource legislation as supporting the public rights and interest in publicly navigable waterways.



[Watch Champions of Public Trust video. DNR's YouTube channel.](#) After viewing Part 1, be sure to click on Parts 2 and 3.

Bill Volkert is a naturalist who worked at Horicon Marsh for 27 years before retiring. While working at Horicon, Volkert conducted more than 3,600 education programs for over 220,000 people.

Common highways and forever free

When Wisconsin became a state, the federal government transferred title to the lands underlying navigable waters to the state, just as it did for all other states as they entered the Union.

According to Wisconsin's Constitution, sec. 1 art. 9, these waters are to be "common highways and forever free" to the public. Courts interpret this constitutional provision to form the backbone of Wisconsin's Public Trust Doctrine, which establishes that the state holds navigable waters in trust for the use and enjoyment of the public.

Originally, public rights in navigable waters involved uses for commerce, navigation and travel. It was unclear in 1913 when Paul Husting went hunting whether public rights in navigable waters extended to rivers where adjacent landowners held title to the beds underlying the rivers and whether public rights included hunting.

The Wisconsin Supreme Court explained when Wisconsin took title to the beds underlying navigable waters "it became a trustee of the people charged with the faithful execution of the trust created for their benefit."

When the state decided to grant title to beds underlying rivers to adjacent private property owners those "riparian" owners, "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."

Having decided that the navigable river on which Husting was hunting was protected by the Public Trust Doctrine, the court then determined that hunting, like fishing, on navigable waters is a protected public right. Harkening back to English common law, the court reasoned that since hunting was protected by the common law of England it is "perfectly logical" to extend the same rights in Wisconsin.

In this case, Husting was hunting from his boat, which was floating on 12 inches of water and surrounded by vegetation that grew up from the bottom of the river to about five feet above the water surface. The water level in this area fluctuated significantly depending on the time of year.

The court held that public rights extend to the Ordinary High Water Mark of navigable waters and defined that as "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."

Thus, hunting on navigable waters is a protected public right when done between the boundaries of ordinary high water marks.

– *Melissa K. Scanlan, Law and Policy Scholar, University of Wisconsin Law School and University of Wisconsin-Milwaukee School of Freshwater Sciences.*



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