October 21, 1958

TO: Individuals Interested in the Wisconsin Water Legislation Problem

FROM: W. E. Scott

SUBJECT: Notes on Talk by Professor J. H. Beuscher to League of Women Voters of Wisconsin on October 15, 1958, at Madison Discussing "Wisconsin Water Legislation, Present and Proposed"

NOTE: The following notes taken on the above subject by me are meant to be an accurate summary of what was said by Professor Beuscher and his answers to several questions which were asked by a special committee for this "Water Workshop" and by individuals from the floor. The body of this talk was recorded on tape by radio station WHA (Madison) and broadcast on Thursday, October 16, 1958.

Summary

The taconite industry is making special requests for the use of water and, among other things, one thing that they want is long-term permits which will guarantee them water use for at least 40 years. Other industries in the state have to get along with the "reasonable use" procedure which is a limited use. The question is: Should we grant the taconite miners 40-year permits when agricultural irrigation can have only short-term permits which can be revoked?

Our water law is a series of responses to special interest pressures. Until 1954, our water law was a "law of the jungle" but at least in 1954, in relation to the ground-water law, there was developed a special type of appropriation law for municipalities, while for the other water uses, the "law of the jungle" continued. Under this procedure, no agricultural user or other user of water has any protection, while there is protection for the domestic use of water in households. Why shouldn't others have the same protection? A new well can offset existing wells, but until we come to a more general system of permits, the municipalities will be immune from damage claims from private well owners. Are we now going to give each industry separate rules, or set up a system of beneficial use for all? It may be best to exempt certain parts of the state from permit requirements for the use of ground water.

So far as surface water is concerned, it is a mistake and misconception to believe that our present Wisconsin water laws are the "quintessence of sweet reasonableness." The riparian law we have now does not protect our riparian doctrine with its loose interpretation of what is "reasonable" and the artificial definition of riparian land.

Our water law now regarding lakes and streams is a "jagged thing" because one group or another has secured a "special consideration." Supreme Court decisions in Wisconsin have given a "declaration of preference" to shore owners on riparian lands even if other lands could use the water much better.

Wisconsin's old Mill Dam Act permitted the building of dams across non-navigable streams and the backing up of waters even on the lands of the neighbor above who had no recourse at all except to go to court. Now the Public Service Commission has permitted hydroelectric dams on navigable streams even though it hurts other riparians. This has been done by simply saying that the holding back of water is a "reasonable use." In the lumbering days, special authority was given to loggers to move their logs and now special use of water is given to cranberry owners even to the extent of permitting diversion of water to non-riparian lands. Also, municipalities draw water for use by golf courses, industry, and other purposes on non-riparian lands, while such use of water in some other states is not permitted. At least one and one quarter million of our people in Wisconsin are supplied water on non-riparian lands in this manner. In addition, land-use zoning for such things as forestry or residential zoning in cities is an expression of the power that could be used in water management in the state.

Today, we require permits for use of surface waters for agricultural irrigation but not for manufacturing or any other use which might be just as damaging to public rights. Some of this damage is in the form of pollution or even consumptive use in fairly large quantities. In 1957, the Legislature went one step further by authorizing the use of water on non-riparian lands which are owned or controlled by the riparian owner and are contiguous to such riparian lands. This law will expire on January 1, 1959, but was another special concession. We now seem to be ready to give the taconite people water to use far away on non-riparian lands. As these special rights and privileges increase, we will have more difficulty in changing our law in the future.

It is high time that we throw away the common idea that the riparian doctrine still exists in this state. It is time to realize that we have changed and "not to preserve a historic delusion" but move toward economic development which also includes our recreational industry.

We need an inventory of water; water-use zoning with some streams only for recreational use and some for industrial or agricultural use; some waters zoned for quiet use and some for noisy water use; a set of goals for public access with money available to a state agency responsible for setting aside and managing public access sites; public rights which cease to be theoretical and become real; to recognize certain water uses which may have high priority in some parts of the state and low in another such as for example possibly snap beans should have high priority in

central Wisconsin. Even agricultural irrigation has an "economic multiplier" effect so that the increase of these industries also makes employment in many others.

If the use of water requested is beneficial and not in violation to the public use and rights, the individual applying should be given a permit for a period of time. All of this presupposes administration by a single state agency but this would not include such things as water purity or pollution, but it would include both ground and surface waters in the total hydrological cycle.

Questions and Answers

1. Question: What is the objection to requiring a new industry to apply for a permit before building a plant which may pollute public waters?

Answer: I see no objection and this matter is under discussion, but Mr. Becker of the Legislative Council Committee seems to oppose this idea because he states that the State Committee on Water Pollution does a very good job already by following planned new building in the Western Builder magazine.

2. Question: What about this single state agency? Would it handle all matters pertaining to water?

Answer: I don't feel it would handle all matters pertaining to water, but it would only allocate water or administer the permit system. I can't see how we could improve other functions of the Board of Health in the protection of water purity or Conservation Department functions as related to water or the functions of the State Soil Conservation Committee in regard to watersheds. But this state agency in charge of administration of the permit system could work cooperatively with all other state agencies in planning water use matters.

3. Question: How can pollution be controlled in populated rural areas where sewage systems are not handled by a municipal government?

Answer: We now have in the Statutes a subdivision control law to require subdivisions to submit soil samples on lands where they have no sewer systems and to control to some extent activities for pollution abatement.

4. Question: You make this all seem so simple and if that is so, why do not others agree with you more readily?

Answer: Other individuals and groups interested in this controversy say, in essence, that we should continue as we have been,

leaving each pressure group to make their own request for water use privileges and even to grant this through special legislation. The idea is to let the market control and if the taconite industry or the agricultural irrigators are strong enough, then give them what they want rather than to regulate water use for "beneficial use per locality." They generally say this is too much of a responsibility for an administrative agency even if it is responsible to the Legislature, and often they suggest that they go directly to the Legislature with requests for special privileges. I propose that the agency have an expert staff and that this staff be prepared to handle all problems that may arise.

5. Question: Do you feel the taconite group will have strength to secure the change that they want?

Answer: Yes, you could not stop this tidal wave. The taconite development in Ashland County plans to spend about 35 million dollars, which equals the total assessed value of the county at present. We need to have the rules used for taconite development apply to all other industries. The present law would not allow water to go two miles from the river but if water is good for snap beans at a point that far from the river and it won't hurt the river, "I can't see why we couldn't let the farmer have it." We now let artificial legal rules get in the way.

6. Question: Have you thought of the composition of this agency which would take charge of Wisconsin water matters?

Answer: The most feasible thing to do is to use the Public Service Commission coupling into this an advisory committee of other state agencies. You could use the Natural Resources Committee or a subcommittee of this group as an advisory body. The Public Service Commission could take on the planning job too. Otherwise, at the present time, we have very good coordination between the various state agencies in this field of water use.

7. Question: You talk of "beneficial use" but is this term to be defined in the law?

Answer: Yes, in the law put in the "hoppers" in 1957, there was some such definition and it would have to be defined. I would say it is something to the effect that beneficial use is a use of water that will clearly benefit the economy in which water is to be used, always keeping in mind the protection of the public rights. This includes the idea of water-use zoning, especially on northern streams which may have recreational use of water as their primary use and then also would permit other uses elsewhere. We can't speak of it as "best use" because it is difficult to tell what would be the best use tomorrow.

8. Question: What do we do when there is a shortage of water and not enough to go around?

Answer: This is strictly a question of supply - both physical and economic - but it is true that the matter becomes much more serious when there isn't enough water to go around and decisions must be made as to which use is most important.

9. Question: At the last Water Resources Committee meeting you gave four points regarding the riparian rights doctrine and riparian rule here in Wisconsin and elsewhere. Can you repeat these for us?

Answer: The Public Service Commission presently defines riparian land by the narrowest possible definition which is a "source of title" rule. In this case, if my grandfather made the mistake of selling off some of the original homestead lands, I can never again buy them back and put the homestead together again so that all of it will be riparian to the stream, but only that which has never been severed or is actually riparian to the stream contains the riparian right. Another is the "unity of title" test in which an individual can buy the land back so long as it is in the same watershed and all of the land purchased and put together can be considered as riparian to the stream. Another "source of title" test is dependent on how much land is actually riparian allowing the use of water on any additional acreage which is not riparian so long as the use does not exceed the amount of area which is riparian in equivalent acreage.

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Note on literature handed out at this League of Women Voters Water Workshop on October 15, 1958, in Madison at the Memorial Union: Besides three pieces of mimeographed literature supplied free from the Wisconsin Conservation Department, the following materials, some available free but most available at cost, can be obtained from the League of Women Voters State Office, 119 East Washington Avenue, Madison:

1. League of Women Voters publication Forward for January, 1958, with summary article on "Water - Wisconsin Water Resources and Policy" by Mrs. David Sauber.

2. March, 1958, mimeographed statement by the Wisconsin Farm Bureau Federation entitled "For the Beneficial Use of Water."

3. March, 1958, mimeographed statement by Mrs. C. R. Nutt entitled "The Hydrologic Cycle and Wisconsin Rainfall."

4. Mimeographed memo dated April, 1958, from Olga Sauber, State Director, to local league presidents and chairmen of state water item, on the subject of "Conservation, Study of Water Resources in Wisconsin."