Wisconsin State Senate
24th Senate District

Serving Wood, Portage, Adams,
Waushara, Monroe, and Jackson

PATRICK TESTIN
STATE SENATOR

DATE: February 5, 2020

RE: **Testimony on Senate Bill 501**

TO: The Senate Committee on Natural Resources and Energy

FROM: Senator Patrick Testin

Thank you to Chairman Cowles and members of the Senate Committee on Natural Resources and Energy for accepting my testimony on Senate Bill 501 (SB 501).

SB 501 is a simple bill that restores waterfront owners' rights to what they were for 140 years of the state's history.

According to the Department of Natural Resources (DNR), there are 260 flowages in the state of Wisconsin. For more than a century, thousands of property owners had a presumption of riparian rights on these bodies of water, and with that presumption, the ability to place a pier in the water. These rights were challenged when the Supreme Court ruled that flowages were not natural bodies of water. I believe that this ruling is a mistake, and have taken the step of introducing this bill not for the purpose of attacking any individuals or organizations, but instead to defend property owners.

Thank you again for listening to my testimony and I hope that you will join me in supporting this bill.

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ROB STAFSHOLT

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P.O. Box 8953
Madison, WI 53708-8953

DATE: February 5, 2020
RE: **Testimony on Senate Bill 501**
TO: Members of the Committee on Natural Resources and Energy
FROM: Representative Rob Stafsholt

Thank you Chairman Cowles and members of the Senate Committee on Natural Resources and Energy for hearing Senate Bill 501 relating to the presumption of riparian rights on navigable waterways.

Last year, a Wisconsin Supreme Court ruling (Movrich v. Lobermier) dealt a devastating blow to citizens who own land on one of Wisconsin's 240 flowages. Ultimately, the court ruled that the public trust doctrine does not allow landowners whose deed does not explicitly grant access to the water bed of flowages, the ability to erect and maintain a pier. Meaning that, unless a landowner's deed explicitly grants the right to the water bed beneath a flowage, a landowner potentially cannot erect a pier.

As Justice Rebecca Bradley stated in her dissent on the court's decision, "riparian rights in Wisconsin are sacred." This bill will protect the presumed riparian rights that many Wisconsinites believe they are currently entitled to. To ensure the rights of these citizens are protected, LRB 2608 establishes that landowners, who's land abuts a flowage or artificial water way, has the ability to exercise all riparian rights established under law, unless the deed to the property explicitly states otherwise.

The bill changes no environmental standards that are found under current law. All land that abuts flowages will be treated as is under current law. LRB 2608 does not make it any easier to erect or maintain piers and does not change any language relating to siting, zoning, or mitigation relating to Wisconsin's shoreline zoning laws. This is a common sense bill that makes riparian rights a priority.

Again, thank you for allowing me to testify on Senate Bill 501. I would appreciate your support on this important piece of legislation.

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Senate Committee on Natural Resources and Energy

2019 Senate Bill 501
The Presumption of Riparian Rights
February 5, 2020

Good morning Chairman Cowles and members of the Committee. My name is Amanda Minks, and I am the Waterway and Wetland Section Chief with the Wisconsin Department of Natural Resources. Thank you for the opportunity to testify, for informational purposes, on Senate Bill 501 (SB 501), related to the presumption of riparian rights.

It is the Department's understanding that the intention of this bill is to provide clarification regarding landowner's rights to place waterway structures, such as piers, on inland waters, specifically flowages and artificial impoundments. It is also our understanding that the bill seeks to add clarification to the statutes in response to the 2018 Movrich v. Lobermeir Wisconsin Supreme Court decision.

The Department has historically considered riparian owners to include those property owners with property abutting artificial flowages and impoundments. Pursuant to Ch. 30, Wis Stats., property owners that do not meet the definition of a riparian owner lack the authority to place waterway structures through an exemption or through a permit for these types of activities.

The Supreme Court decision creates some uncertainty in the ability for property owners abutting artificial flowages and impoundments to continue to place structures through exemptions or permitting. The DNR finds that proposed statutory changes to continue to treat property owners with property adjacent to artificial flowages or impoundments as riparians would offer a reasonable pathway for common sense decision-making.

As currently drafted, however, the Department finds that the proposed language is broader than its intended scope.

The Department recommends that clarification be given to the types of navigable waters that SB 501 could apply to. More specifically, we recommend that the legislation clarify that it applies to artificial flowages or impoundments—as this is consistent with the scope of the Supreme Court decision. DNR has suggested language to the bill authors to address this concern, and we appreciate their consideration of that modification.

The Department also recommends that SB 501 clarify that this proposed legislation does not supersede the requirements of Chapter 30, Wis. Stats. Lakebed is held within the public trust and DNR has the constitutional and statutory responsibilities to ensure that structures and activities occurring in navigable waters do not conflict with the paramount public interest in those waters. The exercise of riparian rights

is also qualified by the common law concept of reasonable use. We do not understand the intent of the proposal to remove or change permitting requirements that protect the public interest in navigable waters or alter the reasonable use restriction, however this is not necessarily reflected in the broad scope in which SB 501 is written. DNR would be happy to work with the bill authors to find ways to address this concern.

Again, the Department would like to reiterate that we support the intention of this bill to recognize landowners adjacent to flowages and impoundments as riparian owners, but we do have concerns that the proposed language is more broad than necessary and may have unintended consequences as currently drafted.

On behalf of the DNR and the Waterways Bureau, we would like to thank you for your time today. I would be happy to answer any questions you may have.

Wisconsin Utility Investors, Inc.

Statement of Attorney William P. O'Connor

in opposition to

Senate Bill 501/Assembly Bill 551

I appear today on behalf of Wisconsin Utility Investors, Inc. WUI is a non-profit association of more than 5,000 individuals who own stock in Wisconsin gas and electric utilities. The WUI is concerned that these bills will adversely affect our members' investments because they will impair the ability of utilities to safely and effectively manage their portfolio of hydroelectric facilities.

My comments also draw on my experience practicing real estate and water law for more than 40 years, including representation of Wisconsin Lakes and other parties in the Supreme Court's oral argument and briefing in *Movrich v. Lobermeier.* In the 2018 *Movrich* decision, the Court rejected the argument that every owner of waterfront property in Wisconsin automatically holds the riparian right to place materials and structures (including piers) in flowages created by dams. Instead, the Court recognized that owners of land submerged by a dam retain property rights as landowners and are entitled to make their own decisions about the property they own.

Some waterfront deeds expressly include or exclude riparian rights. But both are rare in Wisconsin. Far more common are deeds to waterfront lots or parcels that say nothing at all about riparian rights. What then? Did the seller convey, and the buyer purchase riparian rights or not?

This is not a new problem. In 1911, the Legislature adopted the statute now codified as Wis. Stat. §30.10(4)(b) which addresses the interpretation of property interests on and near navigable waters. That section states in part that: "The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity to the common law."

How would the respective rights of a waterfront owner and an owner of submerged land of an adjacent flowage bed be determined under common law? The first place the Court would look is the language of the Deed. If it says it includes or excludes riparian rights, that would settle it. But if it doesn't address riparian rights, a Court would need to dig a little deeper in order to determine what the parties did. That deeper look begins with the presumption that a deed to waterfront land includes riparian rights.

Frankly, almost all waterfront deeds do include riparian rights. But there are exceptions. For example, a utility that owns land fronting on a flowage used to generate hydroelectric power might want to control the placement of structures and materials to prevent safety hazards or other concerns. If the deed is silent, the question whether it includes riparian rights is a question of fact resolved based on relevant evidence. But these bills would ignore all evidence of contracting parties' agreements or intent except where "riparian rights are specifically prohibited by the deed to the land." Never mind what the parties intended, what they may have included in a purchase contract, how the seller may have advertised the lots or any other evidence.

The effect of the bill would be to create brand new riparian rights vested in every waterfront owner who does not currently own those rights. And to take away the right of every flowage bed owner who chose to retain the right to control use of their property. All simply because the Legislature said so.

By what power can the State lawfully take one citizen's property away and give another citizen new property rights? Why wouldn't enactment of these bills affect an unconstitutional taking of property without a public purpose, without due process and without just compensation?

Even if you believe the State should and can lawfully restructure private property rights in this way, how would it work in practice? Suppose waterfront land was conveyed by a deed that expressly excluded riparian rights. Years later the waterfront owner decides to sell the place. The seller's lawyer would likely do what most have and draft a deed including a legal description of the lot or parcel with no reference to riparian rights. Do riparian rights then attach to the property because the second owner's deed lacks prohibitory language? Can the next owner create new and valuable rights and diminish the rights of the owner of the flowage bed by choosing the form of a deed?

SB-501 starts out with a simple premise stating: "An owner of land that abuts a navigable waterway is presumed to be a riparian owner and is entitled to exercise all rights afforded to a riparian owner . . . ." This makes sense because riparian rights are typically included with waterfront land even when they aren't called out in a deed. But these bills go much further, ignoring the facts of actual transactions and evidence of the intentions of the citizens involved.

I would like to briefly address a few other matters that concern utility investors and myself as an attorney. First, this isn't just a "pier bill." It addresses "all rights of riparians" which include rights to place structures and materials, withdraw water for domestic and agricultural use, install rip-rap and fish cages and swimming rafts and wharves and a whole range of other activities, many of them now not even subject to permits.

Second, this isn't just a "flowage bill." Rather it extends to waterfront property on all navigable waters, including the State's 15,000 lakes and thousands of miles of rivers and streams.

Third, I question the urgency of resolving this issue before the close of this Legislative Session. Justice Bradley's minority opinion in the *Movrich* case rang the alarm that the Court's decision "effectively extinguishes the rights of thousands of waterfront property owners along flowages which jeopardizing the rights of waterfront property owners on all bodies of water in Wisconsin." Advocates for this legislation have echoed that dire warning. But the *Movrich* decision was handed down more than two years ago. I have not seen evidence of a single situation (let alone thousands) where a flowage bed owner has challenged the lawfulness of any existing pier in the State. What is the urgency?

WUI urges the Committee not to advance SB-501 or, at least, amend the bill to protect utilities and other flowage bed owners who have chosen to retain their legal right to control offshore development. At a minimum, the bill must be amended to permit such an owner to proffer evidence to rebut the presumption that a waterfront deed includes riparian rights.

Wisconsin REALTORS® Association

To: Members, Senate Committee on Natural Resources and Energy

From: Tom Larson, WRA Senior Vice President of Legal and Public Affairs

Date: January 22, 2020

Re: AB 551/SB 501 – Restoring the Right to Place a Pier on Flowages

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The Wisconsin REALTORS® Association (WRA) supports AB 551/SB 501, legislation seeking to clarify that all waterfront property owners, even those with land abutting flowages and artificial waterways, have the right to place a pier subject to the regulations in Chapter 30 of the Wisconsin Statutes.

Background – For over 140 years, Wisconsin law has recognized that owners of waterfront property have riparian rights, including the right to place a pier. *See Cohn v. Wausau Boom Co.*, 47 Wis. 314, 322, 2 N.W. 546 (1879). In 1959, the Wisconsin Legislature codified this right of waterfront property owners to place a pier. *See* Wis. Stat. § 30.13(1). In recent years, the legislature has further protected this right from permit requirements and enforcement actions if certain conditions are met. *See* Wis. Stat. §§ 30.12(1g)(f) and 30.12(1k).

In 2018, the Wisconsin Supreme Court, in *Movrich v. Lobermeier*, 2018 WI 9, ¶3, 379 Wis. 2d 269, 905 N.W.2d 807, declared that some waterfront property owners do not have a right to place a pier. Specifically, the Court held that owners of waterfront property along flowages and artificial waterways do not have the right to place a pier. *Id.* Because the lake beds of flowages and artificial waterways are privately owned, the Court reasoned that the owners of the lake beds can prohibit any pier from touching the bed or floating above it. *Movrich*, at ¶55.

Potential Impacts of Case – The *Movrich* case will likely have far-reaching impacts, possibly impacting a large number of waterfront property owners and businesses. Consider the following:

- **Thousands of waterfront property owners are impacted** -- The Court's ruling applies to all flowages and potentially other "man-made" waterbodies in Wisconsin.
    - According to the Wisconsin DNR's website, Wisconsin has approximately 260 flowages.http://dnr.wi.gov/lakes/lakepages/Results.aspx?location=ANY&page=ANY&name=flowage&letter=ANY.
    - Thousands of lakes in Wisconsin are considered "man-made" resulting from either the artificial raising of water levels or the damming of rivers and streams, including large water bodies such as Lake Koshkonong, Lake Wisconsin, and the various "chain of lakes" in areas like Minocqua and Eagle River.

- **All piers are prohibited, including floating piers** -- The Court's ruling applies broadly to (a) all piers, even floating piers, (b) existing piers that have been placed for decades, and (c) waterfront property that has been assessed for property tax purposes as having pier rights for years. Because of the Court's ruling, affected property owners may now be forced to either remove their pier or pay several hundred dollars for "dock license fee" to keep their existing pier.

- **Affected waterfront property owners have made significant investments in piers and watercraft** -- Affected property owners have invested thousands of dollars on piers, boats and other recreational vehicles with the expectation they could be used to directly access the water from their property. Waterfront businesses such as restaurants, marinas and gas stations rely exclusively on customers who access their businesses by boat. These businesses have invested thousands of dollars on piers, decks, retaining walls, and other improvements to their property to attract these boating customers to their businesses.

This legislation would restore the rights of affected waterfront property that existed prior to the *Movrich* case.

We respectfully request that you support AB 551/SB 501. Please contact us at (608) 241-2047 if you have any questions about this legislation.

Movrich v. Lobermeier dissent

1. **Mistakes made by the majority opinion.**
   a. Determining that Movriches are not riparians and do not have riparian rights because their deed does not explicitly mention "riparian rights." ¶ 77
   b. Misclassifying flowages as artificial/man-made waterbodies and equating them to privately owned gravel pits filled with water. ¶¶ 81-82.
      i. "Artificial waterbody" is "a body of water that does not have a history of being a lake or stream or of being part of a lake or stream." Wis. Stat. § 30.19(1b)(a).
      ii. Flowages are lakes created by damming a stream.
   c. Failing to recognize that the of presence of navigable water over Lobermeier's property is a game changer, limiting their fee simple rights, and creating rights for both the public and riparians. ¶66.
2. **Unprecedented decision**
   a. "The majority adopts an unprecedented holding that a fee simple interest in land submerged by water cancels riparian rights presumptively recognized under the common law for at least 140 years." ¶ 67
   b. "No authority in Wisconsin or in any other jurisdiction has adopted the majority's reasoning or otherwise restricted placement of a pier on navigable waters by a riparian owner in favor of non-riparian, fee simple ownership of the waterbed." ¶ 90.
3. **Impact of majority opinion**
   a. "[T]he court effectively extinguishes the rights of thousands of waterfront property owners along flowages, while jeopardizing the rights of waterfront property owners on all bodies of water in Wisconsin." ¶ 94

379 Wis.2d 269
Supreme Court of Wisconsin.

Jerome MOVRICH and Gail Movrich,
Plaintiffs–Respondents,
v.
David J. LOBERMEIER and Diane Lobermeier,
Defendants–Appellants–Petitioners.

No. 2015AP583
|
Oral Argument: September 20, 2017
|
Opinion Filed: January 23, 2018

Synopsis

Background: Owners of property upland of creek flowage brought action against owners of waterbed property, seeking declaration of their riparian rights incident to their property ownership and their ability to access the flowage and to install a pier or dock. The Circuit Court, Price County, Patrick J., Madden, J., entered judgment against waterbed property owners, and waterbed property owners appealed. The Court of Appeals, Curley, P.J., 372 Wis. 2d 724, 889 N.W.2d 454, affirmed, and waterbed property owners petitioned for review.

Holdings: The Supreme Court, Patience Drake Roggensack, C.J., held that:

[1] upland property owners were not entitled to riparian rights incidental to property ownership;

[2] public trust doctrine conveyed no private property rights to upland property owners; and

[3] upland property owners' property rights were sufficient to access and exit creek flowage from their property.

Affirmed in part and reversed in part.

Rebecca Grassl Bradley, J., filed an opinion concurring in part and dissenting in part in which Shirley S. Abrahamson, J., joined in part.

West Headnotes (31)

[1] Appeal and Error
Property in General

Whether prior court decisions properly applied the principles of property law, riparian rights, and the public trust doctrine are questions of law that the Supreme Court independently reviews.

[2] Estates in Property
Fee simple

An owner in fee simple is presumed to be the entire, unconditional, and sole owner of any buildings as well as the land; this is true regardless of whether the property has positive economic or market value.

[3] Trespass
Trespass to Real Property

One who intentionally steps from his or her own property onto the property of another, irrespective of whether he or she thereby causes harm to any legally protected interest of the other, is liable for trespass.

[4] Trespass
Nature and elements of trespass in general

Actual harm occurs in every trespass.

owner of property bordering the Flowage.

III. CONCLUSION

¶ 58 There are three issues presented in this review. First, we conclude that while Movriches' property *300 borders the Flowage, they are not entitled to those riparian rights that are incidental to property ownership along a naturally occurring body of water where the lakebed is held in trust by the state. Rather, any rights Movriches may enjoy in regard to the man-made body of water created by the flowage easement must be consistent with Lobermeiers' property rights or the flowage easement's creation of a navigable body of water. Because the placement of a pier is inconsistent with Lobermeiers' fee simple interest and does not arise from the flowage easement that supports only public rights in navigable waters, Movriches' private property rights are not sufficient to place a pier into or over the waterbed of the Flowage without Lobermeiers' permission based on the rights attendant to their shoreline property.

¶ 59 Second, we consider the nature of the Flowage waters, to which all agree the public trust doctrine applies, and whether the public trust doctrine grants Movriches the right to install a pier directly from their property onto or over the portion of the Flowage whose waterbed is privately owned by Lobermeiers. In answering this inquiry, we consider whether and to what extent the existence of navigable waters over Lobermeiers' privately-owned property affects Lobermeiers' rights.

¶ 60 On this issue, we conclude that the public trust doctrine conveys no private property rights, regardless of the presence of navigable water. In a flowage easement such as is at issue here, title to the property under the flowage may remain with the owner. While the public trust doctrine provides a right to use the flowage waters for recreational purposes, that right is held in trust equally for all. Furthermore, although the Lobermeiers' property rights are modified *301 to the extent that the public may use the flowage waters for recreational **822 purposes, no private property right to construct a pier arises from the public trust doctrine.

¶ 61 Third, we consider whether the public trust doctrine, when combined with the shoreline location of Movriches' property, allows Movriches to access and exit the flowage waters directly from their abutting property; or, whether, because Lobermeiers hold title to the flowage waterbed, Movriches must access the Flowage from the public access. On this issue, we conclude that as long as Movriches are using the flowage waters for purposes consistent with the public trust doctrine, their own property rights are sufficient to access and exit the Flowage directly from their shoreline property.

¶ 62 Accordingly, we affirm the court of appeals in part and reverse it in part.

By the Court.—The decision of the court of appeals is affirmed in part; reversed in part.

SHIRLEY S. ABRAHAMSON, J. (concurring in part, dissenting in part).

¶ 63 I join Justice Rebecca G. Bradley's separate writing except for Part II.

REBECCA GRASSL BRADLEY, J. (concurring in part; dissenting in part).

¶ 64 Riparian rights in Wisconsin are sacred.[1] For many, waterfront property *302 in Wisconsin provides more than merely a place to live—it affords a lifestyle. The proverbial cottage "up north" offers the opportunity for fishing off the pier in the morning, waterskiing with children or grandchildren in the afternoon, and an early evening ride on the pontoon boat with friends and neighbors. None of this is possible absent riparian rights. Traditionally, these rights have included "the right to build piers, harbors, wharves, booms, and similar structures, in aid of navigation, and such right is also one which is incident to the ownership of the upland." Doemel v. Jantz, 180 Wis. 225, 231, 193 N.W. 393 (1923). The majority opinion sweeps away these cherished and longstanding property rights and extinguishes riparian rights for those with cottages or homes on Wisconsin's waters called flowages.

¶ 65 The issues before this court are (1) whether Jerome and Gail Movrich may maintain a pier resting over David and Diane Lobermeiers' flowage bed property either as part of their riparian rights or under the public trust doctrine, and (2) whether the Movriches have the right to cross the Lobermeiers' flowage bed from their own property to use and enjoy the flowage waters for recreational purposes. As to the first issue, the majority reverses the court of appeals, concluding the Lobermeiers

own the flowage bed in fee simple absolute, entitling them to exclude the Movriches from erecting a pier. As to the second issue, the majority *303 affirms the court of appeals and holds that the Movriches nevertheless have the right to access and enjoy the flowage bed from their property pursuant to the public trust doctrine.

**823 ¶ 66 I agree with the majority's conclusion that the Movriches may access the flowage from their property; I too would affirm the court of appeals on this issue.[2] I disagree, however, with the majority's conclusion that the Movriches are prohibited from erecting a pier. In defining the Lobermeiers' property rights in terms of fee absolute ownership, the majority ignores the most salient fact of this case: the presence of navigable water over the Lobermeiers' property. The presence of navigable water for over three quarters of a century alters the Lobermeiers' property rights in the waterbed, subordinating them to the riparian rights of the Movriches and the rights of the public under the public trust doctrine. Accordingly, I would affirm the court of appeals on this issue, although I would clarify that riparian rights are independent private property rights, which are not conferred under the public trust doctrine.

¶ 67 The majority opinion overlooks the interplay between private property rights, riparian rights and the public trust doctrine. Although separate and distinct, these competing rights intertwine and the majority opinion errs in its rigid approach toward applying them to the Movriches' and the Lobermeiers' property interests. The majority adopts an unprecedented holding that a fee simple interest in land submerged by water cancels riparian rights presumptively *304 recognized under the common law for at least 140 years. The consequences of what began as a family squabble are not confined to the parties before us but fundamentally transform property rights for thousands of Wisconsin property owners along hundreds of flowages.[3] Such a dramatic change in the law should be the legislature's prerogative, not that of the four justices comprising the majority.

¶ 68 Ultimately, I conclude the Lobermeiers' title to a portion of the waterbed beneath the Sailor Creek Flowage is qualified by the existence of navigable water; the Movriches are entitled to erect and maintain a pier as part of the bundle of rights they enjoy as riparian owners; and the public trust doctrine confers rights on the public to use the flowage. Accordingly, I respectfully concur in part and dissent in part.

I

¶ 69 From its beginnings, Wisconsin prioritized public access to the watercourses across the state. This preference is richly embodied in the public trust doctrine, which finds roots in the Northwest Ordinance and materialized upon statehood through the adoption of Article IX, Section 1 of the Wisconsin Constitution.[4] *305 Under **824 the public trust doctrine, the state holds the waters and beds of navigable lakes in trust for all of its citizens.[5] Conversely, the public trust doctrine has been interpreted to "give[ ] riparian owners along navigable streams a qualified title in the stream beds to the center of the stream, while the state holds the navigable waters in trust for the public. In reality, the state effectively controls the land under navigable streams and rivers without actually owning it."[6] *306 Rock–Koshkonong Lake Dist. v. DNR, 2013 WI 74, ¶ 78, 350 Wis. 2d 45, 833 N.W.2d 800. "The rule is different with respect to the beds under streams[ ] in part because streams can change course, streams can become unnavigable over time, and navigable streams can be very narrow and shallow, so that state ownership of stream beds could be problematic and impractical." Id., ¶ 82 (footnote omitted).

¶ 70 The public trust doctrine applies to lakes and streams that are "navigable in fact for any purpose." Wis. Stat. § 30.10 (providing that lakes and streams, if navigable in fact, are public waterways); see State v. Bleck, 114 Wis. 2d 454, 459–60, 338 N.W.2d 492 (1983). In the absence of a legislative declaration applying specifically to a certain type of watercourse, "navigability is a question of fact." Klingeisen v. DNR, 163 Wis. 2d 921, 931, 472 N.W.2d 603 (Ct. App. 1991) (citing Angelo v. Railroad Comm'n, 194 Wis. 543, 552, 217 N.W. 570 (1928)) (holding that "[t]he public trust doctrine, to be effective, must also extend to public, artificial waters that are directly and inseparably connected with natural, navigable waters"). A finding of navigability in fact is a fairly low bar to meet and thousands of waterways in Wisconsin are considered navigable. Here, it is not disputed that the Sailor Creek Flowage is navigable. Majority op., ¶ 10, n.4.

¶ 71 If a body of water is navigable in fact, then its use is subject to the public trust doctrine, which permits all people to use the waters in aid of navigation and for hunting, fishing, and other recreational purposes. Diedrich v. Nw. Union Ry. Co., 42 Wis. 248, 264 (1877); Ill. Steel Co. v. Bilot, 109 Wis. 418, 425, 84 N.W. 855 (1901); Diana Shooting Club v. Husting, 156 Wis. 261, 271–73, 145 N.W. 816 (1914). If a body of water is not navigable, "the public has no easement; *307 and the riparian owner may, in general, put his estate under the water to any

proper use he may please, not infringing upon the rights of other riparian owners, and not violating any public law." Diedrich, 42 Wis. at 264.

**825 ¶ 72 The applicability of the public trust doctrine does not purport to give a riparian owner more rights than those of the public; indeed, the public trust doctrine does not confer riparian rights at all. Riparian rights exist under the common law as private property rights, independent of and subject to the public trust doctrine. Indeed, the public's right to use the waters for purposes recognized under the public trust doctrine may supersede a riparian owner's various rights of use. Bleck, 114 Wis. 2d at 467, 338 N.W.2d 492 ("[Riparian] rights, however, are still subject to the public's paramount right and interest in navigable waters."). Nevertheless, by virtue of owning property on the banks of navigable water, the public trust doctrine puts a riparian owner's exercise of otherwise public rights in a unique position.

> [A] riparian owner upon navigable water, whether or not he own the soil usque ad medium filum aquæ, and unless prohibited by local law, has a right to construct in shoal water, in front of his land, proper wharves or piers, in aid of navigation, and at his peril of obstructing navigation, through the water far enough to reach actually navigable water; this being held to further the public use of the water, to which the public title under the water is subordinate; and therefore to be, in the absence of prohibition, passively licensed by the public, and not a pourpresture.

Diedrich, 42 Wis. at 262.[7]

*308 ¶ 73 If the Lobermeiers owned the entire waterbed beneath the flowage, the Movriches would not be able to maintain and erect a pier because they would enjoy no riparian rights under the common law. Mayer v. Grueber, 29 Wis. 2d 168, 176, 138 N.W.2d 197 (1965). Of course, the owner of land who creates an artificial body of water not originating from natural, navigable water may permit members of the public, as well as owners of land abutting the waterbody, to use the water but under those circumstances such rights of use arise solely from the prerogative of the waterbed owner rather than common law riparian rights or the public trust doctrine. See id. (citing Haase v. Kingston Coop. Creamery Ass'n, 212 Wis. 585, 588, 250 N.W. 444 (1933)). However, the Lobermeiers own only a portion of the waterbed, the public trust doctrine applies to the flowage because it originates from the public, natural, and navigable waters of Sailor Creek, and the Movriches have a fundamental right to place a pier in the water as riparian owners whose land abuts natural, navigable waters.

¶ 74 "Riparian owners are those who have title to the ownership of land on the bank of a body of water." ABKA Ltd. P'ship v. DNR, 2002 WI 106, ¶ 57, 255 Wis. 2d 486, 648 N.W.2d 854 (emphasis added) (citing Ellingsworth v. Swiggum, 195 Wis. 2d 142, 148, 536 N.W.2d 112 (Ct. App. 1995)); see also Diedrich, 42 Wis. at 262 (1877) ("Riparian rights proper are held to rest upon title to the bank of the water, and not upon title to the soil under the water."); Doemel v. Jantz, 180 Wis. 225, 230, 193 N.W. 393 (1923); Mayer v. Grueber, 29 Wis. 2d 168, 173, 138 N.W.2d 197 (1965) ("Riparian *309 land is land so situated with respect to a body of water that, because of such location, the possessor of the land is entitled to the benefits incident to the use of the water." (Citations omitted.)); Stoesser v. Shore Drive P'ship, 172 Wis. 2d 660, 660, 494 N.W.2d 204 (1993) (citing **826 78 Am. Jur. 2d Waters § 260 (1975)). Riparian rights "are not dependent upon the ownership of the soil under the water, but upon his title to the banks." Doemel, 180 Wis. at 230, 193 N.W. 393 (first citing Diedrich, 42 Wis. at 248; then citing Delaplaine v. Chi. & Nw. Ry. Co., 42 Wis. 214 (1877); then citing Green Bay & Miss. Canal Co. v. Kaukauna Water Power Co., 90 Wis. 370, 61 N.W. 1121 (1895); then citing State ex rel. Wausau St. Ry. Co. v. Bancroft, 148 Wis. 124, 134 N.W. 330 (1912)).

¶ 75 A riparian owner is presumptively entitled to certain rights, including:

> the rights of the owner of lands upon water to maintain his adjacency to it, and to profit by this advantage, and otherwise as a right to preserve and improve the connection of his property with the water. Those rights are not common to the citizens at large, but exist as incidents to the right of soil itself contiguous to and attingent on the water. In such ownership they have their origin, and not out of the ownership of the bed, and they are

> the same whether the riparian owner owns the soil under the water or not.

Doemel, 180 Wis. at 230–31, 193 N.W. 393. "The riparian owner also has the right to build piers, harbors, wharves, booms, and similar structures, in aid of navigation, and such right is also one which is incident to the ownership of the upland." Id. at 231, 193 N.W. 393; Hicks ex rel. Askew v. Smith, 109 Wis. 532, 540, 85 N.W. 512 (1901) ("the right to erect such a pier is simply an incident of riparian ownership"). For 140 years, title to the waterbed has been entirely irrelevant to determining riparian ownership *310 under Wisconsin law. Doemel, 180 Wis. at 230, 193 N.W. 393. And the law presumes that riparian owners may construct a pier in aid of navigation.

¶ 76 As a preliminary matter, the law presumes the Movriches are riparian owners because they own property that abuts the banks of the Sailor Creek Flowage, a navigable body of water. Nevertheless, "[r]iparian rights do not necessarily follow as a matter of course the ownership of the adjacent land." Mayer v. Grueber, 29 Wis. 2d 168, 175, 138 N.W.2d 197 (1965) (citing Allen v. Weber, 80 Wis. 531, 536, 50 N.W. 514 (1891)). "No property owner's riparian rights are absolute." Rock–Koshkonong Lake Dist., 350 Wis. 2d 45, ¶ 110, 833 N.W.2d 800. While an owner may be riparian in nature, his ability to exercise riparian rights may be qualified by a number of factors. Mayer, 29 Wis. 2d at 175, 138 N.W.2d 197 (citing Allen, 80 Wis. at 536, 50 N.W. 514). As determinative here, these factors include the classification of the waterbody with which the Movriches' upland property is contiguous coupled with the private ownership of that waterbody's bed, as well as the language in the Movriches' deed.

¶ 77 The Movriches are unquestionably riparian owners because their property lies on the banks of the flowage. The legal description of their property extends "to the shoreline" of the flowage. Yet, the majority holds that the Movriches are not riparians, contrary to every definition of riparian ownership existing in this state's pertinent precedent, dating back to 1877. See supra ¶74. Relying on Mayer, the majority points out that "when Movriches took title to their land, the legal description on their deed made no reference to riparian rights." Majority op., ¶ 54. The majority equates the deed's silence on riparian rights to the nonexistence of either riparian ownership or riparian rights. This conclusion is patently incorrect.

*311 ¶ 78 It is true "that one who acquires land abutting a stream or body of water may acquire no more than is conveyed by **827 his deed." Mayer, 29 Wis. 2d at 174, 138 N.W.2d 197. It is also true, however, that an owner of waterfront property possesses certain riparian rights under the common law and the common law provides that "a transfer of the property without any reference whatsoever to [riparian] rights automatically conveys and includes them." Doemel v. Jantz, 180 Wis. 225, 230, 193 N.W. 393 (1923) (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892)); Stoesser v. Shore Drive P'ship, 172 Wis. 2d 660, 667, 494 N.W.2d 204 (1993) (citations omitted); Mayer, 29 Wis. 2d at 175, 138 N.W.2d 197. The only way to eliminate riparian rights tied to the property under the common law is "by the clear language in the deed." Mayer, 29 Wis. 2d at 174, 138 N.W.2d 197. In other words, unless the deed expressly disavows riparian rights, property adjacent to navigable water retains presumptive riparian rights, notwithstanding the conveyance documents' silence on this issue.

¶ 79 The majority acknowledges the Movriches' deed does not mention riparian rights.[8] Therefore, the riparian rights attached to the property were conveyed to the Movriches under common law when they purchased their waterfront property. The deed does not need to expressly mention the status of riparian ownership because the presumption of riparian rights exists by operation of law unless the deed expressly excludes riparian rights.

*312 ¶ 80 Wisconsin qualifies a riparian owner's rights based on the classification of the waterbody to which the riparian property is contiguous. In the case of a natural body of water, "one who acquires land abutting a stream or body of water may acquire no more than is conveyed by his deed," which, as already discussed, means that a deed that expressly severs riparian rights will unequivocally strip the owner of those rights. Id. at 174, 138 N.W.2d 197. In the case of an artificial body of water, as was the case in Mayer, ownership of the waterbed may qualify the existence of riparian rights. Id.

¶ 81 In Mayer, we held that "the purchaser of property abutting an artificial lake acquires no rights as a riparian owner by virtue of the land acquisition alone." Id. at 179, 138 N.W.2d 197. Rather, "[u]nless the vendor conveys the right to use the lake, the purchaser is precluded from either the right of access or use." Id.

¶ 82 The majority's characterization of the flowage as a "man-made" body of water similar to the property in Mayer is incorrect.[9] The flowage was an artificial condition created by a dam, which over time became a natural condition. Regardless, "man-made" lakes and

streams are by law artificial waterbodies. Under Wis. Stat. § 30.19(1b)(a), an artificial waterbody is "a body of water that does not have a history of being a lake or stream or of being part of a lake or stream." (Emphasis added.) In Mayer, the artificial lake was *313 "formed as the result of gravel excavations." 29 Wis. 2d at 170, 138 N.W.2d 197. Thus, it had no history of being a lake before seepage **828 filled up the excavation site and created a lake. Id. In contrast, a flowage arises from the damming of a stream already in existence.[10] Here, the Sailor Creek Flowage was created and is currently maintained by the damming of Sailor Creek, a natural, navigable stream, by the Town of Fifield in 1941 (a fact both parties and the majority concede). Majority op., ¶ 9. As the flowage has a history of being part of Sailor Creek, it is not an artificial waterbody and Mayer does not apply.

¶ 83 In a case where a dam overflowed previously dry lands owned in fee, this court held that "the public and the riparian owners enjoy the same rights in and upon such artificial waters," regardless of the fact that the particular body of water on which those rights are subsequently exercised were artificially created by the dam. Haase v. Kingston Coop. Creamery Ass'n., 212 Wis. 585, 587, 250 N.W. 444 (1933) (emphasis added). This concept, now discarded by the majority, was recognized over 100 years ago in Johnson v. Eimerman, 140 Wis. 327, 330, 122 N.W. 775 (1909) ("The artificial condition originally created by the dam became by lapse of time a natural condition.") More recently, the "well settled" principle was reiterated: "If the volume or expanse of navigable waters is increased artificially, the public right to use the water *314 is increased correspondingly." Klingeisen v. DNR, 163 Wis. 2d 921, 927, 472 N.W.2d 603 (Ct. App. 1991). In that case, the court also recognized that title to the waterbed underlying navigable waters "is entirely subordinated to and consistent with the rights of the state to secure and preserve to the people the full enjoyment of navigability and the rights incident thereto." Id. at 928, 472 N.W.2d 603 (citing Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816 (1914)).

¶ 84 Subject to the public trust doctrine, "Wisconsin has ... recognized the existence of certain common law rights that are incidents of riparian ownership of property adjacent to a body of water." R.W. Docks & Slips v. DNR, 244 Wis. 2d 497, 511, 628 N.W.2d 781 (2001) (citing Bleck, 114 Wis. 2d at 466, 338 N.W.2d 492). Such rights include "the right, now conditioned by statute, to construct a pier or similar structure in aid of navigation." Id. (citing Cassidy v. DNR, 132 Wis. 2d 153, 159, 390 N.W.2d 81 (Ct. App. 1986)). Subject to a few exceptions not relevant here, "nothing in [Wis. Stat. ch. 30] applies to an artificial waterbody, as defined in s. 30.19(1b)(a), that is not hydrologically connected to a natural navigable waterway and that does not discharge into a natural navigable waterway except as a result of storm events." Wis. Stat. § 30.053. As the Sailor Creek Flowage is hydrologically connected to Sailor Creek, it is not an artificial waterbody. While Wis. Stat. ch. 30 was enacted after the creation of the flowage, "[t]he statute did not claim to alter the common law" and "[i]t is fundamental that a statute should be construed in harmony with the common law ... unless a different construction is plainly expressed." Klingeisen v. DNR, 163 Wis. 2d 921, 930, 472 N.W.2d 603 (Ct. App. 1991).

*315 ¶ 85 In attempting to distinguish the flowage from other natural waterbodies subject to Wis. Stat. ch. 30, the majority mistakenly limits the holding in Doemel v. Jantz to waterbodies that are public, navigable, and natural. Assuming that "[Lake **829 Winnebago] is a naturally occurring lake," the majority holds that Doemel is not dispositive. Majority op., ¶ 43. Setting aside the fact that Doemel is silent on the nature of Lake Winnebago's hydrological makeup or the ownership of Lake Winnebago's lakebed, Doemel controls the outcome here because the flowage in this case is entirely analogous to Lake Winnebago for the purpose of determining whether the Movriches should be able to install a pier. Like Lake Winnebago, Sailor Creek Flowage is navigable under the public trust doctrine and therefore it is public. And while its existence depended upon human intervention, it is hydrologically connected to a natural navigable waterway (i.e., Sailor Creek) and therefore it is not an artificial waterbody under Wis. Stat. § 30.19(1b)(a). Mayer, therefore, does not extinguish the Movriches' common law riparian rights.

¶ 86 The next question is whether the Lobermeiers' private property rights in the waterbed trump the Movriches' riparian rights, preventing the Movriches from maintaining a pier anchored in the waterbed adjacent to the Movriches' shoreline property. The right of a riparian to maintain a pier is subject to the following statutory limitations:

> 1. "A wharf or pier which interferes with public rights in navigable waters constitutes an unlawful obstruction of navigable waters unless the wharf or pier is authorized under a permit issued under s. 30.12 or unless other authorization *316 for the wharf or pier is expressly provided." Wis. Stat. § 30.13(4)(a) (emphasis added).
>
> 2. "A wharf or pier which interferes with rights of other riparian owners constitutes an unlawful obstruction of navigable waters unless the wharf or pier is authorized under a permit issued under s.

30.12 or unless other authorization for the wharf or pier is expressly provided." Wis. Stat. § 30.13(4)(b) (emphasis added).

Notably, the right to maintain a pier is in no way statutorily limited by the rights of non-riparian owners.[11]

¶ 87 The nature of the flowage bed's title is also distinguishable from that of the private lakebed in Mayer, which was entirely owned by a single owner. In Mayer, this court recognized that in the case of an artificial waterbody, like the artificial lake in Mayer, "the title to the land remains in the owner and does not become vested in the state." 29 Wis. 2d at 176, 138 N.W.2d 197 (citing Haase v. Kingston Coop. Creamery Ass'n, 212 Wis. 585, 588, 250 N.W. 444 (1933)). Mayer 's holding is limited to "[a]n artificial lake located wholly on the property of a single owner." Id. Here, although title to a portion of the flowage bed remains with the Lobermeiers, their title is qualified because of the presence of navigable water over the bed.

¶ 88 This principle arises from Minehan v. Murphy, 149 Wis. 14, 134 N.W. 1130 (1912), where the plaintiff brought an action for ejectment when the *317 defendant adversely occupied the bed of an artificially enhanced stream by crossing over from his side of the stream's thread and onto the plaintiff's submerged property.[12] The stream in question had previously been non-navigable, but upon damming of the mouth and flooding of the privately-owned **830 former uplands the stream was rendered navigable, such that "the former private title had become changed to the same character of qualified title as that of riparian proprietors to the beds of navigable rivers in general." Id. at 16, 134 N.W. 1130 (emphasis added). Likewise, damming a stream and creating a flowage, which in character and shape may resemble a lake, does not transfer ownership of the bed to be held in trust to the state. Rather, like that of a streambed, the title of the flowage bed is privately-held, but qualified by the presence of navigable waters. See e.g., Ne–Pee–Nauk Club v. Wilson, 96 Wis. 290, 295, 71 N.W. 661 (1897); Rock–Koshkonong Lake Dist., 350 Wis. 2d 45, ¶ 78, 833 N.W.2d 800.

¶ 89 The plaintiff's action for ejectment was ultimately successful in Minehan, based in part upon her status as a riparian whose title to the bed of the navigable water bounding the banks of her land was "incidental to her title to the bank." Minehan, 149 Wis. at 14, 134 N.W. 1130. The court's articulation of the rule that title to private property submerged by navigable waters becomes qualified in the same sense as the qualified title of riparians to the beds of navigable waters, is particularly instructive here. Private title enjoys no heightened status vis-à-vis riparian title; rather, "the former private title had become changed to the same character of qualified title as that of riparian proprietors to the beds of navigable rivers in general." Id. at 16, 134 N.W. 1130. *318 Unlike the riparian plaintiff in Minehan, who not only owned the waterbed, but also had title to the upland property along the banks, the Lobermeiers merely own the flowage bed. The crux of the issue is whether the Lobermeiers may exclude the Movriches from erecting and maintaining a pier by virtue of owning only a portion of the flowage bed.

¶ 90 Because the Lobermeiers do not own property on the bank of a waterbody, they are not riparian owners. And while they retain ownership of a portion of the flowage bed in fee simple, that title is qualified by the presence of navigable waters. The majority wholly relies upon the Lobermeiers' ownership of the flowage bed in fee simple absolute to reach its conclusion that the Movriches are not entitled to erect and maintain a pier. Majority op., ¶¶ 18–21, 32 n.7. The majority cites a string of cases that do not contemplate the presence of navigable water over the land. Id. No authority in Wisconsin or in any other jurisdiction has adopted the majority's reasoning or otherwise restricted placement of a pier on navigable waters by a riparian owner in favor of non-riparian, fee simple ownership of the waterbed. The presence of navigable waters qualifies the Lobermeiers' title to the flowage bed subject to the public trust doctrine and the rights of riparian owners along the banks of the flowage. As riparian owners, the Movriches are entitled to exercise riparian rights to access the surface waters and to have their pier rest on the flowage bed.

¶ 91 Over one hundred years ago, this court expounded the "well settled" principle that "if the volume or expanse of navigable waters be increased artificially, the public right is correspondingly increased." Vill. of Pewaukee v. Savoy, 103 Wis. 271, 277, 79 N.W. 436 (1899). Specifically, the court in Savoy *319 expanded the state's ownership rights in natural waterbeds to artificially submerged lands maintained for more than 20 years at an artificially high water level, concluding that "an artificial condition, by lapse of time ... becomes the natural condition." Id. at 275, 79 N.W. 436. Three decades later, the court determined it was unnecessary to vest title to the artificially submerged land in the state in order to protect the public's rights under the public trust doctrine. **831 Haase, 212 Wis. at 587, 250 N.W. 444. Nevertheless, the court in Haase reiterated the rule of law the majority should have applied here: "It is true that, where the waters of a natural, navigable lake are artificially raised, the public and the riparian owners enjoy the same rights in and upon such artificial waters." Id.

¶ 92 The Sailor Creek Flowage was created 76 years ago and has been maintained for more than 50 years beyond the 20–year timeframe deemed sufficient to qualify the fee simple rights enjoyed by the owners of the underlying lakebed. The flowage, created artificially by construction of a dam, submerged privately owned land with the permission of the owner. Over time, during the three quarters of a century this land has remained submerged, both riparian rights as well as public trust rights extended to this artificial expansion of Sailor Creek. While the creation of the flowage did not transfer any property rights from the Lobermeiers to either the state or the Movriches, it subordinated the Lobermeiers' property rights to riparian rights under the common law as well as public rights under the public trust doctrine. While this reconciliation of three distinct rights perhaps leaves the Lobermeiers with property of limited value, this construction of the law takes nothing from the Lobermeiers and preserves what has always been, as reflected in the ***320** $400 assessed value of the flowage bed owned by the Lobermeiers. In contrast, the majority strips the Movriches of their riparian rights and reallocates them to the Lobermeiers.

¶ 93 Unfortunately, the majority's opinion diminishes not only the value of the Movriches' property, but also potentially guts the values of all properties abutting flowages throughout Wisconsin. The breadth of the majority's opinion calls into question the terms of deeds to such waterfront properties, the validity of prior conveyances, and the extent of ownership interests. The majority's transfiguration of the common law governing riparian rights disturbs the reliance on access that induced purchases of waterfront property in Wisconsin for over a century.

II

¶ 94 By eschewing decades of controlling precedent in order to elevate fee simple property rights in a waterbed, unattached to shoreline property ownership, the court effectively extinguishes the property rights of thousands of waterfront property owners along flowages, while jeopardizing the property rights of waterfront property owners on all bodies of water in Wisconsin. A change in the law of this magnitude should come from the legislature, not this court. Accordingly, I respectfully dissent from that part of the majority opinion that effectuates such a redistribution of property rights with no compensation to those left with substantially diminished property values and concur only in that part of the majority opinion that preserves the public's right to access the flowage waters.

¶ 95 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.

***321** ¶ 96 I am also authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this opinion except for Part II.

All Citations

379 Wis.2d 269, 905 N.W.2d 807, 2018 WI 9

Footnotes

1 The Honorable Patrick J. Madden of Price County presided.

2 Lobermeiers do not own the entire waterbed.

3 The Movrich property is legally described as Lot One (1) of Sailor Creek Subdivision. A surveyor's description of the Sailor Creek Subdivision provides that the lots run "to the shoreline" of the Flowage and thence "along said shoreline."

4 The Flowage is navigable, meaning that it is capable of supporting at least light water craft at some time during the year. It is considered a public water pursuant to Wis. Stat. § 30.10 (2013–14). It is undisputed that the public trust doctrine applies to the Flowage.
All subsequent references to the Wisconsin Statutes are to the 2013–14 version unless otherwise indicated.

5 See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' ") ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.").

6 In Mayer v. Grueber, explained in further detail below, plaintiff Mayer sought an injunction to prevent Grueber from trespassing onto the waters of a man-made lake, the bed of which was entirely owned by Mayer. Mayer v. Grueber, 29 Wis. 2d 168, 170, 138 N.W.2d 197 (1965). Grueber counter-claimed, insisting that as a "riparian owner" he was entitled to the beneficial use and enjoyment of the lake. Id.

7 Loretto, 458 U.S. at 434, 102 S.Ct. 3164 ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); Lycoming Fire Ins. Co. of Muncy, Pa. v. Haven, 95 U.S. 242, 245, 24 L.Ed. 473 (1877) (concluding that landowners under a fee simple title are presumed to be the "entire, unconditional, and sole owners of the buildings as well as the land ...."); Walgreen Co. v. City of Madison, 2008 WI 80, ¶ 44, 311 Wis. 2d 158, 752 N.W.2d 687 (concluding that fee simple rights include the right of exclusion); Christensen v. Mann, 187 Wis. 567, 581, 204 N.W. 499 (1925) ("[P]roperty rights extend upwards from the surface to an unlimited extent ...."); Burnham v. Merch. Exch. Bank, 92 Wis. 277, 280, 66 N.W. 510 (1896) (holding that courts must protect the right of the owner to his property); Brownell v. Durkee, 79 Wis. 658, 663, 48 N.W. 241 (1891) (concluding that property rights should be "protected and secured as far as possible."); ABKA Ltd. P'ship v. DNR, 2001 WI App 223, ¶ 28, 247 Wis. 2d 793, 635 N.W.2d 168 (concluding that an interest in fee simple is the broadest interest allowed by law).

8 As discussed above, the public trust doctrine has been "expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty." R.W. Docks & Slips v. State of Wis., 2001 WI 73, ¶ 19, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).

9 Specifically, in Doemel we held that "[t]he riparian owner also has the right to build piers, harbors, wharves, booms, and similar structures ... incident to the ownership of the upland." Doemel v. Jantz, 180 Wis. 225, 231, 193 N.W. 393 (1923).

1 "Riparian" is defined as "relating to or living or located on the bank of watercourse (as a river or stream) or sometimes a lake." Webster's Third New International Dictionary of the English Language (3d ed. 1986). "Sacred" as used in this context, as in other riparian rights cases, is used to describe something secured against violation or infringement rather than in the religious sense. See, e.g., Chapman v. Oshkosh & Miss. River R.R. Co., 33 Wis. 629, 637 (1873) ("And he holds every one of these [riparian] rights by as sacred a tenure as he holds the land from which they emanate."); Avery v. Fox, 2 F. Cas. 245, 247 (C.C.W.D. Mich. 1868) ("This right of private persons to the use of water as it flows by or through their lands, in any manner not inconsistent with the public easement, is as sacred as is the right of a person to his land, his house, or his personal property.").

2 See also deNava v. DNR, 140 Wis. 2d 213, 222, 409 N.W.2d 151 (Ct. App. 1987) ("Since the riparian owner has the exclusive right of access to and from navigable waters to his shore, the riparian owner has exclusive riparian rights.").

3 See generally Wis. Dep't of Nat. Res., Wisconsin Lakes (2009), http://dnr.wi.gov/lakes/lakebook/wilakes2009bma.pdf.

4 "The United States [S]upreme [C]ourt in Barney v. Keokuk (1876), 94 U.S. 324, 24 L.Ed. 224 ... declared that the individual states have the right to determine for themselves the ownership of land under navigable waters." Rock–Koshkonong Lake Dist. v. DNR, 2013 WI 74, ¶ 79, 350 Wis. 2d 45, 833 N.W.2d 800 (quoting Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 492, 53 N.W.2d 514, adhered to on reh'g, 261 Wis. 515b, 55 N.W.2d 40 (1952)). Article IX, Section 1 states: "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 the 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 therefor."

5 The doctrine was "originally designed to protect commercial navigation," but its applicability has since "been expanded to safeguard the public's use of navigable waters for purely recreational and nonpecuniary purposes." State v. Bleck, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983) (citing Muench, 261 Wis. 492, 53 N.W.2d 514); see also Diedrich v. Nw. Union Ry. Co., 42 Wis. 248 (1877); Illinois Steel Co. v. Bilot, 109 Wis. 418, 425, 84 N.W. 855 (1901); Joseph D. Kearney & Thomas Merrill, The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central, 71 Univ. Chic. L. Rev. 799 (2004). "The legislature has the primary authority to administer the public trust for the protection of the public's rights, and to effectuate the purposes of

the trust." Hilton ex rel. Pages Homeowners' Ass'n v. DNR, 2006 WI 84, ¶ 19, 293 Wis. 2d 1, 717 N.W.2d 166 (citing Bleck, 114 Wis.2d at 465, 338 N.W.2d 492).

6 "It is said that the controlling distinction between a stream and a lake or pond is that in the one case the water has a natural motion,—a current,—while in the other the water is, in its natural state, substantially at rest, and this entirely irrespective of the size of the one or the other." Ne–Pee–Nauk Club v. Wilson, 96 Wis. 290, 295, 71 N.W. 661 (1897) (citation omitted).

7 "Usque ad medium filum aquæ" means "up to the middle of the stream." Usque Ad Filum Aquæ, Black's Law Dictionary (1st ed. 1891). A "pourpresture," also spelled "purpresture," is "[a]n inclosure by a private party of a part of that which belongs to and ought to be open and free to the public at large." Purpresture, Black's Law Dictionary (1st ed. 1891).

8 The majority suggests the possibility of a different outcome if the "Movriches had purchased their property from Lobermeiers." Majority op., ¶ 52. However, even if the Movriches had acquired their property from the Lobermeiers, if the deed were silent on riparian rights, as it actually is in this case, riparian rights are nevertheless conveyed under the common law.

9 "The artificial condition originally created by the dam became by lapse of time a natural condition." Haase v. Kingston Coop. Creamery Ass'n, 212 Wis. 585, 250 N.W. 444 (1933) (citing Johnson v. Elmerman, 140 Wis. 327, 330, 122 N.W. 775 (1909)); see also Alvin E. Evans, Riparian Rights in Artificial Lakes and Streams, 16 Mo. L. Rev. 93, 108 n.63 (1951) (citing Minehan v. Murphy, 149 Wis. 14, 134 N.W. 1130 (1912)).

10 A "flowage" is defined as "[t]he natural movement of water from a dominant estate to a servient estate." Flowage, Black's Law Dictionary (10th ed. 2014); see also Flowage Easement, Black's Law Dictionary (10th ed. 2014) ("A common-law easement that gives the dominant-estate owner the right to flood a servient estate, as when land near a dam is flooded to maintain the dam or to control the water level in a reservoir").

11 Wisconsin Stat. § 30.13 provides limited means by which non-riparian owners may maintain a pier. This section mainly considers the rights of easement holders and is not relevant here.

12 The court does not elucidate the exact details of the defendant's impermissible occupancy.

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44 East Mifflin Street · Suite 402 · Madison, Wisconsin 53703 · 608/257-3151

To: **Senate Energy & Natural Resources Committee**

From: **Bill Skewes, WI Utilities Association**

Re: **Opposition to SB 501**

Date: **February 5, 2020**

Good morning Mr. Chairman and members of the Committee. Thank you for the opportunity to testify today. My name is Bill Skewes and I am the Executive Director of the Wisconsin Utilities Association, representing our state's investor-owned gas and electric energy providers. Joining me is Brad Jackson, WUA's attorney, who is here to assist me in answering questions of a legal nature. I will provide copies of this testimony as well as copies of my more lengthy and detailed testimony from the hearing on the Assembly version of this bill, AB 551.

We request your support in opposing SB 501 in its current form.

First, this bill is attempting to address a problem that doesn't exist. Contrary to what proponents are saying in their media campaign, no property rights are being taken away from anyone and no new fees or taxes of any kind are imposed on properties abutting flowages created by hydroelectric dams. Proponents of this bill are frightening waterfront owners into thinking they are losing their water access, when that's just not the case. In the case of my member utilities, the owners of flowages with hydro facilities have historically worked with their neighbors and allowed them to place their piers and will continue to do so. Nothing has changed or will change because of the 2018 Supreme Court case.

Second, this bill would accomplish an unconstitutional "taking" of private property because it would allow owners of land abutting hydroelectric flowages the right to place piers and other structures on my members' property. This is a textbook case of an unconstitutional taking of private property.

Finally, the bill throws into question the licenses of 80-plus hydroelectric dams which have produced clean, renewable energy for the last 140 years. The Federal Energy Regulatory Commission (FERC), which licenses most hydro dams in the U.S., requires the owner to control the flowage to ensure that activity around it does not endanger the operation of the dam. The state also regulates a handful of dams. But granting our ownership rights of the bed of the waterway to others would upend the terms of those licenses and could jeopardize operations, inviting dam licensees and flowage owners to defend their rights in court.

A simple solution to this problem is to fully exempt those state and federally regulated flowage properties, which represent only a small fraction of Wisconsin's waterways, from the bill.

Please do not support AB 551 or its companion, SB 501 in its current form. Thank you.

WUA 44 East Mifflin Street · Suite 402 · Madison, Wisconsin 53703 · 608/257-3151

To: **Assembly Committee on Housing & Real Estate**

From: **Bill Skewes, Executive Director**
Wisconsin Utilities Association

Re: **Opposition to AB 551**

Date: **January 16, 2020**

Good morning Mr. Chairman and members of the Committee. Thank you for the opportunity to testify this morning. My name is Bill Skewes and I am the Executive Director of the Wisconsin Utilities Association (WUA), representing our state's investor-owned gas and electric energy providers. Joining me is Brad Jackson, WUA's attorney from Quarles & Brady, to assist in answering questions of a legal nature.

We're here today to express our opposition to AB 551, which would create a presumption that the owner of land abutting a navigable waterway is a riparian owner and can exercise riparian rights, including the placement of structures and deposits on the bed of the waterway, even if the bed is owned by another. Though we are reluctant to wade into such a sensitive issue, our members are in a unique position regarding the ownership and management of federal, state and locally regulated lands submerged by dams and **we respectfully request that the Committee either amend or not advance this bill.**

In my testimony, we will detail the legal basis of why we oppose AB 551 but it is important to understand that pre-Movrich and post-Movrich, utilities are operating in the same manner as it pertains to conditions put on land owners adjacent to submerged lands, contrary to what has been alluded to by the Realtors in their public messaging. The citizens of Wisconsin with whom utilities currently have pier agreements and that are limited in what they can build out from their land has not changed because of the Supreme Court ruling. Thus, if this bill passes, utilities would lose rights they have always had. Passing AB 551 does not restore any "lost rights". Now let's examine the legal problems with this bill.

First and foremost, the enactment of AB 551 would violate the U.S. and Wisconsin constitutions by a **taking of property rights** without just compensation. Under current Wisconsin law, specifically section 30.10(4)(b), "The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity to *the common law* so far as applicable." *See Mushel v. Town of Molitor*, 123 Wis 2d. 136 (Ct. App. 1985) (applying statute and holding that common law does not recognize presumption that road abutting navigable lake is publicly owned). In its recent decision in *Movrich v. Lobermeier*, 2018 WI 9, the Wisconsin Supreme Court clarified the common law and held that an owner of land that abuts land owned by another that has been artificially flooded is not a riparian owner and he may not place structures and deposits on the submerged land absent the specific right do so in his deed. The enactment of AB 551 would be contrary to the statute and would effect a **taking of the private property** rights recognized in the *Movrich* case. *See, e.g., Noranda Exploration, Inc. v. Ostrom*, 113

Wis. 2d 612 (1983) (statute requiring disclosure of confidential materials amounted to unconstitutional taking of private property without just compensation).

WUA member utilities would be among the private property owners whose **rights would be taken** by AB 551. WUA members own and operate a number of storage and hydroelectric dams and flowages. In some cases the owner of the dam owns the land flowed and in other cases the owner holds the right to flow private property by easement. In those cases, under *Movrich* the owners of land abutting the flowages do not have riparian rights and can use flowed lands only with the permission of the dam owner.

Indeed, many WUA member dams are regulated by the Federal Energy Regulatory Commission (FERC), which **requires the dam operator to maintain sufficient property rights to manage project lands and protect and maintain the project purposes set forth in the FERC license. FERC project licensees have a responsibility to ensure that reservoir shorelines within the project boundaries are managed in a manner that is consistent with project purposes, license conditions and operations.**

The obligation to manage the shoreline in these projects is so important that when a hydro licensee sells land out of its project, FERC requires the licensee to maintain either ownership of, or rights over, the shoreline of the flowage. Owners of land along the flowage need the licensee's permission to put in docks and other structures, which my members do currently allow. In addition to contradicting the licensee's property rights, the proposed legislation **would create a conflict *between the new rights granted owners of lands along flowages and the licensee's obligations to* manage the project shoreline. Thus, the bill would interfere with the relationship between the licensee and FERC and could threaten the licensee's compliance with the conditions of its license.**

I would also note that there are some dams in Wisconsin that are not regulated by FERC but by the State of Wisconsin and/or local governments. In these cases, too, the owners of those dams are subject to regulation of the lands underlying and along the shore of the flowages. The bill would create the same conflict between the landowner's new rights and the dam owner's obligations under state and local law.

While we very much appreciate the authors (and other stakeholders) willingness to listen to our concerns and engage in discussions regarding a possible Amendment, so far, we have been unable to reach an agreement on language.

If an amendment were adopted to exempt dams and flowages under federal, state and local jurisdiction we could drop our opposition. Our hydro dams are a very important source of renewable energy and having their FERC license compliance called into question could threaten their ability to operate and provide emission free electricity to Wisconsin citizens.

We look forward to further discussions with the authors (and other stakeholders) and would respectfully request that the bill be amended to exempt hydro dams and flowages that are regulated under federal, state or local jurisdiction."

Thank you and we'd be happy to attempt to answer your questions.

WISCONSIN PAPER COUNCIL

Wisconsin Paper Council Testimony
Before the Senate Committee on Energy and Natural Resources
Re: Public Hearing on Senate Bill 501

February 5, 2020

Scott Suder
President, Wisconsin Paper Council

Thank you, Mr. Chairman and Honorable Committee Members, for the opportunity to testify on Senate Bill 501 today.

My name is Scott Suder and I am President of the Wisconsin Paper Council. As many of you are well aware, the Wisconsin Paper Council is the statewide trade association which represents the paper and pulp industry here in Wisconsin. We are an industry focused on sustainability and strong environmental stewardship. WPC works in a bipartisan manner to advocate for common-sense regulation that balances a healthy environment with a healthy economy.

I am joined here by Mr. Tom Scharff who is the Director of Power Generation Resources and COO of Consolidated Water Power Company, commonly called CWPCo. CWPCo is a subsidiary of Verso Corporation, which is one of our members.

Also joining us is Mr. Ben Niffenegger and environmental specialist for the Wisconsin Valley Improvement Company who will address the environmental concerns which come into play with this legislation.

WISCONSIN
PAPER COUNCIL

I want to make it clear from the outset that our organization has been, and continues to be, willing to work with other stakeholders, including the Wisconsin Realtors Association on this issue. We have had conversations with the Realtors and remain hopeful that we are able to find common ground on this matter.

Mr. Chairman, we do have serious concerns regarding Senate Bill 501 as currently drafted.

Maintaining our Federal Emergency Regulatory Commission (FERC) license for hydroelectric dams is critical to our overall operations. As you know, FERC requires our members to adhere to strict guidelines and standards. Maintaining sufficient property rights is an essential part of this management.

As federal licensees, our companies are required to ensure that reservoir shorelines are managed in accordance with our license conditions. FERC takes these conditions seriously, as they should. This bill, as currently drafted, could cause significant management issues for our members that are required to maintain this property.

For us, this is not merely an issue limited to Central Wisconsin, this is a statewide issue for many of our members. Our members manage hundreds of miles of shoreline under their FERC licenses, the balance of which is submerged.

First ,we would like to thank both the primary authors of this bill for taking the time to listen to our concerns over the course of the past few weeks. We appreciate their efforts to try to bring stakeholders together on this legislation and to listen to our members' concerns.

On behalf of the 30,000 working men and women who we proudly represent want to thank you for listening to our concerns today.

Thank you again for your time and consideration.

WISCONSIN INDUSTRIAL ENERGY GROUP

44 EAST MIFFLIN STREET | SUITE 404 | MADISON, WI 53703 | PH: 608 441 5740 | WIEG.ORG

To: Senate Committee on Natural Resources and Energy

From: Todd Stuart, Executive Director
Wisconsin Industrial Energy Group, Inc.

Re: Opposition to Senate Bill 501

Date: February 5, 2020

Thank you, Mr. Chairman and members of the Committee, for the opportunity to present comments on this important subject. Senate Bill 501 relates to the presumption of riparian rights on navigable waterways. Wisconsin Industrial Energy Group, Inc. offers these comments on behalf of its members in opposition to the legislation in its current form.

WIEG is a non-profit association of 25 of Wisconsin's largest energy consumers. The group has long advocated for policies that support affordable and reliable energy. Since the early 1970s, WIEG has been the premier voice of Wisconsin ratepayers and an engine for business retention and expansion. Each year its members collectively spend more than $400 million on electricity in Wisconsin. Together they employ, with well-paying jobs, more than 50,000 Wisconsin residents who are themselves state taxpayers and utility customers.

Our member companies have expressed concerns with SB 501. Any additional costs incurred by investor-owned utilities will eventually get passed along to all of their ratepayers. Our member companies have electric bills of over $1 million each month, and it is one of their top costs of doing business.

Some of our member companies, particularly large paper mills, operate hydroelectric dams licensed by the Federal Energy Regulatory Commission (FERC). These companies manage hundreds of miles of shoreline, the balance of which is submerged, in accordance with their FERC licenses. Utilities and paper mills have owned and managed the submerged land for decades, and in some areas for over 100 years.

Under federal regulations, the hydroelectric dam owners must control the flowage of the waterway. By granting the riparian rights under SB 501, we believe this could impair the operation of our dams and therefore jeopardize our FERC licenses.

In order to avoid increased costs and unnecessary legal challenges, WIEG urges you to oppose SB 501 in its current form. WIEG respectfully asks that you amend the bill to provide an exemption for state and federally regulated flowage properties.

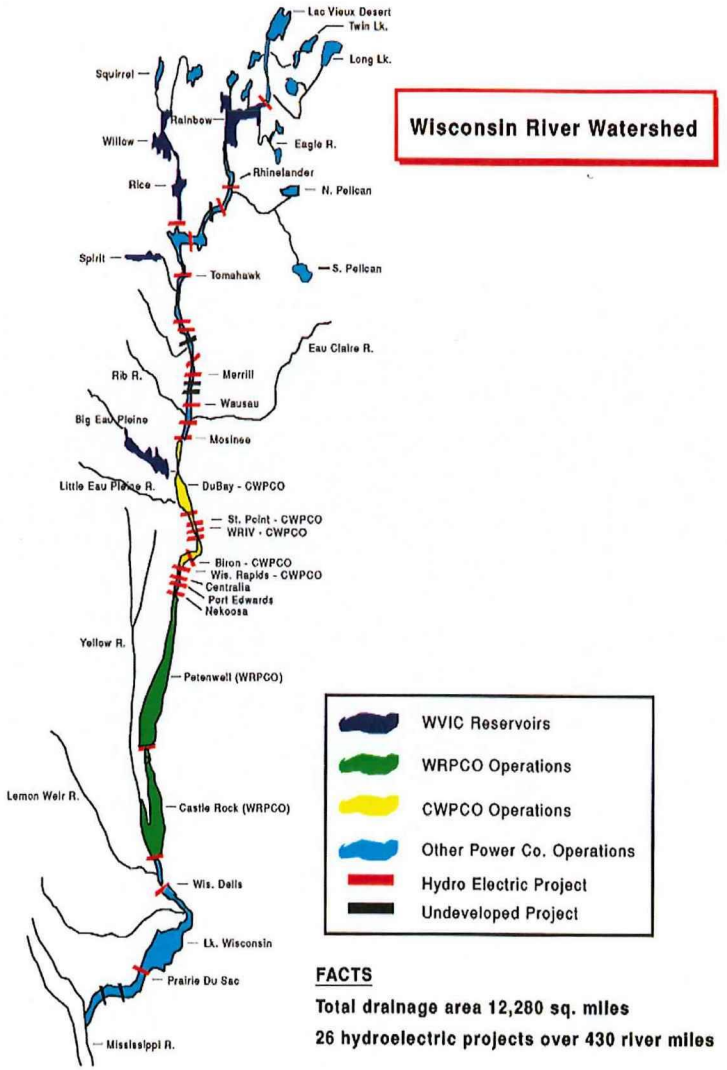
Consolidated Water Power Company

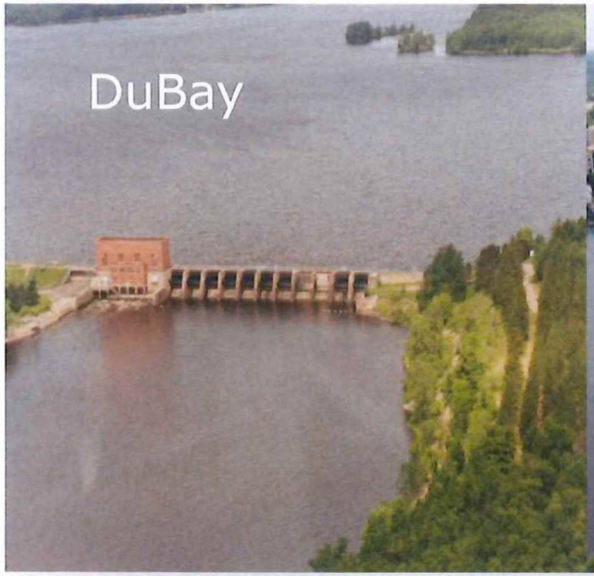
February 5, 2020

VERSO®
Turn to us.™

CWPCo Background

- **Consolidated Water Power Company, (CWPCo) is a wholly owned subsidiary of Verso Corporation.**
  - Serves 3 paper mills and the Village of Biron
  - Utility regulated by the Wisconsin Public Service Commission (PSCW)
- CWPCo owns and operates five hydro-electric dams (projects) on **32 miles of the Wisconsin River.**
  - Own/operate/maintain 5 dam structures, 39 hydroelectric generators, 87 gates, **214 miles of shoreline**, 34,200 feet of dikes, 19 boat landings with 11 boat docks/piers, 3 swim areas, 6.4 miles of walking or portage trails, and 10 picnic areas with 8 having toilet facilities
  - CWPCo also owns 24% of Wisconsin Valley Improvement Company which operates 21 northern reservoirs to uniformly release water to allow downstream owners to generate clean, renewable hydropower.
  - Land ownership is ~ 20,000 ac
    - 8300 acres upland
    - **Balance submerged ~ 12,000 acres**
      - **CWPCo purchased this property!**

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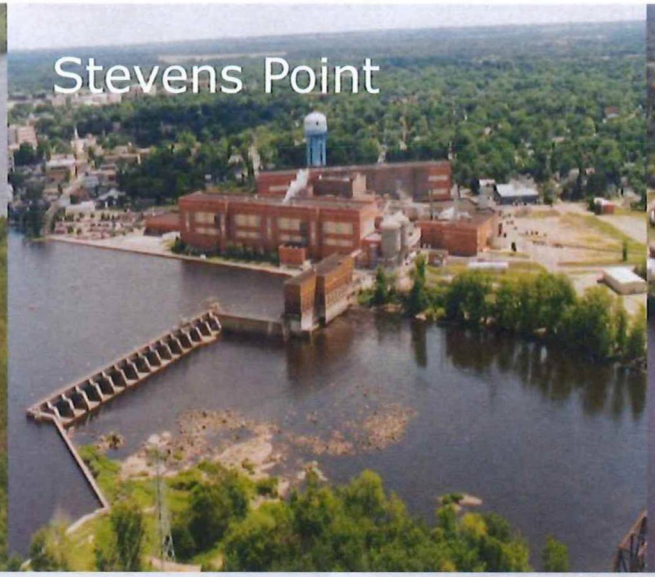
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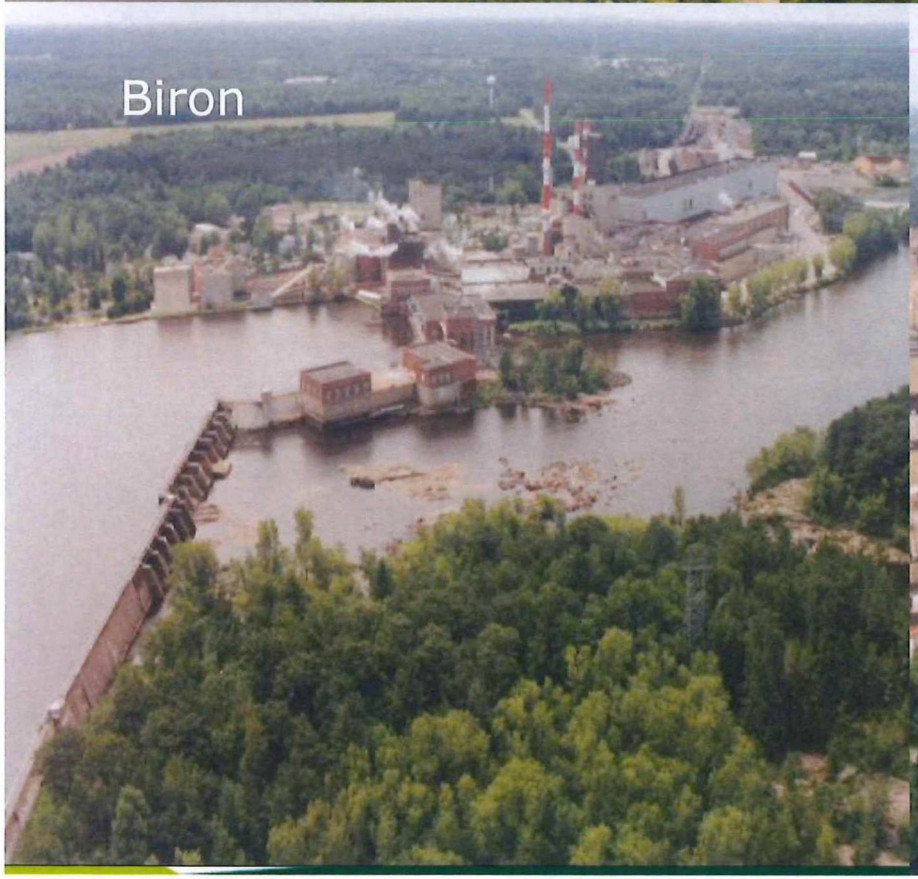
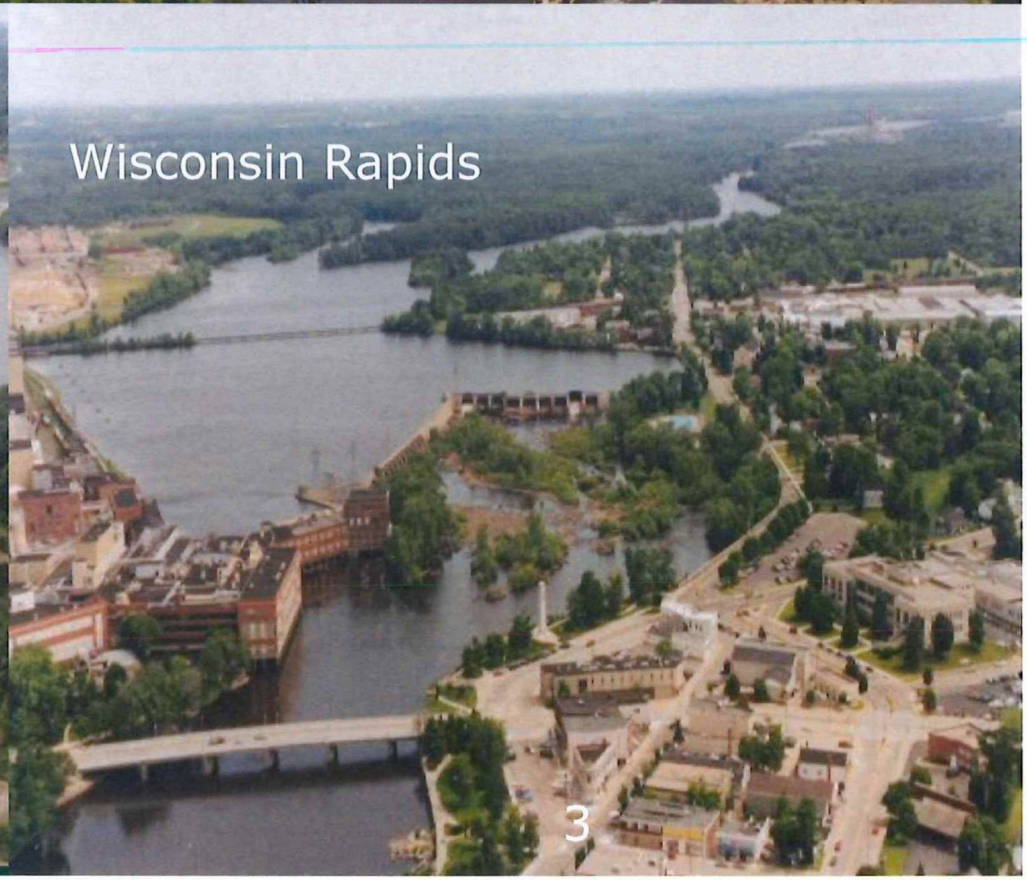

Biron


Wisconsin Rapids

FERC Licenses 101

- **Hydroelectric *projects* are licensed by the Federal Energy Regulatory Commission (FERC) which issues, regulates, and enforces compliance and conditions**
- **What does a "project" include?**
  - All physical, mechanical and operational features necessary for the operation of the facility (generators, turbines, dikes, gravity walls, drainage ditches, ***plus lands we own or have a controlling interest – flowage rights – which allow us to maintain higher water levels than what the free-flowing river would normally flow.***

- **What obligations does a FERC licensee have?**
  - Operational limits (headwater elevations, peaking vs. run-of-river)
  - Land management , ***must have controlling interest in all lands necessary for project operations.***
  - Wildlife management
  - Archaeological protection (cultural and historical)
  - Recreational management
  - Exotic species monitoring and control (purple loosestrife, Eurasian milfoil, zebra mussels, etc.)
  - Water quality considerations / fisheries
  - ***Shoreline management, including erosion control, habitat protection, protect public use of water***

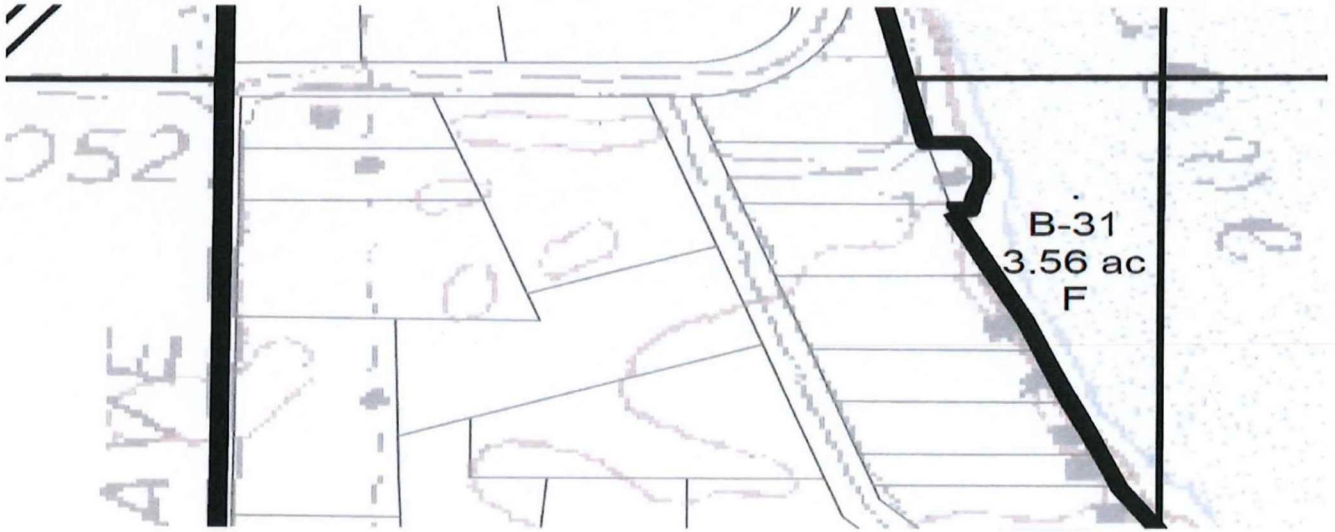
SB 501/AB551 is a solution in search of a problem

- Property rights of hydro project owners and adjacent landowners are well understood
- CWP works with landowners and flowage landowner associations
- ***For decades,*** CWP has maintained a permit program that allows adjacent land owners to install docks
  - Small fee ($200/yr) that partially covers administrative costs (including costs of surveys and property record reviews) ***This is not new!***
  - CWP allows docks as long as they don't conflict with other project requirements (almost always) and the right of the public to use/access the project.
    - ***So long as the permittee is compliant with the requirements of the dock permit, we have never removed a dock.***
- *Movrich* case confirmed and did not change long standing property rights on flowages
- This legislation would upset the status quo:
  - Would give adjacent land owners property rights they don't currently have and didn't buy and ***take*** property rights away from "other" property owners like us.
  - Would create confusion and ***conflict*** where adjacent land owners on flowages assume they have riparian rights and object to CWP's efforts to manage its flowages per our FERC licenses.
  - ***This would eventually force CWP to pay for property rights that it currently already has (and previously paid for) under existing law.***

Common land ownership on a flowage

Adjacent landowner owns to project boundary, CWP owns submerged land

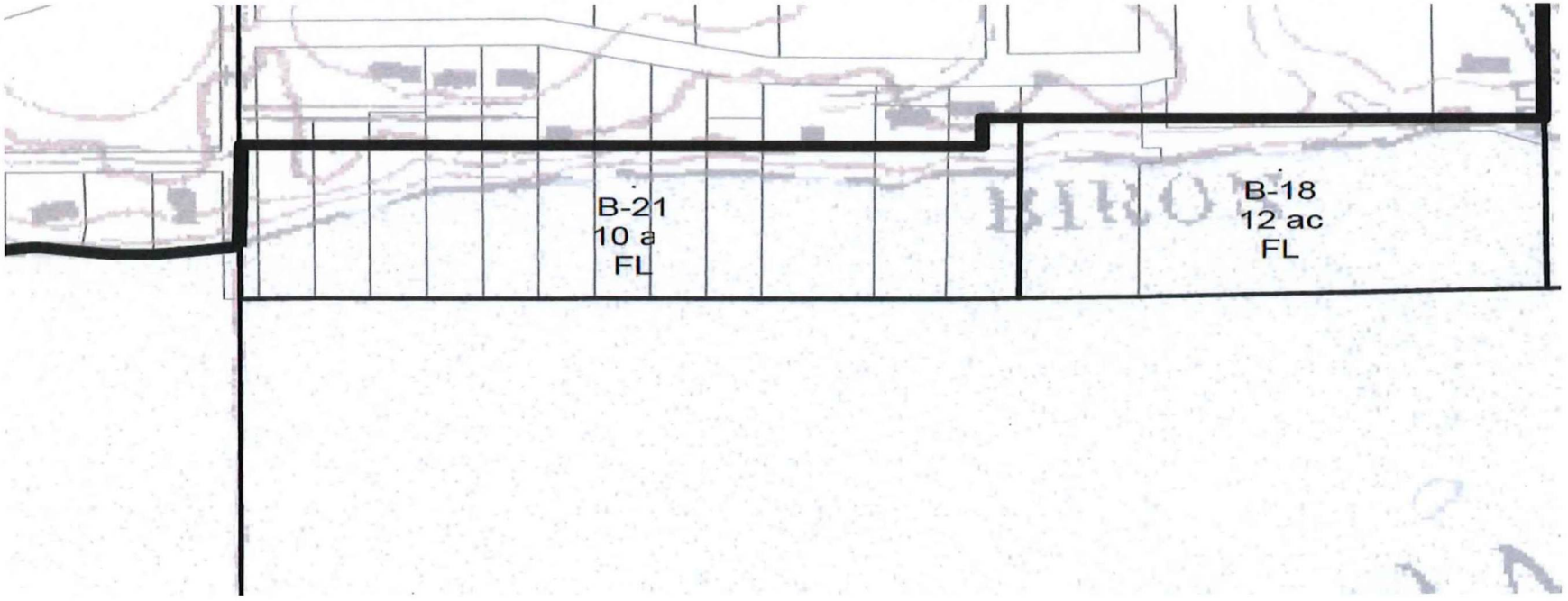
Adjacent landowner needs CWP's permission to place dock on CWP proper



Less common ownership

Adjacent landowner's lot extends past project boundary and includes submerged land

Adjacent landowner has right to place dock on his own property



2301 NORTH THIRD STREET WAUSAU, WISCONSIN 54403
715/848-2976 FAX: 715/842-0284
Web Site: www.wvic.com Email: staff@wvic.com

Public Hearing Testimony
Senate Committee on Natural Resources and Energy
400 Northeast
Wednesday, February 5, 2020

RE: Opposition to SB 501- Presumption of Riparian Rights

Good morning, my name is Ben Niffenegger and I am the Manager of Environmental Affairs with Wisconsin Valley Improvement Company (WVIC). WVIC is a private corporation that was publicly chartered by the State of Wisconsin in 1907. WVIC has 21 storage reservoirs in northern Wisconsin that control the flow of the Wisconsin and Tomahawk Rivers. The purpose of WVIC's reservoir system is to maintain uniform flows in the river to control flooding, generate clean, renewable electricity, provide recreational opportunities for the public, and to protect the environment.

WVIC owned flowage bottomlands were acquired through private investment, provide public benefits, and should not be taken through legislative action. The recreation and economic development opportunities provided by WVIC's Reservoir System came at a cost with more than a century of private investment with no public dollars or taxpayer subsidies. Many of the properties subject to this bill that currently have water access would not be waterfront properties at all if it wasn't for the dams and infrastructure investments made to create the flowages. This bill attempts to transfer WVIC's private property rights to adjoining landowners that never had them to begin with.

WVIC currently has the rights it needs to fulfill FERC license obligations but this bill would take those rights away and jeopardize regulatory compliance. Under its FERC license, WVIC is required to manage the use and occupancy of its land to ensure protection and enhancement of the scenic, recreational, and other environmental values of the project. A loss of property rights would reduce our ability to comply with FERC regulations and protect spawning areas for walleye and gamefish, historic resources like early-American settlements or archaeological sites, along with rare, threatened or endangered plants, animals and fish.

If the property rights we currently have are taken by the proposed legislation, then addressing issues involving the shoreline and flowage bottom will involve a host of legal challenges, expenses and regulatory complications. The additional costs will be passed on to the utilities and paper companies who rely on the WVIC system for hydroelectric generation and, ultimately, to their customers.

Please acknowledge our long standing property rights and fully exempt state and federally licensed flowages from SB 501. Thank You.

WISCONSIN LAKES

We Speak for Lakes!

716 Lois Dr / Sun Prairie WI 53590
608.661.4313
info@wisconsinlakes.org

February 5, 2020

TESTIMONY TO SENATE COMMITTEE ON NATURAL RESOURCES ON SB501
FOR INFORMATION ONLY

Thank you for the opportunity to testify today for information only on SB501. My name is Michael Engleson, and I am the Executive Director of Wisconsin Lakes, also known as the Wisconsin Association of Lakes. Wisconsin Lakes is a statewide non-profit conservation organization of waterfront property owners, lake users, lake associations, and lake districts.

Wisconsin Lakes is neutral on SB501 for two reasons. First, as a conservation organization we do not believe that SB501, if passed, would have much if any of a negative impact on the waters of Wisconsin and their environs, as it does not seem to impact any public trust rights or the ability of the state to regulate the affected waters and is thus is somewhat outside of our mission.

Second, the bill boils down to the kind of dispute between competing property rights in which we typically choose not to engage. Indeed, Wisconsin Lakes members fall into both camps of this debate, though I can say that I have had no contacts from members urging me to support the bill. On the other hand, I have had discussions with members (including a couple of my board members who are themselves riparians) who believe that limiting the right to control who comes onto one's property, as this bill does by elevating the riparian presumption of the right to pier placement over the lakebed owner's fee simple right to exclude, is improper.

I do want to point out a couple of things about the bill that may otherwise get lost in the shuffle that we believe are important for you to consider as you think about the bill.

First, the bill creates a stronger presumptive right for a riparian to place piers, other structures, and deposits than riparians historically have held. It does so by limiting the ability of other parties to rebut that presumption in situations where the riparian does not own the adjacent lakebed to only instances where the deed says the riparian doesn't have the right to place anything. Without a doubt, that adds a layer of certainty to the presumptive riparian right. But to create that more certainty, the bill necessarily has to take something from the property rights of the lakebed owner - namely, as one of my board members argues - the right of the lakebed owner to control what happens on their property. That may be something the Legislature wishes to do if it values the riparian's right more than the lakebed owner's fundamental property right, but it should be a choice made with a full understanding of the impact on both sides of the equation.

Second, this is not just a bill that creates a statutory presumptive right only to pier placement. It also allows for the placement of "other structures or deposits." Those terms are ambiguous and seem to open the door for other types of structures or even some sort of fill or other deposit to be placed by a riparian on lakebed they do not own. It should be noted, that while this is true, such activities would still require a permit from the DNR if a permit would normally be required.

This broader language could lead to a case that would inhibit a conservation practice. It is fairly easy to envision a situation where the lakebed owner might, for example, be planning some sort of habitat restoration activity only to discover that they are not be able to undertake it - on their own property - because the adjacent shoreline owner wants to place a pier or other structure in the same place. As far as we can tell, the bill is silent as to whether the riparian's right includes the right to place the pier where they see fit, or whether the lakebed owner would have some ability to direct where the placement occurs.

These are the sorts of tradeoffs that you, as legislators, need to weigh in deciding on this bill. It is not simply a matter of whether the right to place a pier should be enhanced and codified in statute. Granting that right may be warranted, but you should consider both sides of the equation when making that determination.

Robert D. Lobermeier

loberro@pctcnet.net

February 5, 2020

Opposition to Senate Bill 501/AB551

I am here today to fight the unconstitutional taking of property rights by Wisconsin Legislators proposing SB 501.

I am a riparian landowner on Sailor Creek Flowage in Price County. I own 150 acres with 2300 feet of completely natural shoreline frontage. 685 feet of my frontage property, 30% of the total, will be adversely impacted by SB 501.

My property deed validates that I enjoy fee-simple ownership of my property. The fee-simple interest is described as "the right to use, possess, enjoy, dispose of, exclude or the right to not exercise any of these rights." (ABKA Ltd. P'ship. V. DNR; 2001). The right to exclude is the most important right for without that, there is no sovereignty. As the fee-simple owner I am presumed to be the "entire, unconditional, and sole owner of any buildings as well as the land.." (Phillips v. Wash. Legal Foundation; 1998). Fee-simple estate "is the highest tenure known to the law". (Lycoming Fire Ins. Co. v Haven; 1877). In Wisconsin, "the breadth of rights accompanying fee-simple interest is settled law" (Walgreen Co. v. City of Madison; 2008). These rights are also reflected in Federal property law. My deed begins in the mid-1800s with a U.S. government patent and has provided uncontested proof of quiet title for a long list of owners prior to my purchasing the property 15 years ago.

The sanctity and superiority of fee-simple ownership was upheld for all landowners with the Wisconsin Supreme Court majority ruling in Movrich v. Lobermeier; 2018.

In January 2020, I testified in opposition to AB 551 at the Real Estate and Housing Committee. It was clear that many of the committee members did not understand the unique nature of waterbodies created by dams, which are called flowages. Too much testimony and explanation conflated and confused the

discussion regarding SB 501 as exclusively pertaining to flowages. There was disinformation and purposeful omission of critical facts used to support AB 551 by witnesses. There was little empirical data to support ominous claims of economic doom championed by supporters of the bill. It was also appeared to me that several representatives were more concerned about placating the dams, power and paper entities with special consideration so they would drop their opposition to the bill, than they were to understand the severe shortcomings of the bill.

Be fully aware that this is not a "Dock Bill". SB 501 is giving "Full Riparian Rights" to property owners by taking property rights away from the lawful owners. Full riparian rights include permission by the State, to dredge, fill and alter the shoreline and the flowage bed. This is state sanctioned trespass and destruction of property when the flowage bed is privately owned. The Supreme Court ruled this to be true.

The Towns Association representative testified in favor of AB 551 because of its alleged devastating economic impact to the tax base because of the Movrich v. Lobermeier case. He presented no empirical data to support his claims. To date I have seen no data regarding the number of parcels affected, the estimated value or loss of tax base to the state. He said there has been little impact to date, but only the future will tell and we can't take the chance. This is no way to make sound decisions.

The Towns Association and WRA appeared to agree that the value of a "lake access lot" is twice the value of a "lake view lot". If true, SB 501 proposes to take my valuable property away and give it to an adjacent owner, doubling that persons value while giving me nothing in return. If water access frontage is valued at $1000 per foot, and water view frontage is half, $500 per foot, then my land which could provide access to the upland owner, would also be worth $500 per foot. The state is advocating taking the value from my land with SB 501.

Testifying in favor of AB 551 was a WRA representative and a Mr. Spangler who purchased a lot on Biron Lake and belatedly discovered he did not own the land his dock rested on. He then went on to purchase a second lot on Biron Lake with similar shortcomings. His emotional "woe is me!" testimony rings hollow because

Mr. Spangler is a realtor. Are not realtors the very professionals that are supposed to inform clients of these issues prior to purchasing land? Yet, he decides to double down on it himself and now wants the legislature to bail him out. The WRA is conducting a misinformation campaign to gain support through fear for SB 501. Why fib if the truth is on your side?

Water law guru Paul Kent, testified in favor of SB 501. Mr. Kent was the attorney for one of the losing parties in the Movrich v. Lobermeier case. He testified the Supreme Court got it all wrong and he knows what is right. I believe he didn't go to court because he knows the law, and it was not on his client's side. Mr. Kent should explain to this committee how a meets and bounds legal description dictates ownership through a deed. The committee would then understand the illusion the WRA wants you to believe in.

The DNR testified it had no problem with AB 551 except that it should exclude dredging on Lake Michigan. The DNR representative needs to google Lake Michigan and verify it is a natural lake. AB 551 applies exclusively to flowages. One would think the DNR would be very concerned about the environmental implications of granting "full riparian rights" on previously protected shorelines.

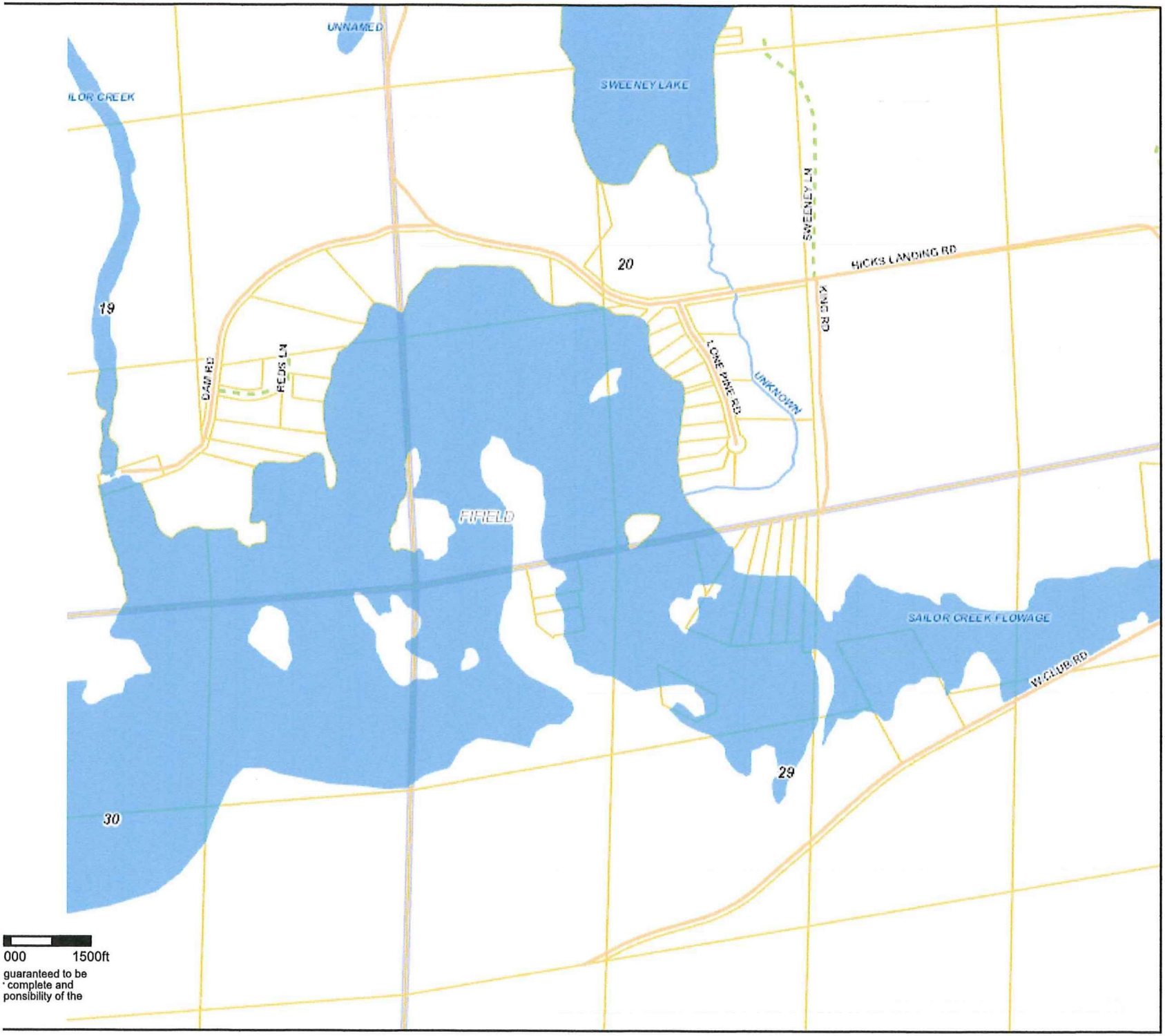
There is a clear effort by some representatives and bill supporters to separate the large flowage bed landowners from us smaller owners. Divide and conquer works well as a strategy whether or not it is legally or morally justified. My deed and those of smaller landowners are the same as those held by the large owners; fee-simple. It is unconstitutional to decide that some fee-simple deeds remain valid and others suddenly are not valid. If the constitution and law was even close to being on the side of the SB 501, there would be no need to exempt the large landowners. But the law is not on the side of SB 501 and the big boys have the money it takes to fight the government. Therefore, the attempt to placate them.

Some questions the Senators need to have clear answers on:

1. On what constitutional basis does SB 501 purpose to take my property rights and give them to another?

2. On what legal grounds can SB 501 retroactively change my deed from fee simple to having an easement?
3. What is the legal precedent for an assumption of ownership to override the validated written document of a fee-simple deed?
4. Property law says, "No one can own more than their deed describes." How does the Senate plan to reconcile the trespass activities SB 501 allows on the land of others?
5. I have real estate condition reports stating there were no encroachments or trespass concerns on my property before I bought it. Is the previous owner now responsible to compensate me for my loss?
6. Who is responsible for rectifying all the legal deeds?
7. What happens when the water goes down and bare earth is exposed between the upland and the waterline? This clearly makes me the riparian with full riparian rights to my own land.
8. How much land needs to be exposed for riparian rights to switch? An inch? A foot? Three feet? Fifty feet?
9. What happens when a dam is removed and there is only the stream remaining? Does the bed owner have legal recourse to demand restoration of the trespass encroachments?
10. What happens when my desire to preserve the shoreline conflicts with the trespasser's desire to dredge, fill and disrupt the flowage bed?
11. What are the liability implications of allowing trespassing structures to be placed on the lands of others? What about maintenance? Demolition?

These are but a few of the issues not being considered by the legislators. You need to ask why is the WRA pressing SB 501? I say follow the money. There is a big pay-off somewhere for them or they would waste their time. They also care squat about the chaos created by this ridiculous proposal. If they think they have a legitimate case, appeal the Supreme Court decision themselves rather than using the legislature to do their bidding. They are using this body to advance their bad idea. Don't fall for it.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Senate Hearing 551/501 February 5, 2020 (4)

OPPOSED

PURCHASE-PRESCRIBED-PERMISSION

FOR THE STATE TO TAKE REQUIRES

1. POLICE STATE

OR

2. EMINANT DOMAIN

1. All of the folks opposed are fee simple property owners or environmental minded.

2. Can anyone answer the glaring question as to why the WRA has such a vested interest in this matter? Members feel exposed to suit or perhaps there is a potential large pot of gold being held up because of property law being up held. I wish I could find the answer to this so perhaps something made sense. Why is the WRA spending so much money running adds, making absolutely false statements if there isn't something in it for them or their members. What is it? Ya gotta follow the money for the answer.

I am still waiting for WRA/WHA to explain how "every dock in the state is in jeopardy" and validate the 10,000 property owners who have been affected by the Supreme Court Decision to up hold current property law. The matter only involves flowages. Not natural bodies of water. In my research of 3 flowages in Price county, only 6 parties do not already have legal rights to qualify as Riparian. All 6 sued us and all are part of the same poorly developed subdivision. How is this my fault?

WRA makes statements with a lot of false or misleading words, scare tactics and fake news. They simply are not telling the truth. Base a new law on this? Doesn't seem to be a sound decision to me.

3. The amended wording of 551 gives some exemption for FERC and other state regulated entities. I don't see how this is even within the boundaries of the Constitution nor possible to consider. It is simply "discrimatory" and wrong. My fee simple deed is exactly the same as their deeds. It describes what I own. Mets and bounds. Clear. It appears to try to simply eliminate powerful opposition.

4. Mr. Spangler. A professional realtor, provides misleading interviews and statements explaining how he buys a water front property in his home area, discovers the paper company or Utilities control the water level and/or own the bed so he sells it. Did he tell the buyer of his place his concerns? I bet he sold it for a nice profit too. Somehow it was all someone else's fault. The Utility? Paper company? Private owner? No. It is Mr. Spangler's fault. Then, he goes out and buys another property with the exact same potential property issues as his first one, someone else owns the bed of the flowage. Now he is just heart broken that the value of his place MAY be less than what he hopes it to be. Again, not his fault. Somehow it is the rightful property owners fault. Really? Mr. Spangler is a professional realtor, he is expected to know real-estate and is required to guide or caution /sellers/buyers of potential concerns. I do not believe Mr. Spangler is that naive to fall victim of the same potential error twice but I do believe he is that anxious to make some money. I was extremely pleased to hear Mr. Spangler's estimate that the value of his property **without** Riparian Rights will be half of its value **IF** it had full Riparian rights. We have been searching for that valuation so based upon that estimated value,

and Mr. Spangler must be correct, the added value to a property for Riparian Rights, the rights attached to our property (deed) the rights that folks are asking you the legislators of Wisconsin to take from us has a real value of $535,300. Based upon actual assessed home values as of yesterday, 2/3/20.

5. Riparian - is a land owner who abuts the water. Definition from Public Truct Doctrine (PTD). So when the flowage water is not at "full" capacity (OHW) and these upland owners no longer abut the water will the new law still "presume" they are Riparian? They do not meet the definition of Riparian at that point in time therefore are not Riparian. I do as the bed owner and therefore I hold Riparian rights per PTD definition. Therefore, not only is this proposed new law contradictory to the history of property law and the Wisconsin Supreme Court decision but it must also expand the Public Trust Doctrine. How far are you willing to go to pass a law that is opposed by fee simply property owners, supported by property law, supported by Wisconsin Supreme Court and Public Trust Doctrine? And for who? How many folks have been affected by the SCT decision? Actual people not an unverified stated number. On 3 different flowages in Price county we found 6 total who do not own what they need for Riparian rights. Everyone else got it right and the 6 parties are the ones who sued us in an effort to "take" what is not theirs. Remember, **a property owner cannot acquire more than what is described in their deed.**

6. In the Assembly hearing I handed out a written statement. In it I had a "shame on you" directed toward Assembly members. I am grateful one of the members was taken aback by the statement and asked me to explain why there is shame on him. He made a good point. He was there to listen to the statements and did not deserve that statement. I

immediately apologized and walked over & shook his hand facing him saying I was sorry for the unwarranted statement. Those words got him up set, think of how we feel after more than 6 years in court, 2 years since our favorable SCT decision and now we are here before this committee still fighting for nothing more than what we already own. We don't gain a thing. Our deed still describes the land we bought. If you disrupt these simple yet solid laws of property ownership in Wisconsin by passing this new law you will be creating future litigation and turmoil for all property owners.

I offer a very simple safety net for potential flowage property buyers:

If buying property on a flowage (has a dam) look at the county GIS property map to see who owns the land (bed) adjacent to the property you wish to purchase. Proceed to 1. purchase it, 2. prescribed (easement) or 3. get permission for dock privileges BEFORE you buy. If unable to secure the legal rights, DO NOT BUY THE PROPERTY.

Simple. No cost, no new laws, current property owners are unaffected and property law remains less confused with less litigation for the future.

DO NOT PASS 501.

Thank you.

Questions?

Dave Lobermeier

8138 Lake Thomas RD

Amherst, WI 54406

715-347-4853

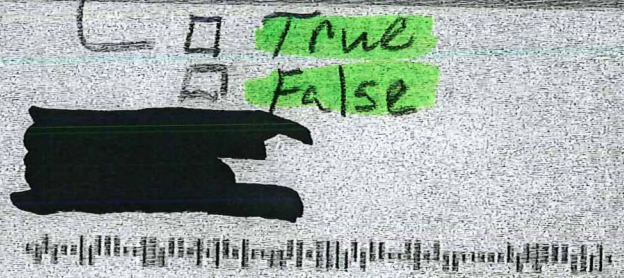
4801 FOREST RUN ROAD
MADISON, WI 53704

ACT NOW AND PROTECT YOUR PIER!

IT IS TIME TO PUT A STOP TO DISAPPEARING DOCKS!

For 140 years, Wisconsin property owners had the right to place a pier or dock on their property and enjoy access to Wisconsin's waterways.

A recent court decision could put ALL waterfront property owners in jeopardy of losing their piers, because someone else may own the ground UNDER the water!



HELP RESTORE YOUR PROPERTY RIGHTS!
CALL YOUR LEGISLATOR AT 800-362-9472.

TELL THEM TO SUPPORT AB 551 / SB 501 AND PROTECT YOUR PIER.

You Decide
Date
Date

Soon, all Wisconsinites with waterfront property may lose the ability to place a pier on their property.

AB 551 / SB 501 will ensure that your rights are restored, and no one will EVER be able to threaten your pier placement again.

ACT NOW TO SUPPORT AB 551 / SB 501 AND

PROTECT YOUR PIER

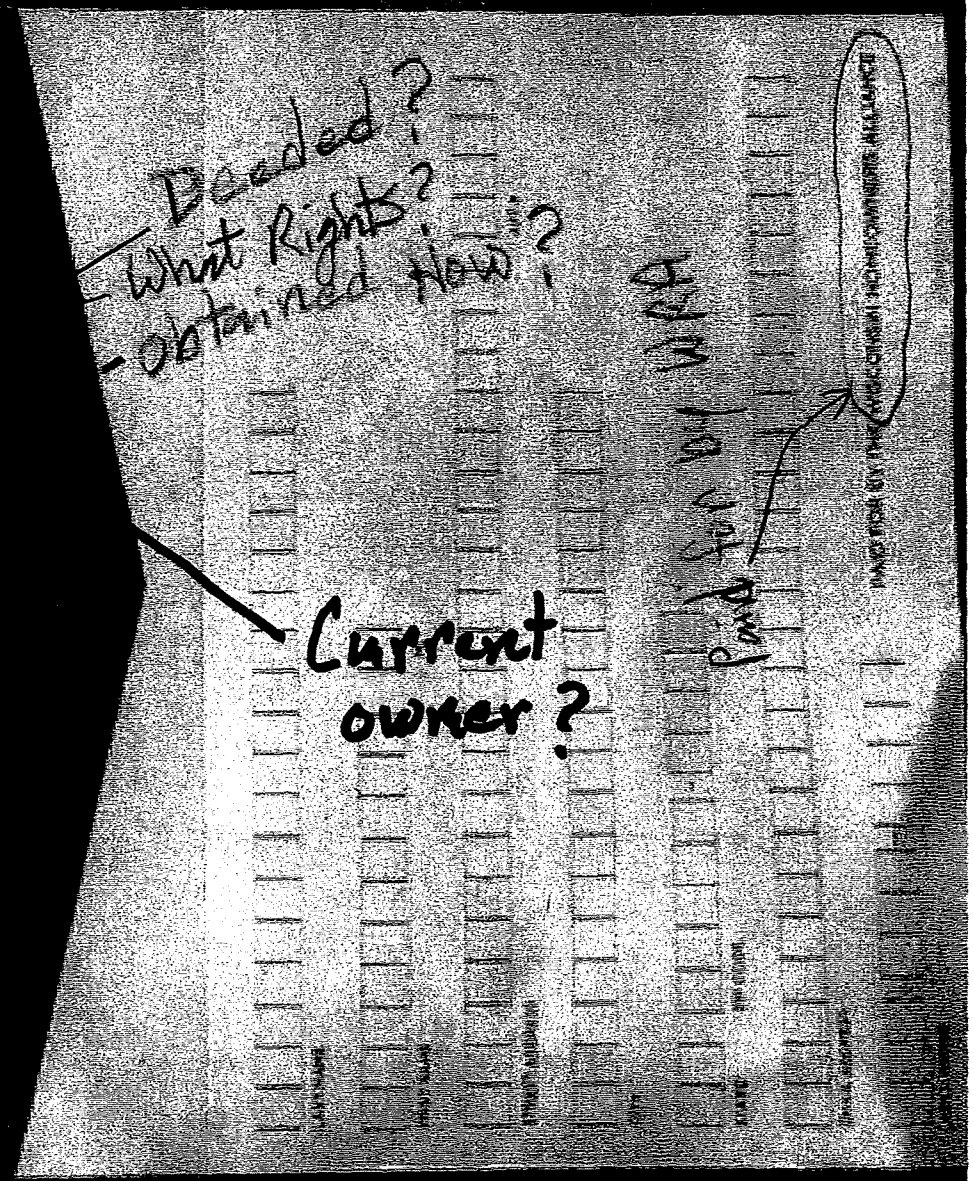
VISIT PROTECTOURPIERS.ORG TO LEARN MORE

Please review my statement thanks

SIGN UP TO BE A PART OF OUR COALITION TO

HELP PUT A STOP

TO THE STRIPPING OF OUR LONG-HELD PROPERTY RIGHTS!



Complete, stamp and mail the detachable postcard

Senate Bill 501 Public Hearing Testimony

Wednesday, February 5, 2020

Read by Morgan Pettit representing

Scott and Stacy Pettit

W6210 Forest Drive Merrill WI 54452

715-218-6739/715-610-6143

tmk1598@frontier.com/scott.pettit98@gmail.com

Thank you for allowing me to read testimony in opposition of SB 501 that has been prepared and submitted by my parents, Scott and Stacy Pettit, who were unable to attend today's hearing.

We own approximately 190 acres, which includes 100 acres of wetlands and 15 acres of Lake Alexander flowage lakebed in Lincoln County. Our lakebed lies within a bay that is a tributary to the Wisconsin River via Lake Alexander. We own, pay property taxes and pay for property and liability insurance on all of this, including 3,300 feet of lake frontage. Remarkably, even though we have every right as lakebed property owners, the opportunity to place a pier, WE HAVEN'T! WHY? BECAUSE YOU DON'T NEED A PIER OR ANY OTHER STRUCTURE TO ACCESS THE WATER.

NO WHERE IN OUR DEED, ORIGINATING IN THE YEAR 1853, DOES IT ALLOW FOR RIPARIAN OWNERS, OR ANY OTHER ENTITY, TO ERECT STRUCTURES ON OUR PRIVATE PROPERTY WITHOUT OUR PERMISSION, AN EASEMENT OR OTHER FORM OF LEGAL AGREEMENT. A deed is in fact, a legal document regarding the ownership of legal property rights. The person holding the deed is the only person who has legal authority to grant a PRIVELAGE to the property. It is OUR RIGHT to make the decision of what takes place on OUR property.

Furthermore, our property is bound to a perpetual, exclusive, private and contractual conservation agreement with North Central Conservancy Trust. Our privately owned lakebed is included in that agreement. Legal agreements such as conservation easements need to be given the same consideration as FERC agreements in as much as they both are existing legal agreements between parties that regulate what can and can't take place on privately owned lakebed property. Perhaps the most important aspect of these agreements is the fact that third parties, such as riparian owners, cannot be assigned "rights" over existing contracts.

We recognize, respect and understand the value of the Public Trust Doctrine, both as public users and private property owners. By placing a conservation easement, we have tried to find a balance of protecting our wetlands and waterways while providing recreation opportunities to the public, all while we continue to assert our rights as public users and private property owners. It is important to acknowledge the fact that our privately owned lakebed, and the responsibilities and liability that go along with it, are what make waterway recreational opportunities available to all. We value our lakebed property ownership as a tremendous responsibility, not as a burden, in protecting Wisconsin's natural resources.

It is ironic that the language in SB 501 is essentially summarized and taken from a 1923 Supreme Court case review where the facts and basis of the case ARE NOT equal to the Movrich vs. Lobermeier case. What is the significance of having the State's highest court if legislators can simply undermine those rulings? Everyone must be aware that there are a significant number of Wisconsin Supreme Court rulings in favor of private waterbed rights. The precedence has been set over the past several decades, not just recently.

The issue of privately owned waterbed rights does not end at the state level. Private property rights are constitutionally protected in the United States through the Takings Clause of the 5th Amendment. This clause prohibits the government from confiscating property if it is not doing so for a public use. Riparian rights are not considered for public use as is required for a legal taking via the Takings Clause. Riparian rights provide a right of access for private upland owners of property that runs into a body of water. In this case, the government has no grounds with which to take private property/lakebed property from one person and give to another in the name of riparian rights. Therefore; this proposed legislation would be a violation of the Takings Clause of the 5th amendment of the United States Constitution.

When Justice Bradley stated, "riparian rights in Wisconsin are sacred", it was meant to invoke an emotional response. That in no way should invoke a response to attempt to create a statute that tramples the rights of one property owner for another. It is a violation of the Wisconsin State Constitution and the United States Constitution that is meant to be upheld by our lawmakers and judicial system.

Following our testimony at the Assembly hearing regarding AB 551, Representative Murphy asked us, "What would you suggest we do to address this?"

We ask that you do nothing. By Mr. Larson's own admission, there is not a problem. NO ONE has come forward and said that they have been forced to remove their structures from a Wisconsin lakebed. Clearly, the utility and paper companies have a system in place that addresses their property rights and riparian privileges. The Movrich vs. Lobermeier case was initiated as a private lawsuit and has been settled in the court of law. Only opinion and special interests have brought a non-issue to your committee. Seeing that there is quite an effort to get the utility and paper companies to sign onto this bill, it is becoming clear that this may be a personal vendetta against the Lobermeier's and their victory in a private lawsuit. If you take the utility and paper companies out of the equation, who is left for this bill to affect? Only individual property owners like ourselves and the Lobermeier's.

We ask ourselves why we are defending our property rights that exist within our deed. We should be on the offensive, not the defensive. We have nothing to prove. The proof lies within our deed. Riparian owners should take responsibility for understanding their real estate and real estate transactions. Realtors should be held accountable for their client's knowledge of the sale. The burden of responsibility lies on them, not lakebed owners. Producing legislation that strips legitimate private property rights is not the answer, it is the beginning of a problem of epic proportions.

Finally, do not underestimate the conflict that this type of legislation will most certainly awaken. As lakebed owners, we have a $1,000,000 liability insurance policy on our property. What type of liability does a riparian owner have if little Johnny dives off their dock and breaks his neck on our lakebed? Little Johnny's parents will most certainly come after the lakebed owner, while the riparian owner hides behind his "presumed" rights. We pay property taxes on the lakebed and surrounding

shoreline. A riparian owner does not pay more property tax than a lakebed owner with equal or more waterfront property. In testimony in support of AB 551, it was stated that riparian owners cannot obtain any type of liability insurance on their docks/piers or the land underneath them because they don't own it. Furthermore, there was testimony filled with misinformation regarding property values and how they affect the economy. A riparian area will still be assessed the same with or without a dock for waterfront property. Their property values won't change because they can still access the water. The water and location still provide aesthetic beauty and value and opportunity for recreation. Winter and ice further question the utility of this Bill. Most docks are in the water 5-6 months out of the year, even less up north. So now this legislation only potentially matters in riparian areas a few months out of the year. Furthermore, riparian owners can still access the water in winter the same as in summer by just walking onto it. Docks do not change property values.

If the proposed legislation is brought back year after year in an attempt to pass it, you can expect the same stand against it from lakebed owners year after year. The facts won't change. As owners of deeded lakebed and the rights that are sacred in our deed, we adamantly oppose Senate Bill 501.

Wisconsin Legislative Council

Anne Sappenfield
Director

TO: SENATOR MARK MILLER

FROM: Anna Henning, Senior Staff Attorney, and Ethan Lauer, Staff Attorney

RE: 2019 Senate Bill 501, Relating to the Presumption of Riparian Rights on Navigable Waterways

DATE: February 4, 2020

This memorandum responds to your request for legal history relevant to 2019 Senate Bill 501, relating to the presumption of riparian rights on navigable waterways, and a discussion regarding the bill's application to a situation in which the removal of a dam returned a flowage to its original stream banks.

RELEVANT STATUTES AND CASE LAW HISTORY

As it has evolved through Wisconsin Supreme Court case law, statutes, and Department of Natural Resources (DNR) interpretations, the state's public trust doctrine provides that navigable waters[1] are held in trust by the state for the benefit of the public. However, ownership of the bed of a navigable water differs based on the type of waterbody.

Interpreting the state's public trust doctrine and early U.S. Supreme Court decisions, the Wisconsin Supreme Court has held that the title to natural lake beds is vested in the state to be held in trust for the public. [*Illinois Steel Co. v. Bilot*, 109 Wis. 418 (1901).] Conversely, river beds are privately owned. River bed ownership is "qualified"; title to a river bed is subject to the rights of navigational use and other recognized forms of public use by others. [See *Ashwaubenon v. Public Service Comm'n*, 22 Wis. 2d 38 (1963).] Title to the beds of artificially expanded waterbodies, such as flowages,[2] remains privately owned, even if, in practice, the waterbody functions more like a lake than a river. [*Haase v. Kingston Coop. Creamery Ass'n.*, 212 Wis. 585 (1933).]

[1] With limited exceptions, all lakes, streams, sloughs, bayous, and marsh outlets that are wholly or partly within the state, are considered "navigable" for purposes of the public trust doctrine if they are "navigable in fact." [s. 30.10 (1) and (2), Stats.] The Wisconsin Supreme Court has interpreted "navigable in fact" relatively broadly, to include any water body that is "capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes." [*Muench v. Public Service Comm'n*, 261 Wis. 492, 506 (1952).]

[2] The term "flowage" is not defined under Wisconsin statutes or administrative rules. In the property law context, the term is typically used in connection with an easement right allowing water to flow over another's property. The term is commonly understood to indicate a waterbody that may function much like a natural lake in practice but is created by damming a river. Partly for that reason, in some contexts, the term "river" is defined to include flowages. [See, e.g., s. NR 195.03 (12), Stats.]

In Wisconsin, a riparian[3] property owner – i.e., a person who owns the shoreline along a navigable water – is entitled to certain rights as a riparian, limited by the public trust doctrine. Among other rights, Wisconsin courts have recognized riparian owners' rights to reasonable use of the waters next to their property and the right to construct a pier or similar structure. However, the courts have recognized that such rights may be restricted by statute. [See *R.W. Docks & Slips v. DNR*, 2001 WI 73, ¶ 20.]

Chapter 30, Stats., relating to navigable waters, recognizes such riparian property rights by authorizing only riparian owners to apply for various types of permits affecting navigable waters. For example, only riparian owners may apply for general and individual permits to place structures in navigable waters, subject to certain statutory criteria. [s. 30.12 (3) and (3m), Stats.] In some instances, ch. 30, Stats., also authorizes riparian owners to take certain actions without first obtaining a DNR permit. For example, riparian owners may place or deposit any of the following without a permit, if the structure or material is not located in an area of special natural resource interest and does not interfere with other riparian owners' rights:

- Certain small deposits of sand, gravel, or stone relating to another authorized activity.
- Certain seasonal structures.
- Certain devices for improving fish or wildlife habitat.
- Certain boat shelters, boat hoists, and boat lifts adjacent to piers or wharves.
- Certain small piers and wharves.
- Pilings for deflecting ice.
- Riprap that satisfies certain criteria.
- Biological shore erosion control structures.
- Certain intake and outfall structures.
- Certain larger piers and wharves placed before August 1, 2012.

[s. 30.12 (1g) and (1k), Stats.]

However, the extent of a person's riparian rights may differ based on the type of waterbody and the ownership of the water bed. For natural lakes, where the state owns the lake bed, riparian rights are relatively straightforward. Similarly, if the owner of riverfront property owns the relevant portion of river bed, riparian rights are also relatively easy to discern.[4]

Complications may arise when different private property owners own the bed of a navigable water and the adjacent land. In some past cases involving such property arrangements, Wisconsin courts have examined property deeds to assess the nature of property rights on each side of the waterbody's ordinary high water mark. [See, e.g., *Mayer v. Grueber*, 29 Wis. 2d 168 (1965).] However, in other cases, the Wisconsin Supreme Court has held that riparian rights are not affected by artificially raising the level of a navigable waterbody, meaning that a shoreline owner has rights similar to the owner of

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[3] In many other contexts, the term "riparian" refers only to land abutting a river or stream, whereas land abutting a lake is referred to as "littoral." In Wisconsin statutes and case law, however, "riparian" refers interchangeably to both riparian and littoral land, and also to the owners of such land.

[4] Many owners of riverfront property own to the thread (center) of the river.

land along a natural lake, even if the bed is owned by a different property owner. [See, e.g., *Haase*, 212 Wis. 585.]

Prior to the *Movrich* decision, discussed below, few published cases specifically addressed riparian rights for property along flowages. According to DNR staff, when reviewing or issuing a permit for activities impacting flowage beds, DNR's common practice has been to note that a riparian owner may need to consider private ownership interests in the flowage bed before proceeding with the permitted activity.

MOVRICH V. LOBERMEIER

In *Movrich v. Lobermeier*, 2018 WI 9, the Wisconsin Supreme Court considered how the public trust doctrine, riparian rights, and other private property rights apply to flowages.[5] The case involved a dispute between the owners of part of the bed of a flowage (the Lobermeiers) and the owners of land adjacent to the flowage (the Movriches).

Asserting riparian rights and rights under the public trust doctrine, the Movriches argued, in part, that they are entitled to install a pier in the flowage adjacent to their property. The Movriches noted that they had purchased their lot with the expectation that it was a "waterfront lot," with accompanying riparian rights, including the right to construct a pier. In response, the Lobermeiers asserted that their private property rights as owners of the flowage bed include the right to prohibit the construction of a pier on their land.

The Court noted the general presumption in Wisconsin law that "owning property abutting a natural body of water confers certain riparian rights." However, the Court noted that the general presumption has been held not to apply to a "man-made body of water located wholly on the property of a single owner." [*Movrich*, 2018 WI 9 at ¶ 24 (citing *Mayer*, 29 Wis. 2d at 176).]

With respect to the Movriches' right to construct a pier, the Wisconsin Supreme Court held, in relevant part, that any rights the Movriches enjoy with respect to the flowage must be consistent with the Lobermeiers' private property rights. Relying on past cases holding that a shoreline owner's riparian rights may be limited by a deed, the Court examined the relevant deed and conveyance and found that neither instrument referred to the Movriches' riparian rights. Because the instruments were silent regarding the Movriches' riparian rights, the Court held that the Movriches had "failed to establish that they are entitled to those riparian rights that are incidental to property ownership along a naturally occurring body of water where the lakebed is held in trust by the state or that the public trust doctrine creates an exception to Lobermeiers property rights in the waterbed...." [*Id.* at ¶ 55.]

In a decision dissenting from the portion of the majority's opinion relevant to this memorandum, three justices[6] characterized the portion of the majority opinion relating to the Movriches' lack of a right to install a pier as having "swe[pt] away...cherished and longstanding property rights and extinguishe[d] riparian rights for those with cottages or homes on Wisconsin's waters called flowages." In reaching that conclusion, the dissenting justices relied in part on past precedents holding that artificially expanding a navigable waterbody does not affect shoreline property owners' riparian rights.

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[5] The *Movrich* Court did not directly address whether its holding would apply to a situation in which the bed of a river (other than a flowage) was owned by someone other than the adjacent landowner. The concurring opinion also characterized the majority opinion as applying only to flowages. [*Movrich*, 2018 WI 9 at ¶ 21.]

[6] Justice Rebecca Grassl Bradley, joined by Justice Ann Walsh Bradley and, in part, by Justice Shirley Abrahamson, concurred in the majority's opinion that the Movriches may access and exit the flowage by way of their own shoreline property for purposes consistent with the public trust doctrine. [*Id.* at ¶¶ 56, 66].

2019 SENATE BILL 501

Senate Bill 501 establishes in statute two principles regarding riparian rights. First, the bill creates a presumption that a certain type of landowner is a riparian owner. Second, the bill entitles such a landowner to exercise all rights afforded to a riparian owner.

The bill applies to a landowner if all of the following are true:

- The landowner owns land that abuts a navigable waterway.[7]
- The exercise of riparian rights complies with the requirements of ch. 30, Stats.
- Riparian rights are not specifically prohibited by the deed to the landowner's land.

The bill provides that the presumption applies, and the riparian rights may be exercised, even if the bed of the waterway is owned in whole or in part by another party. Finally, the bill specifies the following as an example of a riparian right that may be exercised by a landowner under the bill: placing a pier, other structures, or deposits.

The bill apparently overrules the part of the Wisconsin Supreme Court's holding in *Movrich* that is summarized above. Specifically, the bill appears to reverse the presumption regarding an adjacent landowner's riparian rights in instances when a deed to land adjacent to a flowage (or any other waterbody to which a Wisconsin court may have applied the *Movrich* decision in the future) is silent with respect to those rights.

Stated another way, under *Movrich*, a landowner abutting a navigable waterway is not entitled to exercise riparian rights if the bed of the waterway is owned by another private party, unless the landowner's deed grants riparian rights.

In contrast, under the bill, a landowner abutting a navigable waterway is entitled to exercise riparian rights regardless of who owns the bed of the waterway, unless the landowner's deed specifically prohibits the exercise of a riparian right.

DISCUSSION

You asked how the presumption and entitlement under the bill would apply if a dam were removed from a flowage and the waterbody was returned to its original stream banks. Briefly, the answer would likely depend on the location of the property boundaries in question.

For rivers, a common property line is the thread (i.e., center) of the river. For property that retained a "thread of the stream" boundary when a flowage was created, neither the bill nor the *Movrich* decision appear to affect the property owner's riparian rights because the riparian owner would also own the relevant portion of the stream bed. In contrast, a deed may describe a property boundary in reference to the ordinary high water mark; in those situations, it appears that the bill, as introduced, would continue to provide a presumption of riparian rights even if the dam on a flowage were removed.[8] Alternatively, some deeds describe property boundaries by metes and bounds, even when the property boundaries are

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[7] As discussed above, "navigability" is a question of fact.

[8] However, it would be important to review the specific language in a deed to determine whether the property right described referred specifically to the high water mark of the flowage, or more generally to the high water mark of the "water" or "river."

in or near water. In those situations, the removal of a dam could have the effect of changing the property owner to whom the bill confers a presumption of riparian rights.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

AH:EL:jal

Wisconsin Legislative Council

Anne Sappenfield
Director

TO: SENATOR ROBERT COWLES

FROM: Anna Henning, Senior Staff Attorney, and Ethan Lauer, Staff Attorney

RE: 2019 Senate Bill 501, Relating to the Presumption of Riparian Rights on Navigable Waterways

DATE: February 3, 2020

This memorandum responds to your request for an overview of 2019 Senate Bill 501, relating to the presumption of riparian rights on navigable waterways, together with relevant background information and a discussion regarding the bill's likely practical effects.

BACKGROUND

As it has evolved through Wisconsin Supreme Court case law, statutes, and Department of Natural Resources (DNR) interpretations, the state's public trust doctrine provides that navigable waters[1] are held in trust by the state for the benefit of the public. However, ownership of the bed of a navigable water differs based on the type of waterbody.

Interpreting the state's public trust doctrine and early U.S. Supreme Court decisions, the Wisconsin Supreme Court has held that the title to natural lake beds is vested in the state to be held in trust for the public. [*Illinois Steel Co. v. Bilot*, 109 Wis. 418 (1901).] Conversely, river beds are privately owned. River bed ownership is "qualified"; title to a river bed is subject to the rights of navigational use and other recognized forms of public use by others. [See *Ashwaubenon v. Public Service Comm'n*, 22 Wis. 2d 38 (1963).] Title to the beds of artificially expanded waterbodies, such as flowages,[2] remains privately owned, even if, in practice, the waterbody functions more like a lake than a river. [*Haase v. Kingston Coop. Creamery Ass'n.*, 212 Wis. 585 (1933).]

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[2] The term "flowage" is not defined under Wisconsin statutes or administrative rules. In the property law context, the term is typically used in connection with an easement right allowing water to flow over another's property. The term is commonly understood to indicate a waterbody that may function much like a natural lake in practice but is created by damning a river. Partly for that reason, in some contexts, the term "river" is defined to include flowages. [See, e.g., s. NR 195.03 (12), Stats.]

In Wisconsin, a riparian[3] property owner – i.e., a person who owns the shoreline along a navigable water – is entitled to certain rights as a riparian, limited by the public trust doctrine. Among other rights, Wisconsin courts have recognized riparian owners' rights to reasonable use of the waters next to their property and the right to construct a pier or similar structure. However, the courts have recognized that such rights may be restricted by statute. [See *R.W. Docks & Slips v. DNR*, 2001 WI 73, ¶ 20.]

Chapter 30, Stats., relating to navigable waters, recognizes such riparian property rights by authorizing only riparian owners to apply for various types of permits affecting navigable waters. For example, only riparian owners may apply for general and individual permits to place structures in navigable waters, subject to certain statutory criteria. [s. 30.12 (3) and (3m), Stats.] In some instances, ch. 30, Stats., also authorizes riparian owners to take certain actions without first obtaining a DNR permit. For example, riparian owners may place or deposit any of the following without a permit, if the structure or material is not located in an area of special natural resource interest and does not interfere with other riparian owners' rights:

- Certain small deposits of sand, gravel, or stone relating to another authorized activity.
- Certain seasonal structures.
- Certain devices for improving fish or wildlife habitat.
- Certain boat shelters, boat hoists, and boat lifts adjacent to piers or wharves.
- Certain small piers and wharves.
- Pilings for deflecting ice.
- Riprap that satisfies certain criteria.
- Biological shore erosion control structures.
- Certain intake and outfall structures.
- Certain larger piers and wharves placed before August 1, 2012.

[s. 30.12 (1g) and (1k), Stats.]

However, the extent of a person's riparian rights may differ based on the type of waterbody and the ownership of the water bed. For natural lakes, where the state owns the lake bed, riparian rights are relatively straightforward. Similarly, if the owner of riverfront property owns the relevant portion of river bed, riparian rights are also relatively easy to discern.[4]

Complications may arise when different private property owners own the bed of a navigable water and the adjacent land. In some past cases involving such property arrangements, Wisconsin courts have examined property deeds to assess the nature of property rights on each side of the waterbody's ordinary high water mark. [See, e.g., *Mayer v. Grueber*, 29 Wis. 2d 168 (1965).] However, in other cases, the Wisconsin Supreme Court has held that riparian rights are not affected by artificially raising the level of a navigable waterbody, meaning that a shoreline owner has rights similar to the owner of

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[3] In many other contexts, the term "riparian" refers only to land abutting a river or stream, whereas land abutting a lake is referred to as "littoral." In Wisconsin statutes and case law, however, "riparian" refers interchangeably to both riparian and littoral land, and also to the owners of such land.

[4] Many owners of riverfront property own to the thread (center) of the river.

land along a natural lake, even if the bed is owned by a different property owner. [See, e.g., *Haase*, 212 Wis. 585.]

Prior to the *Movrich* decision, discussed below, few published cases specifically addressed riparian rights for property along flowages. According to DNR staff, when reviewing or issuing a permit for activities impacting flowage beds, DNR's common practice has been to note that a riparian owner may need to consider private ownership interests in the flowage bed before proceeding with the permitted activity.

MOVRICH V. LOBERMEIER

In *Movrich v. Lobermeier*, 2018 WI 9, the Wisconsin Supreme Court considered how the public trust doctrine, riparian rights, and other private property rights apply to flowages.[5] The case involved a dispute between the owners of part of the bed of a flowage (the Lobermeiers) and the owners of land adjacent to the flowage (the Movriches).

Asserting riparian rights and rights under the public trust doctrine, the Movriches argued, in part, that they are entitled to install a pier in the flowage adjacent to their property. The Movriches noted that they had purchased their lot with the expectation that it was a "waterfront lot," with accompanying riparian rights, including the right to construct a pier. In response, the Lobermeiers asserted that their private property rights as owners of the flowage bed include the right to prohibit the construction of a pier on their land.

The Court noted the general presumption in Wisconsin law that "owning property abutting a natural body of water confers certain riparian rights." However, the Court noted that the general presumption has been held not to apply to a "man-made body of water located wholly on the property of a single owner." [*Movrich*, 2018 WI 9 at ¶ 24 (citing *Mayer*, 29 Wis. 2d at 176).]

With respect to the Movriches' right to construct a pier, the Wisconsin Supreme Court held, in relevant part, that any rights the Movriches enjoy with respect to the flowage must be consistent with the Lobermeiers' private property rights. Relying on past cases holding that a shoreline owner's riparian rights may be limited by a deed, the Court examined the relevant deed and conveyance and found that neither instrument referred to the Movriches' riparian rights. Because the instruments were silent regarding the Movriches' riparian rights, the Court held that the Movriches had "failed to establish that they are entitled to those riparian rights that are incidental to property ownership along a naturally occurring body of water where the lakebed is held in trust by the state or that the public trust doctrine creates an exception to Lobermeiers property rights in the waterbed...." [*Id.* at ¶ 55.]

In a decision dissenting from the portion of the majority's opinion relevant to this memorandum, three justices[6] characterized the portion of the majority opinion relating to the Movriches' lack of a right to install a pier as having "swe[pt] away...cherished and longstanding property rights and extinguishe[d] riparian rights for those with cottages or homes on Wisconsin's waters called flowages." In reaching that conclusion, the dissenting justices relied in part on past precedents holding that artificially expanding a navigable waterbody does not affect shoreline property owners' riparian rights.

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[5] The *Movrich* Court did not directly address whether its holding would apply to a situation in which the bed of a river (other than a flowage) was owned by someone other than the adjacent landowner. The concurring opinion also characterized the majority opinion as applying only to flowages. [*Movrich*, 2018 WI 9 at ¶ 21.]

[6] Justice Rebecca Grassl Bradley, joined by Justice Ann Walsh Bradley and, in part, by Justice Shirley Abrahamson, concurred in the majority's opinion that the Movriches may access and exit the flowage by way of their own shoreline property for purposes consistent with the public trust doctrine. [*Id.* at ¶¶ 56, 66].

2019 SENATE BILL 501

Senate Bill 501 establishes in statute two principles regarding riparian rights. First, the bill creates a presumption that a certain type of landowner is a riparian owner. Second, the bill entitles such a landowner to exercise all rights afforded to a riparian owner.

The bill applies to a landowner if all of the following are true:

- The landowner owns land that abuts a navigable waterway.[7]
- The exercise of riparian rights complies with the requirements of ch. 30, Stats.
- Riparian rights are not specifically prohibited by the deed to the landowner's land.

The bill provides that the presumption applies, and the riparian rights may be exercised, even if the bed of the waterway is owned in whole or in part by another party. Finally, the bill specifies the following as an example of a riparian right that may be exercised by a landowner under the bill: placing a pier, other structures, or deposits.

The bill apparently overrules the part of the Wisconsin Supreme Court's holding in *Movrich* that is summarized above. Specifically, the bill appears to reverse the presumption regarding an adjacent landowner's riparian rights in instances when a deed to land adjacent to a flowage (or any other waterbody to which a Wisconsin court may have applied the *Movrich* decision in the future) is silent with respect to those rights.

Stated another way, under *Movrich*, a landowner abutting a navigable waterway is not entitled to exercise riparian rights if the bed of the waterway is owned by another private party, unless the landowner's deed grants riparian rights.

In contrast, under the bill, a landowner abutting a navigable waterway is entitled to exercise riparian rights regardless of who owns the bed of the waterway, unless the landowner's deed specifically prohibits the exercise of a riparian right.

DISCUSSION

You requested a discussion regarding the bill's potential practical effects. As discussed below, in addition to affecting the riparian rights of certain owners[8] of shoreline property along a flowage,[9] the bill may also impact the drafting and interpretation of deeds and certain hydroelectric licenses in the state.

In addition to the potential practical effects discussed below, some commentators have noted potential constitutional considerations that could arise if the bill took effect, prompted in part by the bill's application to existing property relationships. Please let us know if you would like an analysis regarding such potential considerations.

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[7] As discussed above, "navigability" is a question of fact.

[8] Practically, the bill only affects shoreline property owners whose property boundaries end at the ordinary high water mark. The bill does not appear to affect shoreline property owners who also own the adjacent flowage bed.

[9] Although the bill applies to any navigable waterway, current case law already generally provides the presumption created in the bill to waterbodies other than flowages. As discussed above, the *Movrich* decision did not directly affect the riparian rights of a landowner abutting either a river or natural lake.

Codification of Piers, Structures, and Deposits as Riparian Rights

In addition to determining who is a riparian owner with riparian rights, the common law also largely determines which rights are included among the bundle of riparian rights. The bill codifies in statute one right that is included in that bundle. In addition to "all" other, unspecified riparian rights, the bill provides that riparian rights specifically include the right to place a pier, other structures, or deposits. In judicial decisions after the bill takes effect, a court applying the bill would likely hold that the owner of shoreline property along a flowage possesses the right, as a riparian, to place such structures, unless the owner's deed stated otherwise. The right would, however, remain subject to any limitations imposed under ch. 30, Stats. Specifically, as discussed above, s. 30.12, Stats., allows riparian owners to apply for a permit to place a structure or deposit in a navigable water. That section also provides for certain statewide general permits applicable to riparian owners and authorizes riparian owners to place certain structures and deposit certain material without a permit.

The bill seems to leave some room for the courts to add to or subtract from the bundle of riparian rights, apart from the placing of deposits, piers, or other structures. However, the bill appears to require the courts to extend all of the same rights afforded to the owners of property along natural lakes to the owners of property along flowages.

Deed Drafting and Construction

The bill may change how deeds are drafted and how they are construed.

Under *Movrich*, the owner of shoreline along a flowage is entitled to a presumption of riparian rights **only** if those rights were granted by deed when the private owner of the flowage bed conveyed the dry property to the abutting landowner.

The bill, on the other hand, provides that riparian rights are presumed **unless** the deed specifically prohibits them.

After enactment of the bill, if a flowage bed owner wants to convey abutting land but still retain the right to exclude the exercise of riparian rights by the new landowner, the conveying owner would have to draft that restriction into the deed. In practice, that legal shift may affect how attorneys and other real estate practitioners advise clients regarding common language in deeds for property located along a flowage.

Federal Hydroelectric Licenses

It has been argued that the bill may adversely affect certain entities operating hydroelectric projects pursuant to a license from the Federal Energy Regulatory Commission (FERC).

The Federal Power Act authorizes FERC to license water power projects. As a condition of the license, FERC may require the licensee to acquire title to the flowage bed that results from installation of the hydroelectric impoundment.[10] FERC may delegate to the licensee the authority to issue permits, and to charge reasonable fees, for the installation of piers or other structures by private parties. [18 C.F.R. s. 2.7; see also *Coalition for Fair and Equitable Regulation of Docks v. FERC*, 297 F.3d 771 (8th Cir. 2002.]

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[10] This condition is referred to as Standard Article 5 in a license. For additional information, see FERC's Guidance for Shoreline Management Planning at Hydropower Projects (July 2012).

During the public hearing on the Assembly companion to the bill, various representatives of the energy utility sector asserted that the bill may jeopardize a licensee's compliance with its FERC license if the bill deprives a licensee of the ability to regulate whether an abutting landowner may place piers or other structures on the flowage bed in derogation of a license provision. The author of the Assembly companion has introduced two amendments in an apparent attempt to address this concern.

It should be noted that if enactment of the bill negatively impacts a licensee in the manner argued before the Assembly committee, it is possible that the Federal Power Act would preempt the state law. Although the Federal Power Act does not expressly preempt any state law, it nevertheless has been interpreted by the courts to preempt certain state laws that are in conflict with the federal law.

In determining whether a conflict exists, a court would ask whether the state law stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal law. Courts have generally found conflict with the Federal Power Act where a state law could be characterized as jeopardizing either the commencement or continued existence of a hydroelectric project. For example, the following state laws were preempted: a law requiring a separate state license for the operation of a federal hydroelectric project;[11] a law establishing minimum stream flow at a hydroelectric project;[12] and a state tort law providing property damage claims for negligent dam operation.[13]

If the bill became law in its introduced form, and thus authorized the placement of piers, structures, or other deposits on the bed of a hydroelectric flowage notwithstanding the objections of the FERC licensee, it is not clear whether a court would view the law as causing as much conflict as the laws listed above. It could be argued that the hydroelectric project could continue unabated, especially if the licensee had a history of allowing the placement of such items on the flowage bed prior to enactment of the bill. But a definitive answer cannot be provided absence court guidance.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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[11] *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946).

[12] *California v. FERC*, 495 U.S. 490 (1990).

[13] *Simmons v. Sabine River Auth.*, 732 F.3d 469 (5th Cir. 2013), *cert. denied*, 572 U.S. 1060 (2014).