

MINUTES

Regulation of Non-Meandered Waters



Representative Lee Qualm, Chair
Senator Brock Greenfield, Vice Chair

**First Meeting, 2017 Interim
Thursday, April 27, 2017**

**Room 362 – State Capitol
Pierre, SD**

The first meeting of the Regulation of Non-Meandered Waters Interim Study was called to order by Representative Lee Qualm at 10:00 a.m. in Room 362 of the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering roll call: Representatives Mary Duvall, Spencer Gosch, Spencer Hawley, Steven McCleerey, Herman Otten, Larry Rhoden, Burt Tulson; Senators Gary Cammack, Jason Frerichs, Craig Kennedy, Joshua Klumb, Jim White; Senator Brock Greenfield, Vice Chair; and Representative Lee Qualm, Chair. Excused: Representative Hugh Bartels.

Staff members present include Amanda Jacobs, Senior Research Analyst; Jessica LaMie, Legislative Attorney; Lucas Martin, Fiscal Analyst; and Cindy Tryon, Senior Legislative Secretary.

NOTE: For purpose of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents distributed at the meeting are attached to the original minutes on file in the Legislative Research Council office. This meeting was web cast live. The archived web cast is available at the LRC web site at <http://www.sdlegislature.gov/>.

Introductions and Chair's Opening Remarks

Representative Lee Qualm stated the purpose of the first meeting is to hear background information. The issues regarding non-meandered waters has been going on for a long time and the Supreme Court opinion, *Duerre v. Hepler*, states that the Legislature is responsible for determining the beneficial use of non-meandered waters ([Document #1](#)).

Governor's Office

Mr. Hunter Roberts, Policy Advisor, Governor's Office, presented information regarding non-meandered waters. He thanked the Legislature for acting in an expeditious manner. The Governor's Office is available as a resource in finding a balance between private property rights, public water rights, and sportsman rights. The Governor's Office is hopeful that the committee will be able to find a resolution. The Legislature needs to define meandered and non-meandered waters; define recreational use; confirm that no person can trespass on private property to gain access to public waters; and remove ambiguity over public access to meandered compared to navigable waters. Mr. Roberts said property taxes are decreased on the land that has been flooded.

Representative Spencer Hawley stated that not every county is assessing flooded property the same way and asked if the Governor's Office could compile information for each county. Mr. Roberts said they will get that information to the committee.

Representative Mary Duvall asked if a landowner pays property taxes on flooded property do they have the right to deny state agencies access to that property. Mr. Roberts stated that he was not aware of any statutes that grants the property owner that right but he will do further research and provide the committee with any information he is able to find regarding that topic.

Senator Craig Kennedy asked how value of marshland is determined. Mr. Roberts replied that he was not entirely sure but when the county assesses values they have a one to zero ratio and they evaluate the marshland at a 0.2. Senator Kennedy asked if the same valuation is applied by each county or is that a separate determination by each county. Mr. Roberts replied that each county determines the valuation of property within that county.

Representative Spencer Gosch asked for the total number of reduced acres for flooding in the state. Mr. Roberts replied that he did not know but he will get that information to the committee.

Representative Hawley asked if SDCL 10-6-33.21 referenced on the Marshall County form states how marshlands are determined, why another county uses another methodology to determine the assessed value. Mr. Roberts replied that it is up to local discretion.

Senator Jason Frerichs stated that it would be helpful to do a comparison of the counties valuations of these properties to better understand the connection between decreased taxes on property covered by non-meandered and county budgets.

Department of Game, Fish and Parks

Mr. Kelly Hepler, Secretary, Department of Game, Fish and Parks, thanked the Legislature for taking time to address this issue and said the Department of Game, Fish and Parks is happy to assist this committee as needed.

Mr. Tony Leif, Director, Division of Wildlife, Department of Game, Fish and Parks, presented the "Recreational Use of Water Over Private Land" PowerPoint presentation ([Document #2](#)).

This issue goes back to when South Dakota was surveyed and became a state. Contract surveyors working for the federal government were given the instruction lakes embracing an area of less than 40 acres should not be meandered. Bodies of water that were not meandered were still described on the map. In 1889, upon statehood, the title to the beds of all meandered lakes were vested with the state. However, the basins of all non-meandered lakes are owned in entirety in fee title, meaning they were privately owned.

Northeast South Dakota experienced a wet cycle in the mid to late 1990s which caused the basins to flood. The water consumed pastures, farmland, and farmsteads. One example is Bitter Lake which has no outlets; in 1991 it covered 3,500 acres and by 2012 it had grown to covering 18,000 acres. Some of the non-meandered lakes, including Bitter Lake, turned into world class fisheries.

Senator Joshua Klumb asked if certain areas had always been public land or if some of it was purchased by the state. Mr. Leif replied that there has been some acquisition of property after the water flooded the land but the majority was already in public ownership.

Mr. Leif stated as these basins filled with water the fisheries developed. The origin of these fisheries comes from natural rearing ponds and when there was winter kill the department would put newly hatched fish in these waters. The department would later take those growing fish to other waters. To stock any waters with fish in the state requires permission from the department. There are some waters that were stocked without permission.

Senator Frerichs asked if the department needs to have permission from the landowner to stock these waters. Mr. Leif replied that when the department works with private lands, it does seek permission from landowners. When the department stocked the other basins, there was no process established for getting permission from landowners.

Senator Frerichs asked how did the department perform stocking if there was no public access. Mr. Leif replied that the department used fee title connections, publicly owned land, or requested permission from landowners.

At first, ice fishing was one of the main means of fishing these waters. Eventually, boaters found ways to get on the non-meandered water. There was an interest in developing access to those waters. The department invested \$1.2 million developing access points. The department put agreements together with private landowners and some private landowners developed their own private access sites.

Non-meandered waters are not just used for fishing but for other recreational purposes such as boating, kayaking, hunting waterfowl, and trapping along the edges of frozen water.

In 2004, the Supreme Court issued the decision in *Parks v. Cooper* addressing the issue of non-meandered waters ([Document #3](#)). The court stated that the landowners hold title to lakebeds; all water in the State belongs to the people in accordance with the public trust doctrine; and the Legislature has the obligation to determine the extent of the public's right to use non-meandered bodies of water held in trust for the public. Because of this decision, there were four attempts to address this issue legislatively. In 2005, HB 1059; in 2006, HB 1096; in 2013, HB 1135; and in 2014, SB 169, all of which failed.

In 2017, the Supreme Court opinion *Duerre v. Hepler* stated the Legislature has not yet said that the public has a right to use this State's non-meandered waters for recreational purposes. Therefore, the Supreme Court held that neither the public nor the landowners have a superior right to use the water and ice over the landowner's private property. Additionally, the Department of Game, Fish and Parks may not facilitate access to water over landowner's private property.

Representative Burt Tulson asked for the definition of facilitate as used in this instance. Mr. Leif replied that facilitate is the act of making something easier. This would include anything the department would say or do to assist the public in using these waters.

Representative Gosch asked how the department determined which of the 91 non-meandered lakes would have public access removed. Mr. Leif replied that the decision was based on the 25 lakes that the department made an investment in creating a boat ramp to facilitate access to the water. Representative Gosch asked if there was any discussion with current landowner to allow access to these waters. Mr. Leif replied that the Supreme Court decision stated that neither the landowner nor the public has superior rights for recreational use of the water, therefore the department did not see it was in their authority to enter agreements with the landowners.

Representative Steven McCleerey asked how the price was determined for the land purchased from landowners. Mr. Leif replied that the process is the same for all property that the department purchases, the department does an appraisal and establishes a fair market value to determine the purchase price.

Secretary Hepler stated that the department represents everyone in South Dakota, not just the sportsmen. He has confidence that the committee will reach a compromise. The department is trying to be responsible to the entire State. The department will continue to do compliance and safety checks on the lakes that were closed.

Senator Brock Greenfield provided a copy of a document that was filed in 1919 in Spink County stating that the residents of Cottonwood Lake "*being desirous that such lake be kept up to a level where it may be maintained for the purpose of fishing and boating, and that the same may be stocked with fish...*" ([Document #4](#)).

Senator Greenfield said that the supreme court ruling states neither the landowner nor the public has ownership of those waters. The decision to close access to Cottonwood Lake was rash, the Department should be establishing agreements and forging relationships in order to keep some of these bodies of water accessible.

Representative Tulson stated that Cottonwood Lake has 197 property owners who are wondering how to put their pontoons and boats on the water without public access sites. Secretary Hepler replied that the department did not close the lake, but restricted public access. Private access sites can be developed with permission of the landowner.

Representative Herman Otten asked if the \$1.2 million spent on access includes other costs or just developing the ramp. Mr. Leif replied the \$1.2 million only includes the cost in developing access infrastructure not the development of fisheries.

Representative Otten asked if the department has a total number of what the State's investment in non-meandered lakes has been overall. Mr. Leif replied that they do not have that amount but the department could go back and figure in other efforts and return with those numbers.

Senator Jim White asked if there was a certain date set as to when the facilitation of access to these waters had to stop as ordered by the Court. Secretary Hepler replied the Supreme Court decision did not set a date but the department wanted to restrict access prior to the start of fishing season. Senator White asked if the department can push the date back to reduce economic damage to local communities and allow communities involved time to prepare for the closure. Secretary Hepler said they are willing to discuss any and all of these suggestions.

Attorney General's Office

Mr. Charlie McGuigan, Chief Deputy, Attorney General's Office, reviewed the two South Dakota Supreme Court decisions. Preceding the 2004 decision *Park v. Cooper*, there was a large body of case law regarding property ownership and waters. Many of this case law involved receding waters on meandered waters. Then in the late 1990's basins began filling with water creating a number of the non-meandered lakes. With *Park v. Cooper*, the Court had to decide on non-meandered waters. The case began in Day County. At the initial trial in Day County the judge ruled the waters were owned by those who owned the land under the water. The state appealed the decision to the Supreme Court and the Court ruled the land is private property, however, the water above is owned by the public, held in trust for the benefit of all citizens. The question then became if recreational use was part of the definition of being for the benefit of all citizens. The Court sent that question back to the Legislature.

In the 2017 decision, *Duerre v. Hepler*, the trial court declared that the public could not use the waters and the state appealed that decision to the Supreme Court. The Supreme Court noted the Legislature did not necessarily intend the waters to be open to recreation and only the Legislature can decide if recreation is beneficial use of these non-meandered waters.

In the decision, the court said the landowners do not have the exclusive right to control the waters over their land. The Legislature must decide how these waters are to be used. The state holds the waters in trust for benefit for the public. Until the Legislature acts neither the landowner nor the public has the right to control the waters.

Senator Craig Kennedy asked if he is correct in his understanding that the Legislature is to decide how the waters are to be used in best interest of the State. Mr. McGuigan replied that the Supreme Court gave that charge in both Supreme Court decisions. Senator Kennedy clarified that the Legislature is to determine if recreation is a beneficial use of the water overlying private property.

Representative Gosch asked how the issue of the water trust not remaining with the landowner begin. Mr. McGuigan replied that goes back to the common law of England. The concept came to the colonies and after we

became independent, the concept continued. During the homesteading era, the desert land act passed separating water from the land and South Dakota falls under that land act.

Representative Gosch asked if this policy violated the 5th amendment that no private property shall be taken without just compensation. Mr. McGuigan replied that there is an argument that this is not a taking of property, as the water is separate from the land, similar to mineral rights.

Representative Gosch stated that many landowners believe it is unfair for the county to assess taxes for property upon which they do not own the minerals or the water.

Department of Environment and Natural Resources

Mr. Steve Pirner, Secretary, Department of Environment and Natural Resources (DENR), presented an overview of water regulations by the department for non-meandered and meandered waters ([Document #5](#)). DENR's regulation in this area is overseen by the water management board. Administrative Rule 74:51:01:42 details how DENR defines beneficial uses of waters and those standards apply to all 98,000 miles of rivers, streams and lakes.

Water rights laws were first passed in 1955. SDCL 46-1-3 states, *"It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law."*

In 2005, DENR formed the Non-Meandered Lakes Working Group, but after five meetings, the group was unable to come to a consensus.

Representative Spencer Hawley pointed out that the standards include both wildlife and recreational uses. Secretary Pirner stated the standards are tied to the water quality characteristics and has nothing to do with use. DENR does the scientific studies that determine the classifications set by the board.

Representative Hawley asked if the department manages the bodies of water that the Game, Fish and Parks has determined to be fisheries. Secretary Pirner replied the Department of Game, Fish and Parks is responsible for the fishery aspect, the Department of Environment and Natural Resources is responsible for the quality of water aspect.

Representative Mary Duvall asked about the water right permits found on page 7 of the handout. Secretary Pirner explained that Game, Fish and Parks holds water right permits for several lakes which guarantees them first right for the water.

States Attorneys' Perspective

Mr. Danny Smeins, Day County States Attorney, Webster, said Day County is in most part a closed basin, meaning the water stays in the county, unlike Marshall County where the water is mostly laddered down and does have outlets.

When the water first started to rise, the situation was contentious in that the landowners did not want their property to be underwater, yet the fisheries aspect meant sportsmen wanted access to the water. Access to those waters is a huge issue. People leave cars and trailers blocking approaches and refuse to move vehicles so farmers have access to their fields. If people get to the water by legal means they are fine, but not when trespassing. The landowners deserve to be respected and people that abuse the law should be penalized.

Mr. Smeins said that in his opinion the recent Supreme Court decision did not say the State must remove all infrastructure from all non-meandered bodies of water, but the ruling applied to the Duerre property.

Other

Mr. Jack Hieb, Attorney, Aberdeen, was the States Attorney for Day County from 1996 to 2000. Mr. Hieb said each area in Day County is different and there is no one-size-fits-all solution, and there needs to be an ability for Game, Fish and Parks to talk to the landowners and negotiate deals with them on an individual basis. The landowners need to have some control.

Representative Larry Rhoden asked Mr. Hieb for his suggestions for finding a meaningful simple solution. Mr. Hieb said everyone must have a voice, talk to as many groups and organizations as possible. The term navigable has different definitions and that should be corrected. And the Department of Game, Fish and Parks must be given the authority to make deals with the landowners. The agreements give landowners the respect they deserve and the agreements will be voluntary so the landowners land is not forcibly taken from them.

Committee Discussion and Staff Direction

Sen. Cammack said today's testimony leads to the belief that the recent Supreme Court ruling is not as broad as the action the State has taken in response, and perhaps the decision to close all the public access points should be reconsidered.

Sen. Greenfield pointed out that Cottonwood Lake is vitally important to the surrounding area's economy.

Representative Qualm said this committee wants to find a solution to this issue so that everyone can move forward. Representative Qualm encouraged members to draft legislation for the committee to consider.

Future Meeting Dates and Sites

The committee discussed hearing public testimony and then tour affected areas at the next meeting. The committee agreed that the next meeting will be May 9 and 10 in Aberdeen.

Adjourn

A MOTION WAS MADE BY REPRESENTATIVE DUVALL, SECONDED BY SENATOR GREENFIELD, THAT THE REGULATION OF NON-MEANDERED WATERS STUDY COMMITTEE BY ADJOURNED. The motion prevailed on a voice vote.

The committee adjourned at 3:35 PM.