

Judge Invalidates Wisconsin DNR's 'Feet Wet' Rule, Reaffirming Private Property Rights in Relation to Flooded Lands

JEFFERSON COUNTY, WI – On June 24, Jefferson County Judge Bennett J. Brantmeier found that Wisconsin’s Department of Natural Resources (DNR) has been misinforming the public by stating, in DNR guidance literature and on the DNR website, that citizens may ignore the Ordinary High Water Mark (OHWM) on a river bank or lake shoreline, and travel unrestricted onto temporarily submerged land above the OHWM, “as long as they ‘keep their feet wet.’”

The Court invalidated the DNR’s “Feet Wet” rule and guidance and corrected the DNR’s error, noting that consistently since before statehood, Wisconsin has recognized that land lying above the OHWM of a river or lake is private, and, thus unauthorized entry onto water covering that land is trespass, even if unauthorized members of the public “keep their feet wet.” The Court’s ruling does not disturb the definition of OHWM or the policy behind the public trust doctrine: under the Wisconsin Constitution, “navigable waters” in Wisconsin remain “forever free” and held in trust by the state for public use. But the doctrine, found the judge, was never meant to justify trespass, and the Wisconsin legislature has not granted DNR the authority to extend its trustee role beyond the OHWM.

The ruling gave a long-sought remedy to Thomas (Tom) Reiss, Jr., a Jefferson County resident and Reinhart client, who had complained in vain to law enforcement and the DNR about repeated, egregious trespass on his property by airboat operators and others, who traveled far beyond the OHWM of the Rock River to access parts of his property temporarily submerged by high water. The Court noted that the DNR did not contradict any of Mr. Reiss’s factual accounts of the harm the DNR rule and guidance had caused, including how the trespassing boaters made excessive noise, light and recklessly fired guns in late-night darkness and how the Jefferson County Sheriff had not issued trespass citations.

But beyond Mr. Reiss, the ruling clarifies private property rights and the rights of the public for all citizens of Wisconsin. “I am pleased that the Court’s ruling should now allow law enforcement to stop the harm I’ve been experiencing,” said Mr. Reiss, “but I felt I needed to act because so many others have told me they’ve

POSTED:

Jun 27, 2024

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experienced similar harm." Mr. Reiss is also pleased that the ruling will also curb harm to wildlife, including eagles, deer, herons, cranes, ducks and geese, on Reiss's property and similar land statewide.

Mr. Reiss welcomes members of the public and respects their rights to use the Rock River along his property in accordance with long-established law. The decision will have no impact on those boaters, fishermen and others who act courteously and use state waters in accordance with the law, including noise limits. On the contrary, Mr. Reiss believes this decision will enhance the public's right to peaceful enjoyment of public waters throughout the state, and he has received many positive comments from citizens for addressing this issue.

"It is unfortunate that a very small minority of egregious actors required me to ask the court to confirm the law," Mr. Reiss continued. "And it is disappointing and a bit ironic that while the DNR generally bans airboats on lands and waters including wetlands within the boundaries of state parks, the DNR suggested in this case that I was trying to diminish the rights of the public to operate such boats in my backyard and fields."

Judge Brantmeier invalidated the DNR's "Feet Wet" rule and related guidance, and he ruled that he will enter a permanent injunction against DNR requiring the DNR to rescind or correct the guidance and remove it from DNR's website. The Court further noted that if the DNR wishes to enact a new rule, DNR must follow the required rulemaking process, which would include a public hearing for all interested parties.

The Reinhart team included shareholders David Hanson and Jessica Polakowski, and attorney Samuel Sylvan. Additional support was provided by shareholders Troy Giles and Anthony Handzlik.

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