

Wisconsin Legislative Council

AMENDMENT MEMO



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2019 Senate Bill 501

**Senate Substitute
Amendment 1**

BACKGROUND

The Public Trust Doctrine and Title to Beds of Navigable Waters

Wisconsin's public trust doctrine provides that navigable waters¹ are held in trust by the state for the benefit of the public. However, ownership of the bed of a navigable water may differ based on the type of waterbody, or based on language in a deed or other conveyance of property rights.

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.² Title to the beds of artificially expanded waterbodies, such as flowages,³ 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).]

Riparian Rights

In Wisconsin, a riparian⁴ 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,

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 However, 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).]

³ 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.]

⁴ 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 suchland.

ch. 30, Stats., also authorizes riparian owners to take certain actions without first obtaining a Department of Natural Resources (DNR) permit. [s. 30.12 (1g) and (1k), Stats.]

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 before *Movrich* had been to note that a riparian owner may need to consider private ownership interests in the flowage bed before proceeding with the permitted activity.

The *Movrich v. Lobermeier* Decision

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).

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.]

Real Estate Disclosure Requirements

Current law generally requires an owner of residential real estate to provide a disclosure form, entitled a "real estate condition report," to a prospective purchaser within 10 days of acceptance of a contract of sale of the property. The real estate condition report must disclose known defects, including certain items specified in statute, and any other "condition that would have a significant adverse effect on the value of the property." A seller of vacant land must also provide a similar disclosure report to a prospective buyer. [ss. 709.02, 709.03, and 709.033, Stats.] Under current law, those real estate disclosure forms do not include a specific disclosure requirement relating to the ownership of beds of adjacent waters.

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.
- The exercise of riparian rights complies with the requirements of ch. 30, Stats.

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.

- 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.

SENATE SUBSTITUTE AMENDMENT 1

Senate Substitute Amendment 1 retains the general presumption under the bill of riparian rights for an owner of land that abuts a navigable water but adds certain provisions specific to beds owned by hydroelectric utilities and makes other changes. More specifically, the substitute amendment does all of the following:

- Retains the general presumption under the bill of riparian rights for an owner of land that abuts a navigable water, subject to the requirements of ch. 30, Stats., including a specific right to place a pier, other structure, or deposit even if the bed of the waterway is owned in whole or in part by another.
- Specifies that the above presumption does not apply if riparian rights are specifically prohibited by a deed to the land, as under the bill, and also specifies that the presumption does not apply if the rights are specifically prohibited by another type of written agreement or recorded instrument.
- Conditions the exercise of riparian rights on reasonable restrictions imposed by an operator of a hydroelectric project regulated by the DNR or the Federal Energy Regulatory Commission (FERC) ("hydroelectric operator"), if the conditions are necessary for the operator to comply with requirements imposed under state or federal law or a FERC license.
- In situations where the bed of a navigable waterway is owned by the operator of a hydroelectric project regulated by FERC or DNR, authorizes a riparian owner to apply to the applicable hydroelectric operator for permission to exercise a riparian right within the hydroelectric project boundaries, and requires a hydroelectric operator who receives such an application in writing to approve or deny the application within 60 days after receiving the application, subject to an appeals process before the Public Service Commission. The substitute amendment specifies that a hydroelectric operator may deny such an application only if necessary for the hydroelectric operator to comply with requirements imposed under state or federal law or a FERC license, but it authorizes a hydroelectric operator to approve an application subject to certain reasonable and necessary restrictions and to impose a reasonable fee for the operator's administrative costs.⁶
- Provides immunity for hydroelectric operators. Specifically, under the substitute amendment, a hydroelectric operator is not liable to any person for any injury or damage arising from a riparian owner's use of the hydroelectric operator's property as authorized under the substitute amendment.

⁶ The substitute amendment limits the authority to impose a fee to proposed new structures, unless a fee was provided for in an existing agreement.

- Specifies that nothing in any of the above provisions invalidates any interest, whether designated as an easement, covenant, equitable servitude, restriction, or otherwise, which is otherwise enforceable under the laws of this state.
- Beginning July 1, 2020, requires the real estate condition and vacant land disclosure reports to include specific disclosures relating to riparian rights and ownership of a waterbody bed. Specifically, the substitute amendment requires a prospective seller to disclose: (1) whether the seller is aware of a written agreement affecting riparian rights related to the property; and (2) whether the seller is aware that the property abuts the bed of a navigable waterway that is owned by a hydroelectric operator. The disclosure report must also include a disclaimer that the owner of land abutting the bed of a navigable waterway that is owned by a hydroelectric operator may need to ask permission of the hydroelectric operator to place a structure on the bed of the waterway.

BILL HISTORY

Senator Testin and others introduced 2019 Senate Bill 501 on October 18, 2019. Following a public hearing on the bill, Senators Testin, Cowles, and Bewley offered Senate Substitute Amendment 1 on February 12, 2020. On February 14, 2020, the Senate Committee on Natural Resources and Energy voted by paper ballot to recommend adoption of the substitute amendment and passage of the bill, as amended, both on votes of Ayes, 5; Noes, 0.

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