

Non-Meandered Lakes or Private Flooded Land and Public Access

In 2004, in *Parks v. Cooper*, the South Dakota Supreme Court determined that the waters in small, newly formed lakes in South Dakota were assets to be held in trust by the state for the benefit of the people, even when those lakes form on top of private land. The Court also ruled that this trust arrangement did not automatically make these lakes open for recreational use. Rather, the Court said it was the legislature's responsibility to decide how to balance the needs of the public with those of private owners and the state's own wildlife production needs.

In the 2013 legislature, HB1135 attempted to have the SD legislature define the parameters given it under the court's decision. The bill would have limited access if the landowner posted the area where the private land was flooded. All unposted flooded private lands would be eligible for public use if public access from a road or right-of-way is available. Landowners would be required to provide "notice of posting" to Game Fish and Parks (GF&P). HB1135 also provided for adverse possession in that if waters over private flooded land were used by the public for 21 years, those nonmeandered lakes showed historical public use and so are public. This would not apply to meandered water and lakes that were surveyed in 1877. If the meandered lakes grow because of extra moisture, the area remains public and cannot be posted. HB1135 created a large reaction from sportsmen, mainly due to misunderstanding and misinterpretation of the bill. Secretary Vonk of GF&P volunteered to work on the issue and return to the legislature with potential solutions.

During the 2014 South Dakota Legislative Session, SB 169 was introduced in an attempt to balance those needs. It allowed for lakes of 40 acres and less to be automatically closed to public access. Lakes over 40 acres and not on the meandered lakes list would allow landowners to petition GF&P to limit public access, plus other provisions that attempted to find a balance. The bill was withdrawn by its sponsor, so the issue remains unresolved. At this point, the legislature must determine how these non-meandered lakes will be managed. In doing that, they will need to balance the rights of private land-owners against the interests of the public in a way that accommodates the rights of both sides and minimizes the need for litigation if the two come into conflict.

Rights of Landowners:

The courts have long understood ownership of property as being a "bundle of rights." These rights include the right to buy, sell, use, and to exclude others from a piece of property. A recent example can be found in Justice Meierhenry's dissent in the 2006 case *Benson v. State*. Some of these rights are absolute, while others are subject to reasonable regulation. The Courts have never put forth a comprehensive list of the rights in that bundle, but for purposes of regulating non-meandered lakes, three are particularly important. These include the owner's right to be free from takings without compensation, his right to exclude others from his property, and his right to due process law.

These foundational rights come from both the federal constitution and our own state constitution. The federal 5th Amendment guarantees that a landowner's property cannot be taken by the State for the public benefit without just compensation, and ensures that the landowner receive "due process of law" before any land is taken. In general, "due process" means that the landowner must be given notice that the government is going to do something that affects his property rights, and the opportunity to voice his opposition to that action before it happens. This is complicated by the fact that mother nature increased the rainfall causing the flooding of the private land. The water is held in trust for the people of South Dakota and is managed by the State. The State did not put the water over the private land, so is it a taking?

Article VI of our state constitution takes these rights a step further. Section 1 guarantees everyone the right to acquire, enjoy, and protect their property. Section 2 reiterates the requirement that due process be provided to property owners before their rights can be intruded upon. And finally, Section 13, as interpreted by our own

courts in cases like *Benson v. State* and *Krier v. Dell Rapids Tp.*, requires actual public use, not just public benefit, before the State can take private property.

In the context of water law, however, there are some physical limitations on these rights. Whatever our constitutions may say, water will still run downhill. Because of this, the basic rule of drainage law, as articulated by the South Dakota Supreme Court in the 1917 case *Thompson v. Andrews*, is that a downstream landowner must accept whatever runoff flows from his upstream neighbors. This is, effectively, an easement that runs with each parcel of land from the moment the first owner takes title to it. Nobody gets notice before the rain runs downhill, and nobody gets compensated for it.

Public Interests:

On the public side, as a trustee the State is obligated to manage the “waters of the state” in a way that is most beneficial to the public. As noted by the Court in *Parks v. Cooper*, in many cases the public benefit can be better served by using those waters for game production than by opening them to public recreation. Opening a lake to the public will inevitably result in higher road maintenance, facility maintenance, and law enforcement costs.

Further, the State is not the only government body with a financial interest to consider. In the absence of state-maintained access facilities, recreational users will resort to using flooded township and county roads to access non-meandered lakes. This use will impose higher costs on the townships and counties that maintain them. Those counties may also be called upon to deal with litter, law enforcement, and emergency services when numbers of recreational uses begin to frequent otherwise low-population areas of the state.

Elements of Solutions:

The regulatory structure, however the bill is ultimately worded, should address as many of these issues and rights as possible. At a minimum, it should protect individual property and due process rights. It should also protect local and state governments, and their employees, from liability and increased costs. And finally, it must provide a rational system for regulating and managing the bodies of waters themselves.

One way to accomplish this would be to authorize the Department of Environment and Natural Resources (DENR) to determine the appropriate use for non-meandered lakes on a case-by-case basis. This determination would be based on standards set by the legislature, and after giving interested parties notice and the opportunity to be heard. If, after those hearings it appears that private property rights will be impacted, DENR could be further authorized to negotiate directly with landowners to secure access and/or compensate them as appropriate. This would follow the same model currently used to secure “walk-in” hunting access to public and private hunting lands.

Current Policy:

There should be no public access on flooded private land without landowner or operator permission. This does not apply to meandered lakes that have been surveyed and currently have public access.