

FILED
07-11-2023
Clerk of Circuit Court
Cindy R. Hamre Incha

STATE OF WISCONSIN

CIRCUIT COURT

JEFFERSON COUNTY

THOMAS REISS
W706 County Road CW
Ixonia, WI 53036,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
101 South Webster Street,
Madison, WI 53707,

WISCONSIN NATURAL
RESOURCES BOARD,
101 South Webster Street,
Madison, WI 53707,

and

ADAM N. PAYNE, in official capacity as Secretary of the Wisconsin
Department of Natural Resources,
101 South Webster Street,
Madison, WI 53707,

Defendants.

*Hand Delivered
3:40 pm
ALL*

WI DEPT. OF
NATURAL RESOURCES

JUL 14 2023

OFFICE OF THE
SECRETARY

Case Type: Declaratory
Judgment

Case Code: 30701

COMPLAINT

Thomas Reiss (“Reiss” or “Plaintiff”), through his undersigned counsel, hereby alleges the following as his complaint:

INTRODUCTION

1. This civil action seeks declaratory and injunctive relief challenging the validity of Defendants’ policy that allows public access to non-navigable land and water as long as the public can “keep their feet wet” (the “Feet Wet Policy”).

2. As part of this policy, the Defendants published multiple guidance documents to distinguish between the rights of Wisconsin riparian property owners such as Plaintiff, Mr. Reiss, and the rights of members of the public wishing to use public waterways.

3. Defendants' guidance documents are internally contradictory and contravene the Wisconsin Constitution and established state law. Members of the public rely on these guidance documents to access non-navigable land and water, and the guidance documents cause confusion and prevent law enforcement from enforcing the law, to the detriment of Mr. Reiss and his rights and privileges as a landowner.

4. The Wisconsin Department of Natural Resources ("DNR") has refused to withdraw or amend the guidance despite repeated requests to do so from Mr. Reiss.

5. By refusing to withdraw or amend the guidance, Defendants are implementing unpromulgated rules governing the rights of riparian landowners, which conflict with well-established Wisconsin law.

6. Defendants' unlawful rules go well beyond the authority granted to them by the legislature.

7. Defendants' unlawful behavior has harmed Mr. Reiss by preventing him from exercising the full use and enjoyment of his property, which is an interference with and impairment of, and continues to threaten interference with and impairment of, Mr. Reiss's legal rights and privileges.

8. Accordingly, as alleged more fully below, Plaintiff asks this Court to declare that: 1) Defendants' guidance documents are invalid because they contradict state law by expanding public access rights under the public trust doctrine beyond the Ordinary High Water Mark ("OHWM") of navigable waters to adjacent private wetlands; 2) Defendants' regulation of

private wetlands adjacent to navigable waters as subject to the public trust doctrine constitutes invalid rulemaking; and 3) public access rights under the public trust doctrine do not extend beyond the OHWM (from a navigable water to a private wetland) regardless of whether members of the public “keep their feet wet.” Plaintiff also requests the Court enter permanent injunctive relief that requires DNR to cease offering the incorrect guidance documents, remove publications of the guidance documents, and amend or issue corrected guidance in accordance with state law.

PARTIES

9. Reiss is an adult citizen of the state of Wisconsin. Mr. Reiss owns property in Jefferson County, Wisconsin, located at W706 County Road CW, Ixonia, WI 53036, (the “Reiss Property”).

10. Defendant DNR is an agency of the State of Wisconsin with its offices and principal place of business at 101 South Webster Street, in the City of Madison, Dane County, Wisconsin. DNR established the policies challenged by this action.

11. Defendant Wisconsin Natural Resources Board (“NRB”) is an agency of the State of Wisconsin with its offices and principal place of business at 101 South Webster Street, in the City of Madison, Dane County, Wisconsin. Under Wis. Stat. § 15.34, NRB exercises direction and control over DNR. Under Wis. Stat. § 15.05(1)(b), NRB maintains regulatory, advisory, and policy-making powers over DNR.

12. Defendant Secretary Adam N. Payne is the Secretary of DNR and is named in his official capacity only. Defendant Secretary Adam N. Payne maintains his principal office at 101 South Webster Street, in the City of Madison, Dane County, Wisconsin. Under Wis. Stat. §

15.05(1)(b), Secretary Adam N. Payne, with the approval of the NRB, shall promulgate rules for administering DNR and performing the duties assigned to DNR.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action under Wis. Stat. §§ 227.40(1) and 806.04(1)-(2).

14. Venue in this County is proper pursuant to Wis. Stat. §§ 227.40 and 801.50(3)(b) because Plaintiff Reiss resides in this County.

FACTUAL BACKGROUND

A. The Reiss Property on the Rock River

15. Portions of the Reiss Property lie next to the Rock River.

16. The Rock River is a navigable waterway.

17. The Rock River has an OHWM.

18. The Reiss Property typically features no standing water and is used for agricultural purposes. From time to time, portions of the Reiss Property surrounding Mr. Reiss's home become saturated and, on occasion, standing water may accumulate in areas above the OHWM of the Rock River (the "Reiss Upland Wet Areas").

19. During such times, members of the public use airboats to access, traverse, and otherwise enter onto the Reiss Upland Wet Areas.

20. Airboats are propelled by large fans that are not submerged, which enables airboats to operate in only minimal water and are regularly used to move across saturated or muddy areas when moving from one body of water to another. In some instances, airboats can operate over long distances of land.

21. Reiss holds certain riparian rights with respect to the Reiss Property.

22. Reiss's right to enjoy his property, including the Reiss Upland Wet Areas, is diminished by the unauthorized and unwelcome use of such property by airboat operators and their guests and other members of the public.

23. Reiss's right to enjoy his property, including the Reiss Upland Wet Areas, has been interfered with and impaired by the unauthorized and unwelcome use of such property by airboat operators and their guests and other members of the public.

24. Reiss's right to enjoy his property, including the Reiss Upland Wet Areas, is continually threatened by the unauthorized and unwelcome use of such property by airboat operators and their guests and other members of the public.

25. Reiss has informed the Jefferson County Sheriff of his concerns about the use of his property by airboat operators and their guests, and he has asked the Jefferson County Sheriff to cite airboat operators and their guests or otherwise dissuade such unauthorized and unwelcome use of his property, but the Jefferson County Sheriff has not done so.

26. Upon information and belief, Defendants' guidance documents cause continuing trespass and will continue to cause trespass on the Reiss Property in the absence of declaratory and injunctive relief, because members of the public rely on Defendants' guidance and guidance documents that contravene the Wisconsin Constitution and established state law.

27. Upon information and belief, Defendants' guidance documents cause continuing trespass and will continue to cause trespass on the Reiss Property in the absence of declaratory and injunctive relief, because the guidance causes law enforcement's confusion and inaction in response to members of the public trespassing on the Reiss Property in reliance on the guidance.

B. The Public Trust Doctrine

28. Article IX, section 1, of the Wisconsin Constitution established that certain waters “shall be common highways and forever free,” [to the public], “without any tax, impost or duty therefor.”

29. Such waters are held in trust for the public by the State of Wisconsin. This doctrine is known as the “public trust doctrine.”

30. Jurisdiction to regulate and enforce the public trust rests with both the Wisconsin Legislature and the Defendants. *ABKA Ltd. P’ship v. DNR*, 2002 WI 106, ¶12, 255 Wis. 2d 486, 648 N.W.2d 854.

31. Acting for the State, the Wisconsin Legislature has by statute delegated a portion of its public-trustee obligations for waters to Defendants.

32. The Wisconsin Statutes—including the statutes that require DNR to follow certain procedures when making rules—define DNR’s authority to carry out the duties the Legislature delegated to it as trustee of the public trust over certain waters.

33. If Defendants believe the public’s rights relating to navigable waters are being infringed, they may seek “an order directing the responsible parties to perform or refrain from performing acts in order to ... fully protect the interests of the public in the navigable waters.” Wis. Stat. § 30.03(4). “Pursuant to Wis. Stat. § 30.03(4), the DNR may bring an enforcement action when it learns of a ‘possible violation’ of the public trust doctrine.” *ABKA Ltd. P’ship*, 2002 WI 106, ¶ 17.

34. The public trust doctrine does not extend beyond navigable waters. “There is no constitutional foundation for public trust jurisdiction over land ... that is not below the OHWM of a navigable lake or stream.” *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶86, 350 Wis.

2d 45, 833 N.W.2d 800 (emphasis omitted). “Public trust jurisdiction has always been confined to a limited geographic area” between the OHWMs. *Id.*, ¶91 (citing *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914); *Ill. Steel Co. v. Bilot*, 109 Wis. 418, 425, 84 N.W. 855 (1901)).

35. DNR cannot rely on the public trust doctrine as authority to regulate non-navigable land and non-navigable water above the OHWM. *Id.*, ¶150.

36. Further, DNR’s authority to implement and enforce the public trust doctrine is limited to navigable lakes, streams, sloughs, bayous, and marsh outlets. Wis. Stat. § 30.10. Flooded yards do not fit into these categories and are not subject to DNR’s public trust jurisdiction. *Village of Menominee Falls v. DNR*, 140 Wis. 2d 579, 593, 412 NW.2d 505 (Ct. App. 1987). Nor does the public trust doctrine authorize the DNR to regulate private wetlands above the OHWM. *Rock-Koshkonong*, 2013 WI 74, ¶86.

37. “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 subject to the requirements of [Chapter 30.]” Wis. Stat. § 30.132(2).

38. A riparian owner holds qualified title to the center of a navigable stream bed. *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶11, 301 Wis. 2d 321, 733 N.W.2d 287 (citing *State v. Trudeau*, 139 Wis. 2d 91, 101, 408 N.W.2d 337 (1987)).

39. If water levels are low, the public’s use of exposed shores between the OHWMs of a stream is limited. *See* Wis. Stat. § 30.134.

40. However, if water levels are abnormally high, the public access rights do not expand past the OHWM to water located in non-navigable areas. In fact, Wisconsin courts have

declined to hold that, under the public trust doctrine, private ownership ends where navigability begins. *See Rock-Koshkonong*, 2013 WI 74, ¶ 83 (citing *Diana Shooting Club*, 156 Wis. at 269).

C. DNR Offers Incorrect and Unlawful Guidance to the Public, and Law Enforcement's Inaction to Address Trespass Is Caused by Such Guidance

41. DNR has published several guidance documents regarding public access and promoting its Feet Wet Policy.

42. The DNR website contains a hyperlink titled “Public or private waters factsheet,” that directs to a PDF file titled on its face “Ordinary High Water Mark (OHWM)”, <https://dnr.wisconsin.gov/sites/default/files/topic/Waterways/OrdinaryHighWaterMark.pdf> (“Public v. Private Factsheet”). A true and correct copy of the Public v. Private Factsheet is attached to this complaint as Exhibit 1.

43. The Public v. Private Factsheet correctly states that “the land above the OHWM is [the] private domain” of riparian landowners. However, the Public v. Private Factsheet also informs the public that they have the right to use any public water body “as long as they ‘keep their feet wet,’” which includes wet feet in water that has swelled above the OHWM. It also assures citizens that “as a member of the public you need not worry about the location of the OHWM as long as you stay in the water.”

44. The Public v. Private Factsheet also contains an illustration of a scenario entitled, “When the Water Level is High.” The illustration shows a person fishing from a boat that has crossed the OHWM and states, “Public may use area up to water’s edge.”

45. The Public v. Private Factsheet advises the public that they have a right to access non-navigable property outside of the OHWM and beyond Defendants’ public trust jurisdiction, which contravenes the Wisconsin Constitution and established Wisconsin law.

46. The DNR website also contains a hyperlink titled “Public access fact sheet: Navigation and incidents to navigation” that directs to a PDF file titled on its face “Navigation and the incidents to navigation,” https://dnr.wisconsin.gov/sites/default/files/topic/Fishing/Questions_PublicAccessFactSheet.pdf (“Public Access Factsheet”). A true and correct copy of the Public Access Factsheet is attached to this complaint as Exhibit 2.

47. The Public Access Factsheet correctly explains that the land above the OHWM is the riparian landowner’s private domain (*see* Ex. 2 at 2), but also contains the following statements: 1) “Everyone has the right to use public water bodies to swim, boat, or walk as long as they ‘keep their feet wet.’”; and 2) “While you must gain access through legal means, anyone may recreate in a public water body provided you stay in the water.”

48. The Public Access Factsheet advises the public that they have a right to access non-navigable property outside of the OHWM and beyond Defendants’ public trust jurisdiction, which contravenes the Wisconsin Constitution and established Wisconsin law.

49. The DNR has also published a guidance document entitled, “Public or Private? II: The Ordinary High Water Mark,” https://dnr.wi.gov/topic/waterways/factsheets/PublicPrivateII_OHWM_Brochure.pdf (“OHWM II”). A true and correct copy of OHWM II is attached to this complaint as Exhibit 3.

50. OHWM II contains statements similar to the statements in the Public v. Private Factsheet and the Public Access Factsheet. OHWM II contains a subsection entitled, “What Does the OHWM Mean to You as a Waterfront Property Owner?” Like the Public v. Private Factsheet and the Public Access Factsheet, OHWM II correctly states a general rule: “As a riparian, the land above the OHWM is your private domain.” However, under a heading entitled, “What Does

the OHWM Mean to You as a Citizen?”, OHWM II states, “As long as you keep your feet wet, you may walk along the shore, swim or boat in any navigable lake or stream. You need not worry about the location of the OHWM as long as you stay in the water.”

51. Like the Public v. Private Factsheet and the Public Access Factsheet, the OHWM II advises the public that they have a right to access non-navigable property outside of the OHWM and beyond Defendants’ public trust jurisdiction, which contravenes the Wisconsin Constitution and established Wisconsin law.

52. All three guidance documents also advise that property owners have a right to “exclusive[ly] use[] exposed” lake bed or stream bed during low water levels, but none clearly and explicitly addresses the limits on public access beyond the OHWM during flooding or extraordinary high-water levels. Nor do they address limitations on the public’s right to traverse non-navigable property that is saturated, muddy, or contains standing water, in order to reach other waterbodies.

53. The only content in OHWM II that addresses extraordinarily high water is a diagram. In the upper-right quadrant of a diagram (Ex. 3 at 2), a text box located above the OHWM reads, “Public May Use Area to Water’s Edge,” and above the text box, a drawing depicts a person fishing in waist-deep water. Above the dry land lying above the edge of the extraordinarily high water, words appear in quotation marks but without any citation: “Although the ownership of private property extends to [the] OHWM, the exclusive use of private property begins at the water’s edge.”

54. OHWM II thus contains statements that contravene established Wisconsin law and expand DNR’s public trust jurisdiction beyond the OHWM.

D. **Reiss Seeks Correction from DNR; DNR Fails to Correct**

55. On August 6, 2021, counsel for Mr. Reiss wrote to DNR Attorney Diane L. Milligan. A true and correct copy of the August 6, 2021 letter is attached to this complaint as Exhibit 4.

56. In the August 6 letter, counsel for Mr. Reiss asserted that a letter Attorney Milligan had written several months earlier to the Town of Ixonia Board had failed to “adequately summarize the concerns” of Mr. Reiss and other area residents related to boaters using the Kaul Park access site, including concerns about “access of lands well beyond the OHWM associated with the Rock River.” (Ex. 4 at 1.)

57. Counsel for Mr. Reiss wrote again to the DNR on April 5, 2022, this time to Attorney Miligan and a second DNR attorney, Michael Kowalkowski, and attached three DNR guidance publications: 1) the Public v. Private Factsheet; 2) the Public Access Factsheet; and 3) OHWM II. A true and correct copy of the April 5, 2022 letter, including partially highlighted guidance attachments, is attached to this complaint as Exhibit 5.

58. After April 5, 2022, counsel for Mr. Reiss spoke with Attorney Kowalkowski. Mr. Kowalkowski stated that the DNR’s position is that there is no clear guidance on the issue of the public’s right to access land above the OHWM.

59. Mr. Kowalkowski told Mr. Reiss’s counsel that the question of such access is “fact specific” and should be addressed “on a case-by-case basis.”

60. Mr. Reiss’s counsel disagreed, stating that Wisconsin law governing such access should not be determined in an *ad hoc* manner because doing so has led to conflict, as it has for Mr. Reiss, and it has and will continue to confuse landowners, the public, and law enforcement.

61. On June 27, 2022, counsel for Mr. Reiss wrote to the DNR yet again, again to Attorneys Milligan and Kowalkowski, and summarized the discussion he had had with Mr. Kowalkowski. A true and correct copy of the June 27, 2022 letter is attached to this complaint as Exhibit 6.

62. In the June 27 letter, Mr. Reiss's counsel included discussion of a 2013 decision of the Wisconsin Supreme Court, *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800, in which the court refused to extend the DNR's jurisdiction under the public trust doctrine to non-navigable wetlands above the OHWM. (Ex. 6 at 2.)

63. Mr. Reiss's counsel closed the June 27, 2022 letter by asking for further discussions on the issues raised both in the June 27, 2022 and April 5, 2022 letters.

64. Mr. Reiss's counsel again wrote to Attorneys Milligan and Kowalkowski on May, 10, 2023, attaching a draft of this complaint in largely its current form and again asking the DNR to reconsider its guidance documents. Attorney Kowalski responded with a letter dated May 31, 2023, by a) denying that the DNR has any "regulatory role in 'allowing' the public to exercise" rights to use navigable waters as alleged in the complaint; b) denying that the DNR has made any determination or advised any member of the public about accessing the Reiss Upland Wet Areas; and c) directing Mr. Reiss to address his concerns about trespass or property damage "at the local level," but the letter said nothing about the guidance documents. A true and correct copy of the May 31, 2023 letter from Attorney Kowalkowski to Mr. Reiss's counsel is attached to this complaint as Exhibit 7.

COUNT I

A DECLARATION PURSUANT TO WIS. STAT. § 227.40(4)(a) THAT DEFENDANTS' GUIDANCE DOCUMENTS ARE INVALID BECAUSE THEY VIOLATE WISCONSIN LAW BY EXPANDING PUBLIC TRUST JURISDICTION BEYOND NAVIGABLE WATERS AND EXCEEDING DNR'S STATUTORY AUTHORITY

65. Plaintiff re-alleges and incorporates by reference all allegations made above as if fully set forth herein.

66. “There is no constitutional foundation for public trust jurisdiction over land ... that is not below the OHWM of a navigable lake or stream.” *Rock-Koshkonong*, 2013 WI 74, ¶86 (emphasis omitted).

67. Under established Wisconsin law, the land above the OHWM of navigable waters is the private domain of the landowner, and the public does not enjoy rights to possess, use, or recreate on such lands, even if such land temporarily contains standing water.

68. Defendants' guidance documents promote their Feet Wet Policy and expand public access rights under the public trust doctrine, beyond the OHWM of navigable waters, to adjacent non-navigable property. By purporting to expand public access in this way, Defendants have exceeded and continue to exceed their statutory authority.

69. Despite having opportunity to do so, including in response to repeated requests from Reiss, Defendants have refused to withdraw or revise their guidance documents discussed above to conform with Wisconsin law.

70. A court shall declare a guidance document invalid “if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency.” Wis. Stat. § 227.40(4)(a).

71. Reiss has been substantially harmed by Defendants' unlawful guidance and overreach beyond their statutory authority. Defendants' guidance interferes with and impairs

Reiss's legal rights and privileges to have exclusive use of his private land and to enjoy his land consistent with his rights as landowner.

72. Unless and until the Court declares that the Defendants' guidance documents are invalid because they contradict state law and exceed statutory authority by expanding public access rights under the public trust doctrine, beyond the OHWM of navigable waters, to adjacent private land, Reiss will continue to be harmed, including harm due to continuing trespass on the Reiss Property caused by Defendants' incorrect and unlawful guidance.

73. Because administrative agencies are creatures of statute, they have "only those powers as are expressly conferred or necessarily implied from the statutory provisions under which [they] operate[]." *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶23, 355 Wis. 2d 47, 64, 799 N.W.2d 73, 81.

74. The legislature has authorized DNR to exercise public trust jurisdiction over lakes, streams, sloughs, bayous, and marsh outlets, as defined in Wis. Stat. § 30.10(1)-(2).

75. Defendants' guidance documents promoting the Feet Wet Policy expand DNR's public trust jurisdiction to lands that are not lakes or streams, as defined in Wis. Stat. § 30.10(1)-(2), which is beyond the authority granted to them by the legislature.

76. A court shall declare a guidance document invalid "if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency." Wis. Stat. § 227.40(4)(a).

77. Reiss has been substantially harmed by Defendants' unlawful guidance. Defendants' guidance interferes with and impairs Reiss's legal rights and privileges to have exclusive use of his private land and to enjoy his land consistent with his rights as landowner.

78. Unless and until the Court declares that the Defendants' guidance documents are invalid because they contradict state law by unlawfully expanding DNR's public trust jurisdiction beyond lakes and streams to adjacent private land, Reiss will continue to be harmed, including harm due to continuing trespass on the Reiss Property caused by Defendants' incorrect and unlawful guidance.

79. Accordingly, Reiss is entitled to a declaration that Defendants' three guidance documents and all similar guidance are unlawful because they exceed Defendants' authority and to an order granting the requested injunctive relief in Plaintiff's Prayer for Relief below.

COUNT II

A DECLARATION PURSUANT TO WIS. STAT. §§ 227.40(4)(a) AND 806.04 THAT DEFENDANTS' REGULATION OF NON-NAVIGABLE PRIVATE LAND ADJACENT TO NAVIGABLE WATERS AS SUBJECT TO THE PUBLIC TRUST DOCTRINE CONSTITUTES INVALID RULEMAKING

80. Plaintiff re-alleges and incorporates by reference all allegations made above as if fully set forth herein.

81. Defendants' Feet Wet Policy is a rule as that term is defined by Wis. Stat. § 227.01(13).

82. Through their interpretation and application of the Feet Wet Policy, Defendants regulate the respective rights of riparian property owners and the public.

83. Defendants' Feet Wet Policy is a rule because it is a regulation, standard, statement of policy, or general order of general application that has the force of law and was issued by Defendants to implement, interpret, administer, and/or enforce their public trust doctrine authority under Wis. Stat. Ch. 30. *See* Wis. Stat. § 227.01(13)

84. Defendants' Feet Wet Policy is also a rule because it is a statement of general policy as to the extent of Defendants' public trust jurisdiction, and how they distinguish (and

enforce the distinction) between the respective rights of riparian property owners and the public, pursuant to Wis. Stat. Ch. 30.

85. Under Wis. Stat. § 227.10(1), “[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.”

86. Chapter 227 of the Wisconsin Statutes includes multiple rulemaking procedures that must be followed in order for Defendants to properly promulgate a rule.

87. Defendants’ Feet Wet Policy was not promulgated pursuant to the requirements of Chapter 227.

88. A rule that was not promulgated or adopted in compliance with statutory rulemaking or adoption procedures shall be declared invalid. Wis. Stat. § 227.40(4)(a).

89. Reiss has been substantially harmed by Defendants’ failure to comply with the statutory rulemaking and adoption procedures.

90. Defendants’ application, implementation and enforcement of the Feet Wet Policy interferes with the Reiss’s legal rights and privileges.

91. Accordingly, Reiss is entitled to a declaration that Defendants’ Feet Wet Policy is an unlawfully adopted rule and is invalid and unenforceable.

92. Under established Wisconsin law, the land above the OHWM of navigable waters is the private domain of the landowner, and the public does not enjoy rights to possess, use, or recreate on such lands, even if such lands temporarily lie under water.

93. Defendants’ Feet Wet Policy, which meets the definition of a rule, expands public access rights under the public trust doctrine, beyond the OHWM of navigable waters, to adjacent non-navigable property, which conflicts with Wisconsin law.

94. Defendant's Feet Wet Policy conflicts with the rights afforded to riparian owners pursuant to Wis. Stat. § 30.132 and Article IX of the Wisconsin Constitution.

95. Pursuant to Wis. Stat. § 227.10(2), Defendants are prohibited from promulgating, implementing or enforcing a rule which conflicts with state law.

96. Therefore, Defendants' Feet Wet Policy regulating non-navigable land pursuant to public trust jurisdiction constitutes an unlawful rule.

97. Additionally, the legislature has authorized DNR to exercise public trust jurisdiction only over lakes and streams, as defined in Wis. Stat. § 30.10(1)-(2). Defendants have no other statutory authority to exercise public trust jurisdiction over land that does not meet the definition of lakes or streams, as defined in Wis. Stat. § 30.10(1)-(2).

98. Defendants' Feet Wet Policy, which meets the definition of a rule, expands DNR's public trust jurisdiction to lands that are not lakes or streams, as defined in Wis. Stat. § 30.10(1)-(2).

99. Under Wis. Stat. §227.10(2m), Defendants are prohibited from implementing or enforcing "any standard, requirement, or threshold . . . unless that standard, requirement or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with" Chapter 227, Subchapter II.

100. A court shall declare a rule invalid "if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures." Wis. Stat. § 227.40(4)(a).

101. Reiss has been substantially harmed by Defendants' implementation and application of Defendants' unlawful rule.

102. Defendants' application and threatened future application of the Feet Wet Policy interferes with Reiss's legal rights and privileges.

103. Accordingly, Plaintiff is entitled to a declaration that Defendants' enforcement of the current Feet Wet Policy is an unlawful rule and otherwise beyond Defendant's authority and is invalid and unenforceable and to an order granting the requested injunctive relief in Plaintiff's Prayer for Relief below.

COUNT III

A DECLARATION PURSUANT TO WIS. STAT. § 806.04 THAT DEFENDANTS MAY NOT PERMIT OR PROMOTE PUBLIC ACCESS TO PROPERTY BEYOND THE OHWM OF RIVERS AND STREAMS REGARDLESS OF WHETHER MEMBERS OF THE PUBLIC "KEEP THEIR FEET WET"

104. Plaintiff re-alleges and incorporates by reference all allegations made above as if fully set forth herein.

105. Pursuant to Wis. Stat. § 806.04, any person whose rights are affected by a statute may have determined any question of construction or validity arising under the statute and obtain a declaration of rights thereunder.

106. When Defendants promote their Feet Wet Policy in published guidance documents, they are engaging in statutory interpretation. Specifically, they are adopting and disseminating to the public and law enforcement an interpretation of several sections of Wis. Stat. Ch. 30, including Wis. Stat. § 30.10, 30.132, and 30.134.

107. Defendants' statutory interpretations are incorrect as a matter of law.

108. Reiss's rights are affected by Defendants' interpretations of these statutes.

109. Reiss's rights to full enjoyment of his property are diminished and impaired by Defendants' incorrect interpretation of these statutes.

110. Reiss therefore seeks a declaration that he enjoys complete private dominion over the Reiss Upland Wet Areas and may exclude the public from trespassing or creating nuisances upon the Reiss Upland Wet Areas and an order granting the requested injunctive relief in Plaintiff's Prayer for Relief below.

PRAYER FOR RELIEF

WHEREFORE, Reiss respectfully asks this Court to grant the following relief:

A. A declaration that Defendants' guidance documents promoting their Feet Wet Policy are unlawful and invalid;

B. A declaration that Defendants' Feet Wet Policy is an unlawfully adopted rule, contradicts Wisconsin law, is otherwise beyond Defendants' statutory authority, and is invalid and unenforceable;

C. A permanent injunction requiring Defendants to: 1) cease offering the incorrect guidance documents and other similar guidance that disseminate or promote the Feet Wet Policy or that expand public access rights beyond the OHWM of navigable waters to adjacent private wetlands, including when water levels are especially high; 2) remove publications of the guidance documents and other such similar guidance; and 3) promptly amend or issue corrected guidance that is consistent with the Court's ruling and Wisconsin law;

D. A declaration that Defendants do not have public trust jurisdiction over property beyond the OHWM of lakes and streams, and an order enjoining Defendants from promoting public access to such lands, regardless of whether members of the public keep their feet wet;

E. Such other relief as the Court deems appropriate.

Dated this 11th day of July, 2023.

REINHART BOERNER VAN DEUREN S.C.

22 E. Mifflin Street, Suite 700

Madison, WI 53703

Telephone: 608-229-2200

Facsimile: 608-229-2100

Electronically signed by Jessica Hutson Polakowski

Jessica Hutson Polakowski

WI State Bar ID No. 1061368

jpolakowski@reinhartlaw.com

David G. Hanson

WI State Bar ID No. 1019486

dhanson@reinhartlaw.com

Samuel C. Sylvan

WI State Bar ID No. 1131339

ssylvan@reinhartlaw.com

48511866v2

Attorneys for Plaintiff