

## SD Supreme Court – Duerre v. Hepler (2017 S.D. 8)

### GFP Guidance and Policy Directives Regarding Agency Activities Associated with the Prohibition on Facilitation of Access to Non-Meandered Waters

April 2017

**Interpretations and Staff Guidance re. the SD Supreme Court Decision in Duerre v. Hepler** - The Supreme Court in *Duerre v. Hepler* sets a legal precedent for all non-meandered waters in the state that the Department will conform to. The Secretary of the Department will provide GFP staff specific guidance on agency policies, staff work direction and agency resource management practices related to non-meandered waters. The Secretary and GFP Communications Team will provide information that GFP staff will use to help inform members of the public on matters related to the *Duerre* decision. Any information relayed to the public shall neither state nor infer the public may continue to access non-meandered waters in the state for purposes of recreation. Specifically, the Department shall develop an “Information Card” that will be provided to staff to share with the public that will contain a consistent message reflecting the declaratory and injunctive relief set forth in the *Duerre* decision (See language of Information Card below). In particular, the information staff share with the public shall focus on the following:

- All waters of the State are held by the State in trust for the benefit of the public.
- While state law and judicial precedent allow the public to use “navigable” or meandered waters of the state for various public purposes, including recreation, (e.g. boating, fishing, hunting, swimming, etc.), the Legislature has not determined that “public purposes” includes a right of both landowners and the general public to recreate on this State’s non-meandered waters.
- Until the Legislature acts, the Court concluded that neither the public nor the landowner Plaintiffs have a superior right to use the waters or ice overlying the landowners’ private property.
- The SD Supreme Court further enjoined and now prohibits the Department and the class of public defendants in this case who have used or intend to use non-meandered lakes from “facilitating access” to these non-meandered bodies of water for any recreational purpose.
- The Department will comply with the Court’s directive and will identify areas where it has “facilitated” access to non-meandered waters for recreational uses. Once these areas have been identified, the Department will take appropriate action to stop all “facilitated” access to non-meandered waters. Those actions include restricting public use of the Department’s non-meandered lake access developments and discontinued establishment of additional lake access facilities on these waters.

**Information Card Language** – The following language will be placed on an Information Card for use by GFP staff in answering questions from the public concerning recreational use of non-meandered waters:

#### **RECREATIONAL USE (*DUERRE VS. HEPLER*) OF NON-MEANDERED WATER OVERLYING PRIVATE PROPERTY**

##### ***A complex issue that has impacted our state for decades.***

*A Supreme Court order stated that the South Dakota Legislature must determine whether members of the public may enter or use any of the non-meandered water or ice overlying private property for any recreational use such as hunting or fishing. The court also stated that neither the public nor landowners have a superior right to use water and ice overlying private property and that South Dakota Game, Fish and Parks cannot facilitate access to these waters. It is up to each individual to read the court’s decision and seek appropriate legal advice to interpret the ruling. GFP cannot provide this advice. GFP will abide by the court’s decision in its entirety and assist the Legislature in whatever capacity requested to resolve this issue of paramount importance to our state.*

**Construction and Maintenance of Facilities (boat ramps and docks) Providing Access to Non-meandered Lakes from GFP-owned Lands or Leased Private Lands** – As per the directive of the SD Supreme Court in *Duerre*, the Department may no longer facilitate the public’s access to non-meandered waters. The Department will therefore discontinue facilitating public access via boat ramps and docks placed on these non-meandered waters. These access sites may include those located on both GFP-owned properties or leased private properties. The Department will place informational signs on these access areas alerting the public of these changes. The informational signs shall state: “**PUBLIC NOTICE** – This is a Non-Meandered Body of Water – The South Dakota Game, Fish and Parks is prohibited by court order from facilitating access for members of the public to enter or use this body of water or ice for any recreational purpose, including hunting or fishing, in the absence of authorization from the state Legislature”. Signs providing public use information, including property boundary signs identifying the area as a lake access area, will be removed from these access areas. However, routine maintenance, including mowing and weed control, etc., will continue on these access areas to protect the public’s investment in this infrastructure. Public access to boat ramps and other access facilities on the state’s meandered waters will not be restricted, including those waters that lie outside the OHWM of the navigable (meandered) waters in accordance with the provisions of SDCL 43-17-29.

**43-17-29. Public rights in lake above high water mark.** If any water level rises above the ordinary high water mark of a navigable lake, the right of the public to enjoyment of the entire lake may not be limited, except that access to the lake shall be by public right-of-way or by permission of the riparian landowner and is subject to §§ 43-17-2, 43-17-31, 43-17-32, and 43-17-33. **Source:** SL 1985, ch 337, § 7; SL 1989, ch 379, § 2.

**Leases of Private Lands that Facilitate Access to Non-meandered Waters** – Leases of private lands that provide access to non-meandered waters will be modified or terminated to preclude facilitation of access to non-meandered waters. Modification may include allowance of GFP to put in place measures to prevent facilitation of access to non-meandered waters.

**Privately-owned Access Points to Non-meandered Lakes** – Individuals who own and utilize private access sites to non-meandered waters should seek guidance from their legal counsel regarding the implications of the *Duerre* decision on their ability to continue to use these sites to access these non-meandered waters.

**Water Specific Fisheries Regulations on Non-meandered Lakes** – The Department will not amend or rescind regulations governing fisheries management on non-meandered lakes currently in place.

**New Access Facilities on Non-meandered Lakes** – The Department will not construct any new access facilities (e.g. boat ramps, docks and associated facilities) on non-meandered lakes until the SD Legislature acts to clarify the circumstances under which the public may use non-meandered lakes for recreation.

**Stocking Fish and Conducting Fisheries Management or Creel Surveys on Non-meandered Waters** – Fish will not be stocked on non-meandered waters nor will creel surveys be conducted on these waters until public recreational use on these waters is clarified by the SD Legislature. Fish management and population surveys may continue on non-meandered waters.

**Redaction of Lake Maps and Other Public Use Information, both Printed and Electronic, Intended to Facilitate Access to Non-meandered Waters** – Bathymetric lake maps and other public use information

intended to 'facilitate' and promote public use of non-meandered waters will be removed from the GFP website and when possible, from future agency handbooks and other publications, until the SD Legislature clarifies the question of recreational use of non-meandered lakes. Fish population survey information is public information and will continue to be made available to the public via the GFP Website.

**Fishing Reports** – the Department will no longer provide "fishing report" information (including information provided to news outlets, radio and TV stations, etc.) specific to non-meandered waters across the State.

**Snow Removal on Access Sites to Facilitate Access for Ice Anglers to Non-meandered Lakes** – The Department will cease efforts to remove snow from ramps and other access points intended to facilitate access for ice anglers to non-meandered lakes.

**Canoe and Kayak Rentals** – the Department will cease efforts to rent canoes and kayaks at locations where it is likely they may be used on non-meandered lakes.

**Fishing Tournaments and Other Specials Events on Non-meandered Lakes** – The Department will rescind all permits issued and deny any future permit applications for fishing tournaments or other special events slated to be conducted on all non-meandered lakes.