

No. 127511

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In the  
**SUPREME COURT**  
of the State of Illinois

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ADAM HOLM, DANIEL HOLM, LORETTA HOLM, AND NICK HOLM,	)	Petition for Leave to Appeal to Supreme
	)	Court of Illinois On Appeal from the
	)	
Petitioners,	)	Appellate Court Third District, Case No.
	)	3-20-0164
v.	)	
	)	There Heard on Appeal from Court of the
PETER KODAT, JAMES BENSON, BENSON MARIAN FAMILY TRUST, MARK A. NORTON, WILFRED K. ROBINSON, and JOHN HEATH,	)	13 <sup>th</sup> Judicial Circuit of Grundy County,
	)	IL, Case No. 18 CH 90
	)	
Respondents.	)	Hon. Eugene P. Daugherty,
	)	Judge Presiding
	)	

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**FOREST PRESERVE DISTRICT OF WILL COUNTY'S *AMICUS* BRIEF IN  
SUPPORT OF PETITIONERS**

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## ARGUMENT

The Forest Preserve District of Will County (“Forest Preserve”) is dedicated to protecting, conserving, enhancing, and promoting Will County’s natural heritage for the educational, recreational, and environmental benefit of present and future generations. Forest Preserve District of Will County, About Us, <https://www.reconnectwithnature.org/About-Us/Contact-Us> (last visited Nov. 1, 2021).

As part of its mission to create recreational opportunities for Will County residents, the Forest Preserve provides canoe and kayak launches at several preserves, including four launches with access to the DuPage River from Hammel Woods, Riverview Farmstead Preserve, and McKinley Woods. Forest Preserve District of Will County, Canoeing/Kayaking, <https://www.reconnectwithnature.org/Activities/Canoeing-Kayaking> (last visited Nov. 1, 2021). The DuPage River has not been categorized by the Illinois Department of Natural Resources as a public, navigable water. See 17 Ill. Adm. Code 3704.Appendix A (listing Illinois navigable, public waters); Illinois Department of Natural Resource, Public Waters, <https://www2.illinois.gov/dnr/WaterResources/Pages/PublicWaters.aspx> (last visited Nov. 1, 2021).<sup>1</sup>

The appellate court’s opinion in *Holm v. Kodat*, 2021 IL App (3d) 200164, threatens the Forest Preserve’s ability to continue providing this valuable recreational opportunity to its community. The *Holm* decision adopts an overly narrow interpretation of this Court’s opinion in *Beacham v. Lake Zurich Prop. Owners Ass’n*, 123 Ill. 2d 227

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<sup>1</sup> The Forest Preserve also operates launches onto the Des Plaines River and the I & M Canal. Forest Preserve District of Will County, Canoeing/Kayaking, <https://www.reconnectwithnature.org/Activities/Canoeing-Kayaking> (last visited Nov. 1, 2021).

(1988), based on an unsupported distinction between nonnavigable lakes and rivers that discounts, without explanation, the recreational value of rivers to the citizens of this state. This Court should reverse and explicitly extend the civil law rule adopted in *Beacham* to nonnavigable rivers.

In general, riparian rights are the rights a property owner has to use the water when their property borders a body of water or a watercourse. *Holm*, 2021 IL App (3d) 200164, ¶ 18 (quoting *Alderson v. Fatlan*, 231 Ill. 2d 311, 318 (2008)). When a riparian owner’s property “extends to and bounds on a river, then the center of the river is the property line.” *Id.* ¶ 19.

“A riparian owner has ‘rights to the beds of all streams above the flow of the tide whether actually navigable or not.’” *Id.* ¶ 20 (quoting *Leitch v. Sanitary Dist. of Chi.*, 369 Ill. 469, 474 (1938)). Where the waters are navigable in fact, the public has an easement to use the waters for navigation. *Id.* If the waters are not navigable, there is no public easement. *Id.* ¶ 22. However, other riparian owners may still have a right to use the entire body of nonnavigable water depending on whether the so-called “common law” rule or “civil law” rule of riparian exclusivity rights applies. *Id.* ¶ 25.

“Under the common law rule, the owner of a part of a lake bed has the right to the exclusive use and control of the waters above that property.” *Beacham*, 123 Ill. 2d at 230-31. In other words, “the owner of a part of a lake bed may exclude from the surface of the overlying water all other persons, including those who own other parts of the lake bed.” *Id.* at 231. In contrast, the civil law rule adopted by this Court in *Beacham* recognizes that an owner of only part of a lake bed has the right to reasonably use and enjoy the *entire* lake surface. *Id.* *Beacham*, however, did not address whether the civil

law rule applied to nonnavigable rivers in addition to nonnavigable lakes.

**I. Applying the Civil Law Rule in this Case Logically Extends *Beacham* to Nonnavigable Rivers**

In this case, the appellate court refused to follow *Beacham* based on a legally irrelevant distinction between nonnavigable lakes and nonnavigable rivers. But *Beacham*'s rationale for adopting the civil law rule applies with equal force to the nonnavigable river at issue in *Holm*.

In *Beacham*, this Court held that “where there are multiple owners of the bed of a private, nonnavigable lake, such owners and their licensees have the right to the reasonable use and enjoyment of the surface waters of the entire lake provided they do not unduly interfere with the reasonable use of the waters by other owners and their licensees.” *Id.* at 232.

In its analysis, this Court explored the short-comings of the common law rule. For example, establishing and obeying definite property lines over lake waters is challenging. *Id.* at 231. And allowing landowners the exclusive rights over the surface waters can lead to “impractical consequences” like “the erection of booms, fences, or barriers.” *Id.* at 231-32. This Court found that the civil law rule, on the other hand, “promotes rather than hinders the recreational use and enjoyment of lakes.” *Id.* at 232. In ultimately concluding that the civil law rule was the preferable approach, this Court expressed its concern that applying the common law rule to “[r]estrict[] the use of a lake to the water overlying the owner’s lake bed property” would “only frustrate the cooperative and mutually beneficial use of that important resource.” *Id.*

These considerations likewise apply to nonnavigable rivers in Illinois. While the property boundaries on a river may be easier to determine compared to a lake, an

uncooperative property owner poses potentially greater obstacles to others' enjoyment of the river. Recreation on a river frequently involves recreational boats like canoes or kayaks, with individuals traveling from upstream to downstream along the river's route. Depending on the length and location of the river, recreational boaters may cross the surface waters of numerous riparian owners as they travel downstream.

Under the common law rule, if these boaters own property along a nonnavigable river, they cannot travel downstream without the consent of every other owner along the river's route through the duration of their trip. The appellate court recognized as much in *Holm*: “[I]t behooves property owners along nonnavigable bodies of water to maintain good relationships with their neighbors. Those relationships could determine whether, by permission or contract, a right of access is granted.” 2021 IL App (3d) 200164, ¶ 29. Thus, if just one property owner is uncooperative, that individual can potentially impede all other owners from sharing in the full recreational value of the river. Or more problematic, the property owner on one side of the river could permit access, while the owner on the other side does not, resulting in a crisscrossed and patchworked route for the boater. Such a result is impractical and threatens to diminish the value of property along nonnavigable rivers, particularly those rivers that are frequently used for recreational purposes.

Although both nonnavigable lakes and rivers provide an important natural resource for the owners abutting the waters, the appellate court in *Holm* found the difference between lakes and rivers significant enough to warrant separate rules for riparian exclusion rights. Yet it offered little analysis or explanation to support this distinction. According to the appellate court, “the public policy of promoting the

recreational use and enjoyment of an entire lake, by each partial owner of a lakebed and his or her licensees, does not equally apply to a narrow, nonnavigable river, like the Mazon River.” 2021 IL App (3d) 200164, ¶ 27. But the appellate court failed to discuss why the recreational use and enjoyment of a nonnavigable river apparently has less value than the recreational use and enjoyment of a nonnavigable lake.

Importantly, the navigability of a river in Illinois is not tied to its recreational uses; a river can be used frequently for boating, canoeing, or kayaking, but still not be “navigable.” Illinois common law applies a narrow definition of “navigability” that focuses on the water’s use for commerce, not recreation: “[A] river or stream is navigable in fact if it naturally, by customary modes of transportation, is ‘of sufficient depth to afford a channel for use in commerce.’” *Holm*, 2021 IL App (3d) 200164, ¶ 21 (quoting *Du Pont v. Miller*, 310 Ill. 140, 145 (1923)); see also Margit Livingston, *Public Recreational Rights in Ill. Rivers & Streams*, 29 DePaul L. Rev. 353, 356 (1980) (“This [navigability] test has turned out to be very restrictive as interpreted by Illinois courts. The cases have emphasized that a waterway is navigable only if it affords a channel for useful commerce.”).

As the appellate court acknowledged in *Holm*, a waterway is not navigable merely because it can support rowboats, small launches, or canoes. 2021 IL App (3d) 200164, ¶¶ 21, 28. Indeed, according to the appellate court, such considerations are “irrelevant” in the navigability analysis. *Id.* ¶ 28 (“[I]t is irrelevant, for purposes of determining navigability in fact, that the Mazon River can support kayaks.”).

The impact of the appellate court’s decision is potentially wide-reaching. Of the 87,110 miles of rivers and stream in Illinois, only approximately 30 rivers (or portions

thereof) are classified as navigable. See Illinois Department of Natural Resources, Illinois Rivers & Streams, <https://www2.illinois.gov/dnr/education/pages/ilriversstreams.aspx> (last visited Nov. 1, 2021) (“Illinois is bordered by 880 miles of rivers and has 87,110 miles of rivers and streams within its borders.”); 17 Ill. Admin. Code 3704. Appendix A (listing public, navigable waters). If the common law rule applies to all nonnavigable rivers in this state, owners on those rivers, including forest preserve districts, may only have the right to access the waters above their portion of the riverbed.

## **II. The Civil Law Rule Equitably Balances Riparian Rights with the Public Policy Supporting Recreational Use of Natural Waterways**

The civil law rule strikes the appropriate balance between allowing adjoining riparian owners the right to access the entire river while also protecting the property rights of the individual owners. Specifically, under the civil law rule, the use of the surface waters must be “a reasonable one that does not unduly interfere with the reasonable use of the lake by other owners and their licensees.” *Beacham*, 123 Ill. 2d at 232. Thus, if a riparian owner believes that an adjoining owner’s use of the river has become unreasonable—whether by excessive traffic, pollution, littering, noise, etc.—they are not without recourse.

Moreover, Illinois laws already provide ample protections to ensure that rivers are not abused. For example, under the Illinois Litter Control Act, 415 ILCS 105, it is a misdemeanor to discard trash “in any river, lake, pond, or other stream or body of water in this State.” 415 ILCS 105/4, 105/8. State agencies are also tasked with protecting the quality of Illinois rivers. The Illinois Department of Natural Resources is authorized “to take measures that are necessary” to prevent pollution and unsanitary conditions in “rivers, lakes streams, and other waters in this State that will promote, protect, and

conserve fauna and flora.” 20 ILCS 805/805-120. The Illinois Environmental Protection Agency likewise works to “ensur[e] that Illinois’ rivers, streams, and lakes will support all uses for which they are designated including protection of aquatic life, recreation, drinking water supply and fish consumption.” Illinois Environmental Protection Agency, Bureau of Water, <https://www2.illinois.gov/epa/topics/water-quality/Pages/default.aspx> (last visited Nov. 1, 2021).

Moreover, the Illinois Environmental Protection Agency and the Illinois Department of Natural Resources work cooperatively with three federal agencies—the U.S. Army Corp of Engineers, the U.S. Environmental Protection Agency, and the U.S. Department of Agriculture/Natural Resources Conservation Service—to help protect natural wetland resources. Illinois Department of Natural Resources, Wetlands, <https://www2.illinois.gov/dnr/conservation/Wetlands/Pages/default.aspx> (last visited Nov. 3, 2021).

### **III. The Civil Law Rule Furthers the Illinois Public Policy Recognizing Waterways as Recreational Resources**

The application of the civil law rule to nonnavigable rivers is further supported by Illinois’ well-established public policy favoring the use of waterways for recreational purposes. For example, the Illinois Recreational Use of Land and Water Areas Act is intended “to encourage owners of land to make land and water areas available to any individual or members of the public for recreational of conservation purposes by limiting their liability toward persons entering thereon for such purposes.” 745 ILCS 65/1. In the Recreational Trails of Illinois Act, the General Assembly declared that “[r]ecreation is an important industry in the State of Illinois and its growth should be encouraged,” 20 ILCS 862/5(1), and it authorized the Department of Natural Resources to “acquire land, waters,

structures, and interests in land, waters, and structures” for recreational trail projects, 20 ILCS 862/12(a). The Department of Natural Resources also is authorized to lease from private or public ownership “any lands or waters for the purpose of developing outdoor recreational areas for public use.” 20 ILCS 805/805-230.

The Department of Natural Resources itself notes the importance of waterways to Illinois recreation:

Water is the cornerstone of much of our recreation—from boating, canoeing and fishing to skiing, scuba diving and swimming. Fishing, hunting and trapping of aquatic life provide recreational opportunities and supplement the table with food and may provide fur for clothing. Many rivers and streams attract tourists and support area businesses.

Illinois Department of Natural Resources, Illinois Rivers & Streams,

<https://www2.illinois.gov/dnr/education/pages/ilriversstreams.aspx> (last visited Nov. 1, 2021).

Other courts that have adopted the civil law rule have emphasized the value of water-based recreation in their states. For example, in *Duval v. Thomas*, 114 So. 2d 791, 795 (Fla. 1959), the Florida Supreme Court underscored water’s strong connection to tourism in Florida in adopting the civil law rule:

Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find [in Florida]. If the enjoyment of non-navigable lakes were to be curtailed or restricted by a holding that the owner of a portion of one of them, and his guests, should enjoy the waters only within the property lines the damage would be immeasurable.

*Id.* at 795.

Likewise, in *Johnson v. Seifert*, 100 N.W.2d 689, 696-97 (Minn. 1960), the Minnesota Supreme Court described the application of the common law rule as illogical”

and acknowledged that the states that had adopted that rule had “few lakes or rivers of any value either to the public or to riparian owners.” *Id.* at 166-67.

Similarly, in *State Game & Fish Commission v. Louis Fritz Co.*, 193 So. 9, 11-12 (Miss. 1940), the Mississippi Supreme Court adopted the civil law rule, relying in part on the “immemorial usages, customs, and practices” of the state’s citizens as to “boating and fishing in the usual and ordinary modes and manners for sport, pleasure, and recreation.” See also *Botton v. Washington*, 420 P.2d 352 (Wash. 1966) (en banc) (adopting civil law rule); *Burt v. Munger*, 23 N.W.2d 117, 120 (Mich. 1946) (“The conclusion follows that defendant has the right to the use of the entire surface of the waters in St. Marys Lake for boating and fishing purposes.”).

In Illinois, rivers and streams are a cornerstone of outdoor recreation and a valued natural resource. Applying the civil law rule to nonnavigable rivers is a logical extension of *Beacham* and ensures that such waters are cooperatively shared among owners for their mutual benefit.

## CONCLUSION

For the above reasons, this Court should reverse the appellate court’s opinion in *Holm v. Kodat*, 2021 IL App (3d) 200164, and hold that the civil law rule for riparian rights applies to nonnavigable rivers.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages or words.

Respectfully submitted,

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