6-1-1987

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John E. Thorson, *The Use of "Nonnavigable" Water for Public Purposes*, *in* WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1987).

# THE USE OF "NONNAVIGABLE" WATER FOR PUBLIC PURPOSES

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Water as a Public Resource: Emerging Rights and Obligations

Natural Resources Law Center
University of Colorado School of Law
June 1-3, 1987

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I. Introduction

A. In the settlement of the West, water was important for domestic uses, mining, and agriculture.

B. Over the last few decades, other values are being recognized in water; and the prior appropriation doctrine is adapting accordingly.

1. Hydropower
2. Fish and wildlife
3. Water quality
4. Recreation

C. These changes have not come without problems and controversy. One area where controversy has been particularly volatile concerns public access to surface waters.

1. On the one hand are growing demands to use these waters for recreational purposes. Water-based recreation is an important and growing sector in the economies of our western states.
2. On the other hand are the expectations of many water users that certain of these waters (especially "nonnavigable" lakes and streams) are private.

D. Prof. Richard Hildreth has discussed public access in coastal setting. "Public Access to Shorelines and Beaches," *supra.*

E. This presentation examines the same issue as it pertains to inland rivers, streams, and lakes.

II. The distinction between navigable and nonnavigable waters

A. Importance of distinction: Navigable waters have been long recognized as available for public use. Nonnavigable waters have not.

B. Origins of the distinction.

1. Origins explain emphasis on navigability:

a. "[T]he common law of inland waterways has been dependent upon doctrines which came from the law concerning coastal waters, and coastal waters, in turn, owe their debt to the law of the sea itself." Stone, *Waters and Water Rights* § 37.1, at 202 (R.E. Clark ed. 1967).

b. Until recent years, public has not made sufficient demand for use of inland waters other than for commercial purposes. *Id.* at 203.

2. Navigability in American law first defined in context of admiralty jurisdiction. *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825)(jurisdiction extended only "upon the sea, or upon waters within the ebb and flow of the tide").

3. Navigability concept modified to extend admiralty jurisdiction to Great Lakes. *The Propellor Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851)("there can be no reason for admiralty power over a public tidewater, which does not

apply with equal force to any other public water used for commercial purposes and foreign trade").

4. In *Martin v. Waddell,* 41 U.S. (16 Pet.) 367 (1842), the U.S. Supreme Court determined that the 13 original states, rather than the federal government, succeeded to the British Crown's title to tidelands and the foreshore.

5. In *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), the U.S. Supreme Court held that, under the equal footing doctrine, each new state also took title to the streambeds of navigable waters.

6. In *The Daniel Bell,* 77 U.S. (10 Wall.) 557 (1870), the U.S. Supreme Court determined that navigable waters are those "used or . . . susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted . . . ." *Id.* at 563.

III. Modifications of the "navigability-nonnavigability" distinction

A. Development of "recreational use" test

1. Courts have modified the meaning of navigability to include public recreational uses.

2. *People v. Mack,* 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971)("[T]he real question here is not of title but whether the public has the right of fishing and navigation").

3. *Kelley ex rel. MacMullen v. Hallden,* 51 Mich. App. 176, 214 N.W.2d 856 (1974)("[R]ecreational uses alone can support a finding of navigability").

4. *State v. McIlroy,* 268 Ark. 227, 595 S.W.2d 659 (1980), *cert. denied,* 449 U.S. 843 (1980)(calling the commercially based navigability test a "remnant of the steamboat era").

5. Legislatures have also passed "angling statutes" authorizing fishing on navigable streams. *See, e.g.,* MONT. CODE ANN. § 87-2-305 (1985).

B. Development of public easement theory

1. *State v. Red River Valley Co.,* 51 N.M. 207, 182 P.2d 421 (1945)("[T]he waters in question were, and are, public waters . . . The right of the public, the state, to enjoy the use of the public waters in question cannot be foreclosed . . . .").

2. *Day v. Armstrong,* 362 P.2d 137 (Wyo. 1961)("The title to waters within the State being in the State, . . . there must be an easement on behalf of the State for a right of way through their natural channels . . . . The waters . . . are available for such uses by the public of which they are capable").

3. *Southern Idaho Fish & Game Ass'n v. Picabo Livestock Co.,* 96 Idaho 360, 528 P.2d 1295 (1974)("[T]itle to all water in Silver Creek belongs to the State of Idaho, . . . [and] there is an easement in the state on behalf of the public for a right of way through the natural channels of [the creek]").

4. *But see People v. Emmert,* 198 Colo. 137, 597 P.2d 1025 (1979)(rafters properly convicted of criminal trespass when they floated nonnavigable river crossing private land). The Colorado attorney general has attempted to limit this holding by an opinion that a trespass does not occur if the bank or

beds of a stream are not touched. Colo. Att'y Gen. slip op. (Aug., 31, 1983).

IV. The Montana case study

A. Montana is excellent case study of the controversies that surround efforts to increase public use of nonnavigable waters.

B. Early decision prohibited fishing in waters over a privately owned streambed . *Herrin v. Sutherland,* 74 Mont. 596, 241 P. 328 (1925).

C. During 1971-72 Constitutional Convention, delegates considered but rejected proposals to recognize the public trust in the environment and natural resources of the state. Proposal 12, 1 MONT. CONST. CONV. 308-09; Proposal 162, 2 MONT. CONT. CONV. 555.

D. While not adopting explicit public trust provisions, Montanans did ratify a constitution recognizing the broad public interest in its waters: "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." MONT. CONST. art. IX, §3(3).

E. Somewhat isolated controversies between certain landowners and recreationists on the Dearborn and Beaverhead Rivers developed into statewide controversy.

1. Montana Supreme Court adopted and broadly applied provisions of public trust doctrine, as well as provisions of state constitution. *Montana Coalition for Stream Access v. Curran,* __ Mont. __, 682 P.2d 163 (1984); *Montana*

*Coalition for Stream Access v. Hildreth*, __ Mont. __, 684 P.2d 1088 (1984).

a. Court adopts a recreational use test not linked to streambed ownership: " The capacity of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people." __ Mont. at __, 682 P.2d at 170.

b. Public has right to use state-owned waters up to the high water mark. *Id.* at __, 682 P.2d at 172.

c. Public is allowed to portage around barriers in water by entering private property is the least obtrusive way. *Id.*

d. Unequivocal statement that public does not have any right, other than portage, to enter private property. *Id.*

2. Legislative "clarification" of supreme court decision. MONT. CODE. ANN. §§ 23-2-301 to -322 (1985)("stream access law").

a. The act classifies rivers and streams (not lakes).

(1) Class I - waters navigable under traditional title or commercial use tests

(2) Class II - all other waters

b. The act imposes limitations on use of surface waters.

(1) For all rivers and streams, public use does not include all-terrain vehicles, big game hunting except by bow or shotgun, overnight camping within 500 yards or the site of an occupied dwelling, or passage when the bed is dry.

(2) Additionally for Class II waters, public use does not include big game hunting, overnight camping, or any activity which is not primarily a water-related pleasure activity.

c. The act authorizes the fish,wildlife, and parks commission to restrict public access on Class II waters not capable of sustaining recreational use.

d. The act provides a procedure for county officials, upon request, to determine portage routes.

3. The controversy extends into another round of litigation. *Galt v. Montana,* 44 St. Rep. 103 (Jan. 15, 1987).

a. Supreme court holds that "any use of the bed and banks must be of minimal impact." Court adopts a public easement approach and holds that the easement "must be narrowly confined so that impact to beds and banks owned by private individuals is minimal." *Id.* at 107.

b. Court also holds that statute is overbroad in allowing uses that are not necessary for the public's enjoyment of water (*e.g.,* overnight camping or placement of duck blinds on banks).

c. Court holds that requiring landowner to bear cost of constructing portage routes is unconstitutional.

4. The controversy extends into another round of legislation. S.B. 159 (Boylan), S.B. 286 (Galt), 50th Mont. Leg. Sess. (1987).

5. The controversy extends into a third round of litigation. Landowners file suits for refund of taxes paid on stream beds and banks now available for public use.

V. Development of a new approach for identifying and determining publicly important surface waters

A. The traditional tests based on concepts of navigability were sufficient for an earlier time when the public interest in waters was based on their contributions to commerce.

B. The "recreational use" test used by the courts in *Day, Curran,* and *Hildreth* updates the earlier test. The "recreational use" test, however, still does not focus the attention of decisionmakers on what really is at issue.

C. "Navigability" and "recreational use" are only imperfect proxies of certain public interests in surface waters. The challenge is to develop a new decision rule which more directly identifies and compares the public and private interests in certain surface waters. The public interest needs to be defined broadly to include recreation, aesthetics, the preservation of habitat, flows sufficient to protect fish and other water-dependent species, water quality, etc.

D. Certain factors should be explicitly identified and considered in determining whether a particular stream or lake is to be available for public use:

1. The customs and traditions of use of a particular waterway that have developed over time. *See* Sax, 14 U.C. DAVIS L. REV. (1980) ("settled expectations").
2. The extent of water appropriation including the amount of consumptive use and return flows.
3. The nature and importance of wildlife and habitat on any stream segment or lake front.
4. The demand being made for greater public use
   a. The extent of possible commercial activity
   b. The extent of possible noncommercial activity
5. The extent to which the state or local economy might be served by greater public use.
6. The burdens that would result to adjoining landowners from greater public use.

E. After consideration of these and other factors, the responsible state agency would determine

1. Whether a particular waterway should be designated "public"
2. What type of public designation should be made?
   a. Because of their dominant recreational potential, certain waterways would be opened to those uses.
   b. Because of their importance for wildlife values, certain waterways would be declared "public"; but

public access would be denied or conditioned as a means to preserve those values.

c. Other "public use" categories and conditions would be developed.

F. What is being proposed is a planning or zoning system for surface waters and their attendant beds and banks. *See* Abrams, *Governmental Expansion of Recreational Water Use Opportunities,* 59 OR. L. REV. 159 (1980) for excellent development of similar approach.

1. It is similar to the state wild and scenic river designation programs used by such states as California, New Mexico, Oregon, and the Dakotas. *See., e.g.,* CAL. PUB. RES. CODE § 5093.50 -.69 (West 1984).

2. It is also similar to the water reservation systems used by Montana, Alaska, and the Dakotas. *See, e.g.,* MONT. CODE ANN. § 85-2-316(1)(1985).

3. It would also protect some of the same values sought to be protected under instream flow programs. *See, e.g.,* COLO. REV. STAT. § 37-92-102.

G. What the prior appropriation doctrine and all these programs lack, however, is the ability to integrally manage all the values attendant to a waterway. A planning-zoning approach, for all its limitations, offers an improved means of achieving integrated water management.

VI. Problems of a planning or zoning-type approach to identifying and determining publicly important surface waters

A. The chief weakness (and greatest strength) of this method is that it requires the application of general principles and the balancing of public and private interests on a case-by-case basis.

B. The magnitude of an effort to review and categorize all surface waters of a state could well be an over-whelming task. Yet, most of the conflicts occur on a relatively few number of streams and lakes. If, however, a petition were required from a landowner, member of the public, or state agency to initiate the process, decisionmaking resources could be prioritized.

C. Many landowners and water users will resist what they see as another needless intrusion of government agencies.

D. Whether compensation will need to be paid

1. At what point will a zoning approach result in the taking of private property without compensation?

2. U.S. Supreme Court has yet to decide whether the payment of damages is required in the case of a taking or whether invalidation of the governmental action, as in excess of the police power, is an appropriate remedy.

3. The U.S. Supreme Court has before it this term three cases which raise the taking issue.

a. *Nollan v. California Coastal Comm'n,* No. 86-133 [lower court decision at 223 Cal. Rptr. 28 (2d Dist. 1986)]. In this case, the petitioners wanted to tear down an old house and build a new house on beach front property. The California Coastal Commission

required that the petitioners give public access across the ~~property to the~~ beach.

b. *First English Evangelical Lutheran Church v. Los Angeles,* No. 85-1199. The church's retreat center was destroyed by a flood in 1978. A county ordinance was passed to prevent building in that area due to the dangers of flood. The church claims money damages; but under state law, they are entitled only to declaratory relief or mandamus to invalidate the ordinance.

c. The third case, *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 55 U.S.L.W. 4326 (Mar. 9, 1987), has already been decided by the Court.

4. *Keystone* is a good analogy to the situation presented by public use of surface waters overlying private lands.

a. In a famous decision by Justice Holmes, the Court held in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), that a Pennsylvania statute prohibiting mining under certain structures constituted an unconstitutional taking.

b. Sixty-five years later, the Court in *Keystone* upholds a very similar Pennsylvania statute. The difference, however, is that the statute is now embellished with explicit statements by the legislature as to the public interests that are served by the prohibition: conservation of surface lands, safety, enhancement of taxable value, water preservation, and "generally

to improve the use and enjoyment of such lands." 55 U.S.L.W. at 4330.

c. One important basis for the Court's decision in *Keystone* is the difficulty of the coal company in demonstrating financial harm. The Court quotes approvingly from its decision in *Andrus v. Allard*, 444 U.S. 51 (1979): "'[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.'" 55 U.S.L.W. at 4334.

c. The zoning of publicly important waterways is more like *Keystone* than *Pennsylvania Coal.*

5. Another case to watch is *Ariyoshi v. Robinson,* 753 F.2d 1468 (9th Cir. 1985), *vacated,* 106 S. Ct. 3269 (1986), *now pending,* No. 85-5999 (9th Cir.), which involves a condemnation claim arising out of Hawaii's change of its water rights system in 1973. As a result, certain water rights which had been established as early as 1931 are no longer recognized by the state. A Ninth Circuit decision in favor of the water rigthts claimants has been vacated by the U.S. Supreme Court and ordered to be reexamined in light of the Supreme Court's decision in *Williamson Co. Regional Planning Comm'n v. Hamilton Bank.*, 105 S. Ct. 3108 (1985).

6. *See also Kaiser Aetna v. United States,* 444 U.S. 164 (1979)(when owners of private nonnavigable pond

connected it to navigable bay, government could not open pond to public without payment of compensation); *Loving v. Alexander,* 745 F.2d 861 (4th Cir. 1984)(U.S. Army Corps' determination that portion of river was navigable, contrary to belief of land owners, did not constitute a taking).

E. Mitigating the effects on private landowners

1. It is ironic that the present movement of western water is to allow water users to profit from the sale or lease of water that is described as publicly or state-owned in many state constitutions. Yet, at the same time, compensation may not be available when the public uses the private land under or adjoining many lakes and streams.
2. While increasing public use of waterways may not result in compensable injuries, there are equitable and public policy reasons for mitigating the effects of this transition.
3. State and local governments should acquire and develop more access and camping sites.
4. State and local governments will have to provide adequate law enforcement to ensure that the rights of upland landowners are respected.
5. State and local governments should provide financial assistance to needy landowners for fencing where needed, posting, and the construction of portage routes.

VII. Conclusion

A. Public access cases are difficult challenges in balancing public and private interests.

B. In addition to these public and private interests, there is the integrity and need of the water resource itself. It no longer makes much sense to management the water rights regime separately from the land through which these waters run or from the wildlife which depend on these waters.

C. The need is for integrated management of the lakes and streams in the western states.

D. Hopefully, traditional legal regimes will prove sufficiently flexible to make this accommodation. *See, e.g., Idaho Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) (state appropriation of certain waters for scenic beauty and recreational purposes).

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