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Recreational Use of Montana's Waterways: An Analysis of Public Rights

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COMMENTS

RECREATIONAL USE OF MONTANA'S WATERWAYS: AN ANALYSIS OF PUBLIC RIGHTS

I. INTRODUCTION

Montana is, and has been for generations, a paradise for outdoor recreation.[1] From the days of Lewis and Clark,[2] it was apparent that

1. "[Montana has] . . . recreational delights of more than 200 miles of truly 'Wild' free-flowing rivers unaccessible except by boat or trail, 450 miles of unspoiled 'Blue Ribbon' rivers, 1600 tributaries ranging from foaming mountain cataracts to meandering valley brooks and with a combined total of 11,000 miles of top-flight fishing waters, and 1500 lakes ranging from crystal clear mountain jewels, to small ponds, to inland seas 150 miles long." D. KONIZESKI, 1 THE MONTANAN'S FISHING GUIDE at v (1970) (citations omitted).

2. Captain Meriwether Lewis reported: "In the river we see a great abundance of fish, but we cannot tempt them to bite by anything on our hooks." Captain Lewis and the entire expedition were camped at the headwaters of the Missouri River near present-day Three Forks on July 29, 1805, when he made that entry into his journal. 2 LEWIS AND CLARK JOURNALS 14 (1904). Captain Lewis also reported that the "Gallatin River is however the most rapid of the three [Gallatin, Jefferson, and Madison Rivers], and though not quite as deep, yet navigable for a considerable distance." *Id.* at 13.

this state's waterways would be a haven for people who like to fish[3] and float.[4] This has caused an increased demand for recreation and has led to conflicts[5] and litigation.[6] While members of the public eagerly use waterways for recreation, many landowners have growing fears about damage to their land. Consequently, the problem has become one of balancing the rights of landowners against the desires of members of the public to fish and float on Montana's waterways.

The belief that the public has the right to use and enjoy water resources is a time-proven doctrine, honored throughout the ages.[7] Traditionally, American courts and legislatures have employed a strict standard of navigability to determine the public's right to use waterways.[8] If the waterway was navigable, anyone could use it for public purposes.[9] Gradually, courts and legislatures have backed away from this strict navigability standard in favor of a more flexible and usable public use standard.[10] The trend now is to include recreational use as a recognized public use.[11]

Conflicts between landowners and members of the public who desire to fish and float will worsen in the future because of increasing demand by recreationists for access to water coupled with the unsettled law in this area. Steps should be taken now to insure harmony among all parties. This comment will present suggestions for those steps and, in doing so, will discuss rights of the public to use Montana's waterways for recreational purposes.[12] It will begin with a discussion of historical navigability, and then treat modern trends of the courts in the area of recreational water use. This comment will argue that determination of public rights on Montana's waterways should be based upon

3. *E.g.*, 293,000 copies of the "1981-1982 Montana Fishing Regulations" were published.

4. *E.g.*, Fischer, *The Floater's Guide*, MONTANA OUTDOORS, May-June, 1977, at 19-35, lists twenty-seven rivers and describes them as Montana's most popular float streams.

5. *See, e.g.*, Lindler, *Floaters, landowners dispute is a needless one*, Great Falls Tribune, June 22, 1981, at 9-A, col. 1.

6. *E.g.*, the Montana Coalition for Stream Access, Inc. sued to have two rivers, the Dearborn and the Beaverhead, declared open for public recreational use. *Id.*

7. "The belief that water resources are a public asset, subject to a unique pattern of use and management runs in an almost unbroken line from Roman times to the present." Abrams, *Recreational Water Use*, 59 OR. L. REV. 159, 162 (1980) [hereinafter cited as Abrams] (presents a detailed history of public uses of water).

8. Stone, *Public Rights in Water*, in 1 WATERS AND WATER RIGHTS § 37.1 (R. Clark ed. 1967) [hereinafter cited as WATERS].

9. Abrams, *supra* note 7, at 167.

10. *See* Johnson and Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1 (1967) [hereinafter cited as Johnson and Austin].

11. Abrams, *supra* note 7, at 167.

12. This writing will update Professor Albert W. Stone's 1971 article *Legal Background on Recreational Use of Montana Water*, 32 MONT. L. REV. 1 (1971) [hereinafter cited as Stone].

a standard of potential significant recreational use, rather than a standard based upon navigability and title to beds of waterways.

II. NAVIGABILITY

As a general rule, the public has the right to use navigable waterways.[13] Therefore, any discussion of recreational water use must begin with a study of navigability. Navigability is not easily defined as it is a term that has several meanings.[14]

In describing navigability, it is best to examine various analytical tests used by courts. Early in the development of navigability standards in this country, American courts rejected the English test, based upon ebb and flow of tides, by labeling it inappropriate for this continent.[15]

Several general rules developed as courts became more comfortable defining navigability. For determination of title,[16] or when navigability must be defined for federal purposes[17] such as regulation of interstate commerce,[18] the so-called federal test applies. The federal test defines navigability generally as the capacity of a waterway for use as a highway for commerce.[19] For all other purposes, states may employ their own test,[20] which may be less restrictive than the federal test. Consequently, states have developed a wide variety of tests to determine navigability for various local purposes including recreation.[21] The Supreme Court expressly allowed states to make this determination in the 1912 case *Donnelly v. United States*.[22] The Court declared: "[W]hat shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states."[23]

13. Rich, *Managing Recreational Rivers*, 8 AKRON L. REV. 43 (1974) [hereinafter cited as Rich].

14. *Id.* at 1-33.

15. The U.S. Supreme Court expressly rejected the English test of navigability in The Daniel Ball, 77 U.S. (14 Wall.) 557. "The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters." *Id.* at 563.

16. *See* text accompanying notes 25-45 *infra*.

17. Some federal purposes are maritime jurisdiction, regulation under the commerce clause, and title disputes between state and federal governments. State v. McIlroy, 268 Ark. 227, 234, 595 S.W.2d 659, 663 (1980), *cert. denied*, 449 U.S. 843. *See also* Rich, *supra* note 13, at 46.

18. *See* text accompanying notes 46-56 *infra*.

19. The Daniel Ball, 77 U.S. (14 Wall.) 557 (1870).

20. Rich, *supra* note 13, at 46.

21. *See* text accompanying notes 62-106 *infra*.

22. 228 U.S. 243 (1912).

23. *Id.* at 262. *See also* Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (state law rather than federal common law applied to determine title to exposed land which was once under a navigable river); *noted in Supreme Court De-*

A. *The Federal Test*

The federal test is used for determination of navigability for federal purposes,[24] two of which are: determination of title to beds of waterways and regulation under the Commerce Clause.

1. *Determination of Who Holds Title to Beds*

As a general rule, those who own the bed of a waterway can dictate who may use its surface.[25] If the state owns the bed, the public has a right to use the surface.[26] Where the state owns the bed of a waterway, it holds it in trust for the use of the people.[27] If the bed is privately owned, then the public may have some rights to the use of the surface, depending upon local law.[28]

Navigability for purposes of determining title had its beginnings in the mid-nineteenth century. In the 1842 United States Supreme Court case *Martin v. Waddell*,[29] a controversy arose involving a dispute over title to tidal beds under navigable waters off New Jersey. The Court found that title to all tidal beds was originally in the British Crown and that each of the thirteen colonies succeeded to title of the tidal beds after American independence.[30] The Court said that after the Revolution, "the people of each state became themselves sovereign."[31] In that character, states "hold the absolute right to all their navigable waters and the soils under them for their own common use."[32]

The *Martin* doctrine was expanded three years later in *Pollard v. Hagen*,[33] when the Supreme Court applied it equally to all states, including those admitted after the original thirteen. The Court used an "equal footing"[34] rationale: "[T]he new states have the same rights, sovereignty, and jurisdiction over . . . [navigable waters] . . . as the original states."[35] The Court, in a long line of cases since then, has

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clares State Law Controls Riverbed Title Issues, 7 ENVTL. L. REP. (ENVTL. L. INST.) 10045 (1977).

24. Others include maritime and admiralty jurisdiction. *See generally* Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975) (discussion of navigability for purposes of exercising admiralty jurisdiction).

25. *See* Annot., 6 A.L.R.4th 1030, 1034 (1981).

26. Johnson and Austin, *supra* note 10, at 7.

27. Abrams, *supra* note 7, at 168.

28. Rich, *supra* note 13, at 50.

29. 41 U.S. (16 Pet.) 367 (1843).

30. *Id.* at 410.

31. *Id.*

32. *Id.*

33. 44 U.S. (3 How.) 212 (1845).

34. *See* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 415-18 (1971).

35. Pollard v. Hagen, 44 U.S. at 230.

applied the doctrine of state ownership of beds to non-tidal inland waters as well as to tidal waters.[36] These cases have established state ownership of lands beneath navigable waterways.[37]

In 1870, the Supreme Court decided the landmark case of *The Daniel Ball*.[38] Even though *The Daniel Ball* arose out of a question of Commerce Clause navigability,[39] it set the standard used today to determine navigability for purposes of deciding bed ownership.[40] The Court held that the test to be applied when deciding who holds title to the bed of a waterway is one based upon the waterway's capacity for commerce.[41] The Court, in an often-quoted passage, stated:

> *Those rivers must be regarded as public navigable rivers in law which are navigable in fact*. And they are navigable in fact when they are used, or *are susceptible of being used*, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[42]

While *The Daniel Ball* established the standard for determining navigability when the concept is used to define bed ownership, subsequent decisions have made important refinements in its application. For instance, navigability for title must be determined as of the date of statehood.[43] In 1926, in *United States v. Holt State Bank*,[44] the Supreme Court declared that navigability for purposes of determining *title* is a federal question and the federal test from *The Daniel Ball* should be used for its determination.[45]

2. *Commerce Clause*

Navigability for purposes of federal regulation under the Commerce Clause[46] arose out of the 1824 case *Gibbons v. Ogden*,[47] where

36. Stone, *supra* note 12, at 3 n.10 (citing United States v. Oregon, 295 U.S. 1 (1945); United States v. Utah, 283 U.S. 64 (1926); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); Packer v. Bird, 137 U.S. 661 (1891); Hardin v. Jordan, 140 U.S. 371 (1891); Barney v. City of Keokuk, 94 U.S. 324 (1876)).

37. Stone, *supra* note 12, at 3.

38. 77 U.S. (14 Wall.) 557 (1870).

39. *Id.* at 562-63.

40. United States v. Holt State Bank, 270 U.S. 49 (1926), solidified the test from *The Daniel Ball* as the standard to be used for purposes of determining bed ownership.

41. *See* Annot., 6 A.L.R.4th 1030, 1036 (1981).

42. The Daniel Ball, 77 U.S. at 563 (emphasis added).

43. United States v. Appalachian Electric Power Co., 311 U.S. 377, 408 (1940). *See also* Stone, *supra* note 12, at 3-4.

44. 270 U.S. 49 (1926).

45. *Id.* at 55-56.

46. U.S. Const. art. I, § 8, cl. 3.

47. 22 U.S. (9 Wheat.) 1 (1824).

the Court declared that Congress has power to regulate interstate commerce and may declare a waterway navigable for purposes of federal regulation.[48] Congress may regulate commerce on a waterway even if title to the bed of that waterway is held by a state.[49] Unlike navigability for purposes of determining title, navigability for purposes of regulation under the Commerce Clause need not be determined as of the date of statehood; it may be made at any time.[50] As with title navigability, several refinements were made in Commerce Clause navigability, most of them coming in the 1940 case *United States v. Appalachian Electric Power Co.*[51] In *Appalachian*, the Court held that a waterway is not barred from being declared navigable merely because improvements are necessary to make it suitable for commercial navigation.[52] *Appalachian* is confusing because the Court decided a Commerce Clause case but based its decision on title navigability. The Court in *Appalachian* thus left open the question of whether, for title navigability as well as Commerce Clause navigability, waters may be declared navigable when they can be made so with reasonable improvements.[53] Authorities tend to believe that *Appalachian* should only be applied for purposes of Commerce Clause navigability, and that for purposes of determining title, waters must be usable in their natural state without need of improvements.[54]

Appalachian further established the permanency of navigability: "[W]hen once found to be navigable, a waterway remains so."[55] The *Appalachian* Court also declared it is not necessary that use be continuous for navigability for purposes of regulation of commerce: "Even absence of use over long periods of years . . . does not affect the navigability of rivers in the constitutional sense."[56]

B. *Various State Tests*

Generally, state tests employ two different standards in determining navigability: "commercial use"[57] and "recreational use."[58]

48. *See also* Johnson and Austin, *supra* note 10, at 13-14.

49. Montana Power Co. v. Federal Power Comm'n, 185 F.2d 491 (1950).

50. Stone, *supra* note 12, at 5-6.

51. 311 U.S. 377 (1940).

52. *Id.* at 407.

53. *See* Johnson and Austin, *supra* note 10, at 17-19 (detailed discussion of *Appalachian*).

54. *Id.*

55. *Appalachian*, 311 U.S. at 408.

56. *Id.* at 409-10.

57. *See generally* Johnson and Austin, *supra* note 10, at 20-21.

58. *See generally* Stone, *supra* note 12, at 6-8.

1. *Commercial Use Standard*

Originally, states primarily used commercial use standards to determine navigability. Commercial use standards are consistent with the federal test established in *The Daniel Ball* because their primary criterion is the commercial capacity of a waterway. One early test to determine commercial capacity was the "saw-log" test, which uses as its basis the capacity of a waterway to float logs for commercial use.[59] The "saw-log" test remains the traditional method used today for determination of navigability by means of a commercial use standard.[60] Other states employ the more obvious tests based upon standards of use by cargo or passenger-carrying vessels.[61]

2. *Recreational Use Standard*

The need for a recreational use standard arose when states were faced with growing demand for recreational water use.[62] With the adoption of recreational use standards, the states may more easily declare rivers open for public recreational use.[63] Tests based upon recreational use standards may not be used for determination of who holds *title to the bed* of the waterway; they can only be used for determination of *use* of the waterway.[64]

Courts generally hold that waterways which have been declared navigable for determination of title[65] are open for public recreational use.[66] Similarly, if a waterway has been declared navigable for purposes of regulation under the Commerce Clause[67] or under a state test based upon a commercial use standard,[68] courts generally hold that the public has the right to use it for recreational purposes.[69] The problem, then, arises when a waterway has not been declared navigable for title purposes, for commercial use, or for regulation under the Commerce Clause. For waterways in this group, courts have created tests for determination of navigability based upon recreational use standards, which are different from traditional standards used for the federal test.

59. *See* Johnson and Austin, *supra* note 10, at 10-21 (analysis of saw-log test and its origins).

60. *See* Southern Idaho Fish & Game Ass'n. v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974) (evidence that persons floated logs with diameters in excess of six inches down creek supported finding that creek was navigable).

61. Rich, *supra* note 13, at 46.

62. *Id.* at 47.

63. Stone, *supra* note 12, at 7.

64. *See* Johnson and Austin, *supra* note 10, at 1 *passim*.

65. *See* text accompanying notes 25-45 *supra*.

66. Rich, *supra* note 13, at 45.

67. *See* text accompanying notes 46-56 *supra*.

68. *See* text accompanying notes 59-61 *supra*.

69. Rich, *supra* note 13, at 45.

States have adopted a variety of tests[70] for determination of navigability for recreational use because they are not bound to follow strict federal commercial capacity standards. Naturally, a different result may follow when a court uses one standard instead of another.

Many state courts have adopted some form of test for navigability utilizing a recreational use standard. The cases from these courts establish that a river is navigable for public recreational use without determining who holds title. One significant case, decided by the Arkansas Supreme Court in 1980, is *State v. McIlroy*.[71] Certiorari was denied that same year by the United States Supreme Court. The *McIlroy* court discarded the traditional test of navigability, based upon commercial value, calling it a "remnant of the steamboat era."[72] In its place, the court adopted a new state test for navigability based upon a recreational use standard.[73] The court explained its rejection of the traditional standard and adoption of a recreational use standard by saying that the previous decisions may not have "anticipate[d] such use of streams which are suitable . . . for recreational use."[74] The court held that the river in controversy was "navigable at that place with all the incidental rights of that determination."[75] *McIlroy* also holds that a river which can be used for a substantial portion of the year for recreational purposes is navigable.[76]

The Michigan Supreme Court utilized a recreational use standard in 1974 when it decided *Kelley ex rel. MacMullen v. Hallden*.[77] The court found that a test for navigability may be based solely upon a recreational use standard: "[R]ecreational uses alone can support a finding of navigability."[78] The court found that a river was navigable, even though there was no evidence of commercial use.[79] In doing so, it

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70. *See* text accompanying notes 71-106 *infra*.

71. 268 Ark. 227, 595 S.W.2d 659 (1980), *cert. denied*, 449 U.S. 843.

72. *Id.* at 236, 595 S.W.2d at 664.

73. *Id.* at 237, 595 S.W.2d at 665 (navigability decided for use and not for determination of who holds title).

74. *Id.* at 237, 595 S.W.2d at 665. The court based its holding in part upon the decision in Barboro v. Boyle, 119 Ark. 377, 178 S.W. 378 (1915), a case which anticipated recreational use of waterways. The *McIlroy* court described the anticipation of recreational use by the *Barboro* court as "almost prophetic." *McIlroy*, 268 Ark. at 235, 595 S.W.2d at 664. The language from *Barboro* emphasized by *McIlroy* is: *"[T]he waters of the lake might be used to a much greater extent for boating, for pleasure, for bathing, fishing and hunting than they are now used." Id.* at 236, 595 S.W.2d at 664 (emphasis added by *McIlroy*). *But see McIlroy*, 268 Ark. at 240, 595 S.W.2d at 666 (Fogelman, J., dissenting) (criticism of the majority's use of *Barboro*).

75. *McIlroy*, 268 Ark. at 237, 595 S.W.2d at 665.

76. *Id.*

77. 51 Mich. App. 176, 214 N.W.2d 856 (1974).

78. *Id.* at 184, 214 N.W.2d at 860.

79. *Id.* at 183, 214 N.W.2d at 860.

abandoned the strict commercial test of navigability developed in the nineteenth century: "[W]e must . . . strive to mold the concept of navigability to the needs of the later 20th century."[80] In Michigan, even if a waterway is found to be navigable, title to the bed is vested in the riparian owner subject to public rights of fishing and navigation.[81] Therefore, title to the bed is not an issue.

Kelley involved a Michigan fishing statute which provides: "That in any of the navigable waters of this state . . . the people shall have the right to catch fish with hook and line . . . ."[82] Plaintiffs in the case instituted this action to have the river declared navigable so that the public rights created by that statute could be enforced.[83]

In 1975, the Court of Appeals of Ohio in *State ex rel. Brown v. Newport Concrete Co.*,[84] mandated that courts use a recreational use standard in determining navigability: "We hold that the modern utilization of our waters by our citizens requires that our courts, in their judicial interpretation of the navigability of such waters, consider their recreational use as well as the more traditional criteria of commercial use."[85] The court in *Brown* made the important distinction between determinations of the usage of the waterway and who holds title to the bed of the waterway. In doing so, the court did not declare that *title to the bed* was in the state, but held that the public has a right to *use the water*. The court stated: "[T]he fundamental question here is *not* whether the defendant has *title* to the soil under the water, but whether the river at this location can be determined from the facts presented to be a 'navigable' stream, and therefore subject to the general public use for navigation purposes."[86] The court found that the stream was navigable and, therefore, subject to general public use.[87]

The California Court of Appeal addressed the question of navigability in two cases decided in the 1970's. The court looked to a recreational use standard both in *People v. Mack*,[88] and the later case of *Hitchings v. Del Rio Woods Recreation and Park District*.[89] The *Mack* court made the distinction between title issues and use issues when it declared: "[T]he real question here is not of title but whether the pub-

80. *Id.* at 179, 214 N.W.2d at 858.
81. *Id.* at 185, 214 N.W.2d at 860.
82. *Id.* at 177, 214 N.W.2d at 857 (citation of MICH. COMP. LAWS § 307.41 (1981) (MICH. STAT. ANN. § 13.1681 (Callaghan 1981))).
83. 51 Mich. App. at 177-78, 214 N.W.2d at 857.
84. 44 Ohio App. 2d 121, 336 N.E.2d 453 (1975).
85. *Id.* at 127, 336 N.E.2d at 457.
86. *Id.* at 124, 336 N.E.2d at 455 (emphasis added).
87. *Id.* at 127-28, 336 N.E.2d at 457.
88. 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971). *See generally* Case Comment, People v. Mack: *A Sportman's Definition of Navigability*, 3 ENVTL. L. 68 (1973).
89. 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976).

lic has the right of fishing and navigation."[90] *Mack* established a test for navigability which included "waters . . . which are capable of being navigated by oar or motor propelled small craft."[91]

Hitchings expanded *Mack* to include waterways that are navigable for only part of a year. The river at issue was navigable for only nine months each year. The court said this was "a sufficient period to make it suitable, useful and valuable as a public recreational highway for most of the year, and therefore it is navigable in law."[92]

In the 1974 case *Southern Idaho Fish & Game Association v. Picabo Livestock Co.*,[93] the Idaho Supreme Court found that a waterway which flows through privately-owned land was navigable and could be used for recreational purposes. The dispute in *Picabo* arose when the defendant-landowner ordered several fishermen, who were fishing from boats in the creek where it flowed through his land, to leave because they did not have permission to be there.[94] The plaintiff then brought an action for declaratory judgment to have the court determine the rights the parties involved.[95] *Picabo* is significant because the court utilized a recreational use standard[96] in addition to the traditional floating-log standard[97] in determining navigability.[98] In finding that the creek was navigable, the supreme court adopted the trial court's definition of navigability: "Any stream which, in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable."[99] The supreme court said: "In so holding, the trial court reasoned that in accordance with modern authorities, the basic question of navigability is simply the suitability of a particular water for public use."[100]

The court based its decision partially upon the public water doctrine.[101] The court found that "title to all water in Silver Creek belongs to the State of Idaho, . . . and that there is an easement in the state on behalf of the public for a right of way through the natural channels of [the creek]."[102]

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90. 19 Cal. App. 3d at 1051, 97 Cal. Rptr. at 454.
91. *Id.*
92. 55 Cal. App. 3d at 571, 97 Cal. Rptr. at 837.
93. 96 Idaho 360, 528 P.2d 1295 (1974).
94. *Id.* at 361, 528 P.2d at 1296.
95. *Id.* at 361, 528 P.2d at 1296.
96. *Id.* at 362, 528 P.2d at 1297.
97. *Id.* at 361-62, 528 P.2d at 1296-97. *See also* text accompanying notes 59-60, *supra*.
98. *Id.* at 362-63, 528 P.2d at 1297-98.
99. *Id.* at 362, 528 P.2d at 1297.
100. *Id.* at 362-63, 528 P.2d at 1297-98.
101. *See generally* text accompanying notes 107-25 *infra*.
102. 96 Idaho at 362, 528 P.2d at 1297.

Picabo is also significant for its interpretation of Idaho's former fishing statute, which is similar to Montana's current fishing statute.[103] The former Idaho statute, repealed in 1976, provided in part: "Navigable rivers, sloughs or streams . . . shall . . . be public highways for the purpose of angling or fishing . . . subject to the right of any person owning a fish license of this state . . . ."[104] In analyzing public rights in light of this statute, *Picabo* established that the public's right to use the creek "extended not only to the incidents of fishing . . . but also boating, swimming, hunting, and all recreational purposes."[105]

As these cases show, states may employ a test based upon a recreational use standard for determination of public rights to use water in a waterway, but may not employ such a test for determination of who holds title to the bed of a waterway.[106]

III. WATER IS HELD BY THE STATE FOR PUBLIC USE

Authorities tend to agree that ownership of water is vested in the sovereign and is held in trust for use of the people.[107] The western states particularly have taken a protective view of the waters within their borders.[108] This is evidenced by language in various state constitutions or statutes granting ownership of water to the people.[109]

This section will discuss public rights in non-navigable waterways.[110] The theory here is that since the waters are publicly owned, the public has the right to use the waters even though they may flow over land which is held privately.[111] The supreme courts of New Mexico, Wyoming, and Missouri have decided cases based upon the belief "that waters do not belong to the owners of the land through which they flow; they belong to the public."[112]

The New Mexico case, *State v. Red River Valley Co.*,[113] decided in 1945, involved a declaratory action brought by the state to determine whether it could open waters flowing over private land for public fish-

103. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 87-2-305 (1981) (section text provided at note 165 *infra*).

104. Idaho at 362, 528 P.2d at 1297 (citation of IDAHO CODE § 36-901 (repealed 1976)).

105. *Id.* at 362, 528 P.2d at 1297.

106. United States v. Holt State Bank, 270 U.S. 49 (1926) (mandated that the federal test apply when determining title).

107. Abrams, *supra* note 7, at 171-72.

108. *See* WATERS, *supra* note 8, at 240.

109. Professor Stone catalogs language from statutes and constitutions of eighteen western states dealing with ownership of water. All of the provisions listed still in effect use the terms "public" or "people" in their description of ownership. *Id.* at 242-44.

110. *See generally* Annot., 6 A.L.R.4th 1030 (1981).

111. Abrams, *supra* note 7, at 162.

112. Stone, *supra* note 12, at 8.

113. 51 N.M. 207, 182 P.2d 421 (1945).

ing. The New Mexico Supreme Court held that fishing is a beneficial use. It stated: "[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 . . . ."[114]

The Wyoming Supreme Court took a similar approach in the 1961 case *Day v. Armstrong*,[115] which arose out of a dispute involving a non-navigable river. In describing the rights of the public, the court stated: "[R]iparian ownership to the center of nonnavigable streams need not necessarily materially interfere with and does not necessarily prevent the State's use of waters for purposes for which they are adaptable and to which they may be put for the equal benefit of all members of the public."[116] The court in *Day* summarized: "Irrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this State for floating usable craft and that use may not be interfered with or curtailed by any landowner."[117] The court analyzed the language from the state constitution and stated: "[O]ur Wyoming Constitution declares that all natural streams, springs, lakes, or other collections of still water . . . are property of the state."[118] However, the court stated that even though members of the public had the right to float the river, they did not have the right to unrestricted use of the river bed: "[I]n using the State's waters for floating, the public is not privileged, except as incidental to such use, to violate other property rights of riparian owners."[119] The court explained:

> 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. When waters are able to float craft, they may be so used.[120]

The Missouri Supreme Court extended the "public water" doctrine the furthest of any jurisdiction.[121] In *Elder v. Delcour*,[122] the court held that members of the public have the right to wade in a non-navi-

114. *Id.* at 228, 182 P.2d at 434.
115. 362 P.2d 137 (Wyo. 1961).
116. *Id.* at 144.
117. *Id.* at 145.
118. *Id.*
119. *Id.* at 146 (express refusal to adopt holding in Elder v. Delcour, 241 Mo. App. 839, 263 S.W.2d 221, *rev'd* 364 Mo. 835, 269 S.W.2d 17 (1954), which allowed wading or walking upon the bed).
120. *Id.* (citations omitted).
121. *See* Johnson and Austin, *supra* note 10, at 46. *Cf.* Day, 362 P.2d at 146, where the Wyoming court specifically rejected the Missouri rule from *Elder*.
122. 364 Mo. 835, 269 S.W.2d 17 (1954).

gable waterway, the bed of which is privately owned.[123] The court, in holding that the defendant-wader had not trespassed, stated: "[W]e must and do hold that the waters of the Meramec River are public waters and *the submerged area of its channel* over and across appellant's farm *is a public highway* for travel and passage by floating and by wading, for business or for pleasure . . . ."[124]

Elder is significant because the court not only found that people have the right to use the surface of the water in a waterway for recreational use, but also the right, in some cases, to use the bed of the waterway for purposes such as wading.[125] Thus, *Elder* goes one step beyond *Day* and holds that people have a right to use beds of privately-owned waterways in addition to the surfaces.

In a Colorado decision contrary to the above three cases, *People v. Emmert*,[126] the Colorado Supreme Court found that a group of floaters were properly convicted of criminal trespass[127] when they floated in a raft down a non-navigable river crossing a privately owned ranch.[128] Even though they touched the riverbed to aid in floating, they did not leave their rafts or touch any dry land owned by the ranch.[129] The court rejected the contention of the defendant-floaters[130] that they lawfully floated through the ranch as a matter of right under authority of the Colorado Constitution.[131] The court based its rejection of the constitutional argument on the premise that Colorado waters are public property only for "the right of appropriation in this state."[132] The court rejected the reasoning of the Wyoming court in *Day*, and stated that the Wyoming Constitution does not mention appropriation.[133] The analysis used by the court in *Emmert* seems to indicate that the decision was based upon property law,[134] not water law, as were the

123. *Id.* at 848, 269 S.W.2d at 27.

124. *Id.* at 847, 269 S.W.2d at 26 (emphasis added).

125. *Id.*

126. 198 Colo. 137, 597 P.2d 1025 (1979).

127. *Id.* at 139, 597 P.2d at 1026.

128. *Id.*

129. *Id.*

130. *Id.* at 140, 597 P.2d at 1027.

131. COLO. CONST. art. XVI, § 5 is under the heading "IRRIGATION" and is entitled: "Water of streams public property." It provides:

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

132. 198 Colo. at 141-42, 597 P.2d at 1027-28.

133. *Id.* at 142-43, 597 P.2d at 1028.

134. The common law rule holds that he who owns the surface of the ground has the exclusive right to everything which is above it ("*cujus est solum, ejus est usque ad coelum*"). This fundamental rule of property law has been recognized not only judicially but also by our General Assembly . . . .

three decisions discussed above.

Emmert's significance is its rejection of the defendant-floaters' contentions that they had a right under the Colorado Constitution to use the waters in the river for recreational purposes. It is the minority view of the small number of states who have considered the question. *Red River, Day*, and *Elder* represent the majority view holding that the public has the right to use waters flowing within their state for recreational purposes, regardless of bed ownership.[135]

IV. MONTANA'S SITUATION

The law in Montana with respect to the public's rights to use waterways has not been clearly defined. This has caused some misunderstanding regarding individual rights,[136] which is not surprising because Montana has no statute and only a few court opinions defining the rights of recreationists on Montana's waterways.[137] The Montana Legislature has declared that all navigable waterways are public ways, although they do not specifically mention recreation as a public purpose.[138] The Montana Department of Fish, Wildlife, and Parks, however, does use navigability in defining public rights in waterways.[139] This section will examine public recreational water use rights in light of the law in Montana.

A. *Navigable Waterways*

Throughout the years, Montana courts and the legislature, as well as others, have provided definitions of navigable waterways.[140] Montana statutes define navigable waters, beginning first with navigable

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Id. at 140-41, 597 P.2d at 1027.

135. *See* text accompanying notes 112-25 *supra*.

136. The Montana Department of Fish, Wildlife, and Parks distributes a brochure entitled "Montana's Popular Floating Streams" (1977) in which it warns:

> Most Montana rivers—even some of the most popular streams—flow through private land. Some floaters incorrectly assume all land between high water marks is, in essence, public land. Unfortunately, most river beds are legally classed as private land. Floaters can be cited for trespassing if they leave their crafts.

137. *See* Stone, *supra* note 12, at 17-18.

138. MCA § 85-1-111 (1981) provides in pertinent part: "Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purpose of navigation and such transportation."

139. The Montana Department of Fish, Wildlife, and Parks advises people on the public's right to the use of waterways based upon whether the waterway has been declared navigable. Conversation with LeRoy Ellig, Regional Supervisor of the Montana Department of Fish, Wildlife, and Parks, in Bozeman, Mont. (Sept. 17, 1981) [hereinafter cited as Ellig].

140. One of the first definitions of navigability was provided by Captain Meriwether Lewis when he reported that the "Gallatin River is however the most rapid of the three [Gallatin, Jefferson, and Madison], and though not quite as deep, yet navigable for a considerable distance." 2 LEWIS AND CLARK JOURNALS 13 (1904).

lakes: "All lakes . . . which have been meandered[141] . . . and all lakes which are navigable in fact are hereby declared to be navigable and public waters."[142] Navigable rivers and streams are those "which have been meandered . . . and all . . . which are navigable in fact."[143]

The Montana Supreme Court, over eighty-five years ago in *Gibson v. Kelly*,[144] defined navigable waterway: "[A] stream navigable in fact is navigable in law."[145] This standard follows the strict test for navigable waterways and is consistent with the federal test.[146] Since *Gibson*, the court has never been called upon to define navigable waterway in a recreational use case. The controversy in *Gibson* was a title dispute[147] and not a dispute over recreational water use. This leaves open the possibility that the court will follow the modern trend and adopt a less restrictive recreational use standard for determination of navigability when confronted with a dispute over recreational water use.

Navigable waterways have been defined in the Opinions of the Attorneys General in Montana. In 1931, the Attorney General rejected a "canoe test" for determining navigability.[148] The same opinion suggested that the "meander test" should apply for determination of navigability.[149] This seems to be consistent with the statutory definition of

141. Meander lines are lines on a survey map which define the banks of waterways. Supposedly, if the surveyor thought that a waterway was important enough, *i.e.* navigable, then the surveyor would indicate that waterway with meander lines. Otherwise, the surveyor would ignore the waterway and draw the township and section lines across the waterway. There are very few meandered waterways in Montana. Interview with Professor Albert W. Stone, Professor of Law, University of Montana, in Missoula, Mont. (Oct. 13, 1981).

142. MCA § 85-1-112 (1981) provides:

> (1) All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all lakes which are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable streams or public waters. (2) All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all rivers and streams which are navigable in fact are hereby declared to be navigable.

143. *Id.*

144. 15 Mont. 417, 39 P. 517 (1895).

145. *Id.* at 422, 39 P. at 519.

146. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

147. 15 Mont. at 417-18, 39 P. at 518.

148. 14 MONT. OP. ATT'Y GEN. 195, 196 (1931).

149. A navigable stream is a stream which is considered capable of floating the produce of the country to market; this might include timber and in a sense no doubt the streams in question might be considered navigable streams for the purpose above mentioned. . . . [A] better test would be as to whether or not the land bordering on the stream has been meandered.

Id. The opinion, citing Faucett v. Dewey Lumber Co., 82 Mont. 250, 266 P. 646, defines meander lines as "merely for the purpose of determining the amount of land for which the owner originally paid the United States." 14 MONT. OP. ATT'Y GEN. 195, 196 (1931).

navigable waterways.[150] However, the U.S. Supreme Court has questioned the accuracy of the meander test for determination of navigability because government surveyors who made the meander lines were "not clothed with power to settle questions of navigability."[151] Another Attorney General, in 1954, defined navigable waterways by using a definition harmonious with the federal test of navigation: "[A]ll streams, capable of floating logs or which have floated logs to the mill or market are . . . navigable in fact."[152]

By statute, Montana has declared that the state is owner of all land below navigable waterways.[153] Title to the beds of all navigable waterways passed to the state at the time of statehood.[154] Under a principle called the "Public Trust Doctrine,"[155] the state owns the beds of navigable waterways and holds them in trust for use by the people.[156]

B. *High and Low Water Marks*

After the American Revolution, the states succeeded to ownership of land beneath navigable waters and were permitted to determine for themselves whether the ownership extended to the high water mark or to the low water mark.[157] States admitted after the original thirteen were also permitted to make this determination because they have the same sovereignty as the original thirteen.[158] In 1895, Montana, by both statute[159] and court decision,[160] opted for state ownership of the bed

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150. MCA § 85-1-112 (1981).

151. Oklahoma v. Texas, 258 U.S. 574, 585 (1922) *noted in* Stone, *supra* note 12, at 5 n.25.

152. [A]ll streams, capable of floating logs or which have floated logs to the mill or market are by the enactment of Chapter 95, Laws of 1933 [Now codified as MCA § 85-1-112 (1981)] made navigable in fact . . . . [T]he legislature has by the above enactment allowed all streams in the above category to be navigable in fact, and that the access provisions of the code immediately apply.

25 MONT. OP. ATT'Y GEN. 179, 181 (1954).

153. MCA § 70-1-202 (1981) provides: "The state is the owner of—(1) all land below the water of a navigable lake or stream . . . ."

154. Montana v. United States, 450 U.S. 544, 553-57 (1981) (applied to the bed of the Big Horn River in Montana).

155. YANNACONE, COHEN, & DAVISON, 1 ENVIRONMENTAL RIGHTS AND REMEDIES § 2:3 (1972) [hereinafter cited as YANNACONE] (good discussion of the Public Trust Doctrine).

156. *Id.* at 2:3, at 16.

157. Seven states elected the low water mark while six chose the high water mark. *Id.* at 17.

158. *Id.* § 2:3, at 18.

159. MCA § 70-16-201 (1981) provides:

Except where the grant under which the land is held indicated a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at *low-water mark*; when it borders upon any other water, the owner takes to the middle of the lake or stream. (emphasis added).

The statute was enacted in 1895, the same year as Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895).

only to the low water mark.[161]

Since water is always moving, the determination of exactly where a high or low water mark falls is difficult to make. The Montana Supreme Court has never defined either term, but Montana Attorneys General have struggled with high water marks throughout the years. For instance, in 1942, the Attorney General defined "high water mark" as:

> [T]he line which defines that part of the bed of a navigable stream which . . . is submerged so long as so frequently in ordinary seasons that vegatation does not grow upon it; the great annual rises of the river . . . or any unusual floods do not have any effect . . . upon the location of the high water mark . . . .[162]

While Montana is silent on the question, authorities tend to agree that determinations of high and low water marks are questions to be decided by the trier of fact.[163]

Even though riparian and littoral landowners may own to the low water mark of a navigable waterway, the public has an easement on the strip between the high and low water marks for recreational purposes. The court in *Gibson*, albeit dictum, stated: "It is true that, while the abutting owner owns to the low water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river and upon the strip in question."[164] Furthermore, a Montana statute[165]

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160. Gibson v. Kelly, 15 Mont. 417, 422, 39 P. 517, 519 (1895). The court discusses what is now MCA § 70-16-201 (1981): "We refrain from an elaborate presentation of our grounds for this holding . . . for the reason that the rule thus announced by decision will become in a few months the rule by statute." 15 Mont. at 422, 39 P. at 519.

161. *But see*: The Montana Attorney General in 1911, only sixteen years after the adoption of the statute and case declaring state ownership only to the low water mark, took the position that the state owned the land between the high and low water marks. 4 MONT. OP. ATT'Y GEN. 61 (1911). Attorney General Albert J. Galen said that: "[T]he state [has] ownership and control of land between high and low water mark and that comprising the bed of navigable streams or lakes . . . ." *Id.* However, in 1925, the Montana Supreme Court again affirmed the original doctrine that the state's ownership extends only to the low water mark. Herrin v. Sutherland, 74 Mont. 587, 595, 241 P. 328, 331 (1925).

Authorities have questioned whether a state has the power to give up ownership of land under a navigable waterway including that between the high and low water marks. *See generally* YANNACONE, *supra* note 155, § 2:3. The holding in *Gibson*, 15 Mont. at 422, 39 P. at 519 was based largely upon what is now MCA § 70-16-201 (1981), which was adopted from California (CAL. CIV. CODE § 830 (West 1954)). *See* Comment, 12 U.C.D. L. REV. 125 (1979) (arguing that the true boundary in California, notwithstanding the statute, is the high water mark because of persuasive precedent supporting this position).

162. 19 MONT. OP. ATT'Y GEN. 631, 633 (1942).

163. *E.g.*, Anderson v. Ray, 37 S.D. 17, 26, 156 N.W. 591, 594 (1916); GOULD ON WATERS § 76, at 150 (1900).

164. Gibson, 15 Mont. at 423, 39 P. at 519.

165. MCA § 87-2-305 (1981) provides in pertinent part:

Navigable rivers, sloughs, or streams between the *lines of ordinary high water*

provides that navigable waterways between "the high water flow lines" shall be subject to the right of any person owning an angler's license who desires to fish along those banks.[166]

C. *Montana's Application of the Public Water Doctrine*

Like most western states,[167] Montana has a constitution providing for state ownership of all water within the state: "All surface,[168] 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."[169] The delegates to the 1972 Montana Constitutional Convention specifically intended this language to insure that the ownership of the water would forever be vested in the state for the use of the people.[170] This feeling was so strong that the delegates rejected an amendment which would

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thereof of the state of Montana . . . shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the *high water flow lines* . . . shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks . . . ." (emphasis added).

166. *See generally* text accompanying notes 82-83 and 103-05 *supra*.

167. *See* note 109 *supra*.

168. The term "surface" as used in this context means all water above ground including that found in waterways. Interview with Professor Albert W. Stone, Professor of Law, University of Montana, in Missoula, Mont. (Oct. 9, 1981). *Cf.*, a second definition of "surface" waters: "[T]hat water which is diffused over the ground from falling rains or melting snows and continues to be such until it reaches some bed or channel in which water is accustomed to flow." Fordham v. Northern Pac. Ry., 30 Mont. 421, 430, 76 P. 1040, 1043 (1904).

169. MONT. CONST. art. X, § 3(3). The language in the constitution is substantially different from that found in the 1889 constitution. The 1889 language was: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use . . . shall be held to be a public use." MONT. CONST. art. III, 15 (1889).

170. Charles B. McNeil, member, Committee on Natural Resources and Agriculture, 1972 Constitutional Convention, explained the language as follows:

> The source of that language we considered carefully. We carefully considered Colorado's, which has been upheld by the U.S. Supreme Court and it says the water belongs to the people. We had four delegate proposals introduced. Two of them said it belonged to the state and two of them said it belonged to the people. So, I said it belonged to the state for the use of the people.

6 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT OF PROCEEDINGS 4037. (March 2, 1972). [hereinafter cited as TRANSCRIPT].

The actual language in the Colorado Constitution is "public," not "people." COLO. CONST. art. XVI, § 5. (full text of this provision at note 131 *supra*).

The official comment of the committee on this issue was:

> Subsection (3) is a new provision to establish ownership of all waters in the state subject to use by the people. This does not in any way affect the past, present or future right to appropriate water for beneficial uses and is intended to recognize Montana Supreme Court decisions and guarantee the state of Montana standing to claim all of its water for use by the people of Montana in matters involving other states and the United States government.

MONTANA CONSTITUTIONAL CONVENTION COMMENTS, COMMITTEE ON NATURAL RESOURCES AND AGRICULTURE 10-11 (1972).

have eliminated the words "for the use of its people" from that section.[171] Apparently, it was the intention of the delegates that recreational use was one of the uses to be protected.[172]

The Montana Supreme Court considered public use of a non-navigable waterway in 1925 in *Herrin v. Sutherland*.[173] In *Herrin*, a man waded from the navigable Missouri River into a non-navigable stream.[174] The court found that the man trespassed when he waded on the bed of a privately owned creek.[175] The court said: "It would seem clear that a man has no right to fish where he has no right to be."[176] However, *Herrin* was decided well before the adoption of Montana's 1972 constitution.[177] The court did not have the opportunity to determine the rights of the public to use publicly owned water for recreational purposes as have courts in other states with similar constitutional provisions.[178]

The Montana Supreme Court through the years has emphasized that water use within the state is a "public use."[179] Although the court has never called recreational use of water a "public use," it has hinted that it could easily do so.[180]

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171. TRANSCRIPT, *supra* note 170, at 4042-43. Delegate Cedor B. Aronow, who wrote the amendment stated his concern was that the words "for the use of its people" would imply a right of access over private lands to the waterways. *Id.* at 4018. Delegate McNeil assured him that was not the intention. *Id.*

172. Delegate Aronow, author of the amendment discussed in note 171 *supra*, acknowledged that *use* of waterways should be allowed. TRANSCRIPT, *supra* note 170, at 4022. In a question-answer exchange with Convention Chairman Leo Graybill, Jr., Aronow explained:

> CHAIRMAN GRAYBILL: Do I understand it to be the sense of your remarks, which are of course in the record here, that a rancher could fence a fishing stream, a river, so that I couldn't fish or boat or go up and down that river?
>
> DELEGATE ARONOW: No, that is not the sense of my remarks. You can go up and down that stream all you want to. The only thing is you can't drive across the rancher's land willy-nilly in order to get to it. You can go along county roads or wherever there's access. You certainly may boat. You may hike up and down that stream.

Id.

173. 74 Mont. 587, 241 P. 328 (1925). *But see* Stone, *supra* note 12, at 10-12 (criticism of the holding in *Herrin*).

174. *Id.* at 590, 241 P. at 329.

175. *Id.* at 596, 241 P. at 331.

176. *Id.*

177. The constitution became effective July 1, 1973, replacing Montana's original constitution adopted in 1889.

178. *See* text accompanying notes 112-34 *supra*.

179. *See* HUTCHINS, THE MONTANA LAW OF WATER RIGHTS 1-3 (1958).

180. In Paradise Rainbow v. Fish & Game Comm'n, 148 Mont. 412, 421 P.2d 717 (1966), the court said: "Under the proper circumstances, we feel that such a public interest [in water] should be recognized." *Id.* at 418-20. *See* Stone, *supra* note 12, at 16-18 (discussion of *Paradise Rainbow*).

D. *Navigable Waters Subject to Fishing Rights*

In 1933, the Montana Legislature[181] enacted what is now section 87-2-305 (the fishing statute) of the Montana Code. It provides that all navigable waterways shall be open for fishing to anyone owning an angler's license.[182] It appears to include fishing while floating as well as fishing from the bank.[183] Through this statute, the legislature has mandated that the public may use navigable waterways for recreational fishing.

As noted above,[184] Montana's fishing statute[185] is similar to Idaho's former fishing statute.[186] In *Southern Idaho Fish and Game Association v. Picabo Livestock, Inc.*,[187] the Idaho Supreme Court interpreted that statute[188] to mean that the public could use navigable waterways for "boating, swimming, hunting, and all recreational purposes" as well as fishing.[189]

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181. House Bill 259 was introduced by the Committee on Fish and Game and assigned to that committee on February 10, 1933. It went through the legislative process and was signed by the governor on March 7, 1933 enacting what is now MCA § 87-2-305 (1981). House Journal 1933. The bill generated almost no public comment at the time. Letter from Bob Clark, Montana Historical Society Librarian, to author (Sept. 21, 1981) [hereinafter cited as Clark letter]. The minutes of the Fish and Game Commission from September 27, 1932, indicate a possible reason for the introduction of the bill:

> [Commissioner William] Steinbrenner presented a letter addressed to him from Mr. Frank Woody, Helena attorney. Mr. Woody explained that there is a new situation on the Madison River which needs attention. For a distance of about five miles, property owners on both sides of the Madison River have posted their property against trespassing, and will not allow fishermen thereon unless they pay a fee of $1.00 each. This practice is most objectionable, and Mr. Woody presented a bill for the consideration of the Commission, to be presented to the Legislature prohibiting the practice of charging fishermen to enter property. [State Fish and Game Warden and Secretary of the Commission Charles B.] Marrs was authorized to write Mr. Woody that the question will be given consideration by the Commission. Copies of this bill were furnished the Commissioners. Mr. Marrs reported that he had requested from the Attorney General an opinion as to whether the property owner has the right to make such a charge, and to so post his property.

Minutes, Montana Fish and Game Commission 245 (Sept. 27, 1932). Apparently, the attorney general did not issue the opinion requested. Clark letter, *supra*.

182. This section in full provides:

> Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof of the state of Montana and all rivers, sloughs, and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an angler's license of this state who desires to go therein or along their banks to go upon the same for such purpose.

MCA § 87-2-305 (1981).

183. *Id.*

184. See text accompanying note 103 *supra*.

185. MCA § 87-2-305 (1981).

186. IDAHO CODE § 36-901 (repealed 1976).

187. 96 Idaho 360, 528 P.2d 1295 (1974).

188. IDAHO CODE § 36-901 (repealed 1976).

189. 96 Idaho at 362, 528 P.2d at 1297.

Section 87-2-305 of the Montana Code[190] was the subject of a controversy in a Montana state district court case where a fisherman sued a landowner to enforce his rights thereunder. In *Martin v. Hintzpeter*[191] a case tried before a jury in Gallatin County in 1960, a fisherman wanted to fish on the banks of the Gallatin River where it flowed through a private landowner's property.[192] The plaintiff contended the river was navigable[193] while the landowner insisted it was not.[194] In returning a plaintiff's verdict,[195] the jury found that the Gallatin River was navigable[196] and, therefore, open for fishing to anyone with a fishing license.

E. *Specific Navigable Waterways*

Over the years, many waterways in Montana have been declared navigable by decisions of various courts. Waterways and the decisions finding them navigable are:

Missouri River—*Herrin v. Sutherland*,[197] *United States v. Eldredge*,[198] and *Montana Power Company v. Federal Power Commission*.[199]

Gallatin River—*Martin v. Hintzpeter*,[200] and *Montana Wilderness Association v. Board of Health and Environmental Sciences*.[201]

Flathead Lake—*Faucett v. Dewey Lumber Co.*[202]

Yellowstone River—*Roe v. Newman*.[203]

Big Horn River—*Montana v. United States*.[204]

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190. MCA § 87-2-305 (1981).

191. Nos. 14166 and 14167 (Mont. 18th Judicial Dist. Gallatin County 1960).

192. Complaint at 1, *Id.*

193. *Id.*

194. Answer at 1, Nos. 14166 and 14167 (Mont. 18th Judicial Dist. Gallatin County 1960). The presiding judge refused to give defendant's proposed jury instruction number 2, which stated: "You are instructed that the Gallatin River is not a navigable stream."

195. Judgement at 2, Nos. 14166 and 14167 (Mont. 18th Judicial Dist. Gallatin County 1960). Even though the jury found for the plaintiff, they awarded him no damages. *Id.*

196. Jury Instruction No. 10 read as follows: "You are instructed that a navigable stream or river is one capable of being used in its ordinary condition by the public at all times or periodically during the year for times long enough to make it susceptible of beneficial use to the public as a means of transportation." Nos. 14166 and 14167 (Mont. 18th Judicial Dist. Gallatin County 1960). The jury found that the Gallatin River was navigable; therefore, plaintiff had a right to fish there.

197. 74 Mont. 587, 241 P.2d 328 (1925).

198. 33 F. Supp. 337 (1940).

199. 185 F.2d 491 (1950).

200. Nos. 14166 and 14167 (Mont. 18th Judicial Dist. Gallatin County 1960).

201. Nos. 37664 and 37154 (Mont. 1st Judicial Dist. Lewis and Clark County 1974).

202. 82 Mont. 250, 255, 266 P. 646, 647 (1928).

203. 162 Mont. 135, 139, 509 P.2d 844, 846 (1973).

204. 450 U.S. 544 (1981).

F. *Legislative Activity*

Montana's Legislature has discussed recreational water use in almost every session during the 1970's, even though no legislation has been enacted.[205] The subject provokes a great deal of interest throughout the state.[206] For example, a bill introduced in 1975,[207] which was defeated, would have provided that streams and rivers having a certain mean annual flow may be utilized for recreational uses.[208]

G. *Other Aspects*

Montana law allows the state to reserve waters for "existing or future beneficial uses."[209] The law also permits the Department of Fish, Wildlife, and Parks to acquire land for recreational access sites.[210]

Another approach that has been taken in the area of recreational use of waterways is prescription and dedication.[211] Prescription is the acquisition of an easement by adverse usage while dedication is the appropriation of an easement for the use of the public. These are traditionally areas of property law, but they have been used in relation to water law in such cases as beach access in California.[212]

Another area worthy of note is access rights to waterways. In *Herrin v. Sutherland*, the Montana Supreme Court in dictum stated that the public might have an easement over private land to "public land."[213] This would enable the public to have access over private land to get to public waterways. This concept, however, is beyond the scope of this writing and has been discussed elsewhere.[214]

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205. Telephone interview with Representative Herb Huennekens, Montana House of Representatives (Dec. 26, 1981).

206. *Id.*

207. House Bill 79, 44th Mont. Legislature (1975).

208. *Id.*

209. MCA § 85-2-316 (1981).

210. MCA § 87-2-316 (1981). *See also* MCA § 23-1-102 (1981). The Department of Fish, Wildlife, and Parks no longer has the right of eminent domain to acquire such sites as it did prior to October 1, 1981. The 1981 Legislature eliminated that power from the Department. Act of Apr. 1, 1981, ch. 230, 1981 Mont. Laws 235 and Act of Apr. 17, 1981, ch. 418, 1981 Mont. Laws 727.

211. *See generally* WATERS, *supra* note 8, at 16-18.

212. *See generally* Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970) (discussion of prescription and dedication as applied to California beaches).

213. If it be conceded also that by reason of the fact that he had no way of reaching the public land except by going across plaintiff's ranch, and therefore the law provided for him a way by necessity under the doctrine laid down in Herrin v. Seiben, 46 Mont. 226, 127 P. 323, the defendant has not shown that he availed himself of his remedy.

Herrin v. Sutherland, 74 Mont. 587, 600, 241 P. 328, 333 (1925).

214. WATERS, *supra* note 8, § 38.

V. SUGGESTED SOLUTIONS

As we look toward the future with its increased population and increased demand for recreational opportunities, it becomes apparent that Montana should determine for all time the rights of the public to use the state's water resources for recreation. This determination should be done now while Montana still has an abundant supply of water available for the use of its people.[215]

In order to aid in this determination, the archaic methods of navigability and bed ownership should be eliminated and replaced with a system based on opportunity for reasonable public use.[216] Courts of several other states have adopted such standards, noted elsewhere in this comment, which should serve as models for Montana. For instance, in determining public rights on a waterway, the Montana court should set up a uniform standard to judge public rights. The court should begin with the premise that that water is owned by the state and is held in trust for the use of the people. It should then determine if the waterway is available for significant public use. This can be done by adopting one of the standards discussed above. Whatever the standard, it should be based upon the waterway's capability for significant recreational use. This designation would allow the court to reasonably determine which waterways should be open for public use and could protect all parties involved in the use of Montana's waterways. It would insure the rights of the public as well as guaranteeing the rights of landowners.

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215. Several authorities have discussed recreational use in terms of its amenity values. *See generally* R. STROUP, M. COPELAND, R. RUCKER, ESTIMATION OF AMENITY VALUES AS OPPORTUNITY COSTS FOR ENERGY RELATED WATER USE IN MONTANA (Report No. 81, Montana University Joint Water Resources Research Center, Dep't of Agricultural Economics and Economics, Montana State University, August, 1976); Abrams, *supra* note 7 at 193-94.

216. *See* Abrams, *supra* note 7, at 160-61; Stone, *supra* note 12, at 17-18, and Ellig, *supra* note 139 (advocating a standard based upon suitability).