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# Riparian Rights, Navigability, and the Equal Footing Doctrine in Montana

Dennison A. Butler

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## **Riparian Rights, Navigability, and the Equal Footing Doctrine in Montana**

**Dennison A. Butler\***

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### I. INTRODUCTION

The exact location of property boundaries is vitally important. Typically, a property boundary can be determined through the use of a credible land surveyor. If the survey markers can be found, the boundary survey can be used for decades, even centuries.<sup>1</sup> However, unlike non-riparian land boundaries, riparian land is unique due to the ephemeral nature of the property boundaries that change on a daily basis. As such, a body of law has developed to provide guidance.<sup>2</sup> This analysis will

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1. *E.g.*, a Boundary Stone from 12 A.D. set the boundary between water rights in China. *The Boundary Stone of Han Dynasty in Suma Bay*, CHINADAILY.COM.CN, [http://www.chinadaily.com.cn/regional/2015-05/18/content\\_2075\\_0795.htm](http://www.chinadaily.com.cn/regional/2015-05/18/content_2075_0795.htm) (last visited Oct. 21, 2016).

2. *E.g.*, Roman law widely recognized riparian boundaries and the public's right to the navigable waters. THOMAS COLLETT SANDARS, *THE INSTITUTES OF JUSTINIAN* 158 (William Gardiner Hammond ed. & trans., 1876).

discuss the different bodies of law that have developed to address these ever changing boundaries in Montana

## II. EQUAL FOOTING DOCTRINE

Concerning tidal waters in the original thirteen states, the United States Supreme Court held in *Martin v. Waddel*, that “[w]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.”<sup>3</sup> As additional states were admitted into the Union, the federal government granted each sovereign state title to all submerged beds of navigable waters contained within their borders under the Equal Footing Doctrine.<sup>4</sup> This was done to allow all states subsequently admitted to be on “equal footing” with the original thirteen states concerning tidal waters.<sup>5</sup> The U.S. Supreme Court subsequently extended this principal to non-tidal waters up to the high water mark.<sup>6</sup> To reaffirm this idea, Congress enacted the Federal Submerged Lands Act of 1953.<sup>7</sup> Once again confirming that the federal government vested in each state all “title to and ownership of the lands beneath navigable waters within the boundaries of the respective States.”<sup>8</sup>

The ownership is reaffirmed by the precursor to Montana Code Annotated § 70-1-202 which declared in 1894 that “[t]he [S]tate is the owner of . . . all land below the water of a navigable lake or stream.”<sup>9</sup> Montana was admitted into the Union on November 8, 1889. As of that date, the State of Montana is owner in fee simple of all submerged lands located under navigable waters within the borders of the State, subject to Congress’s power to regulate interstate commerce.<sup>10</sup>

Prior to statehood, the federal government only claimed ownership of waterways used and regulated for commerce, or

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3. *Martin v. Waddel*, 41 U.S. 367, 367 (1842).

4. *Pollard v. Hagan*, 44 U.S. 212, 231 (1845).

5. *Id.* at 216.

6. *Barney v. Keokuk*, 94 U.S. 324, 325 (1877); *see also* *State v. Mogen*, 993 P.2d 699 (Mont. 2000) (holding the high water mark is the absence of vegetation).

7. 43 U.S.C. § 1311(a) (2012).

8. *Id.*

9. CODES AND STAT. OF MONT., tit. II, § 1091 (1895).

10. U.S. CONST. art. I, § 8, cl. 3; *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926).

“navigable” waterways.<sup>11</sup> As such, the State of Montana did not obtain title from the federal government for waterways that were non-navigable.<sup>12</sup> For non-navigable waterways, Montana Code Annotated § 70-16-201 and § 70-20-201 direct that the riparian landowners bordering the water each own to “the middle of the lake or stream.”<sup>13</sup> As such, the first step in determining ownership is establishing if the waterway is “navigable” for title purposes.

### III. TESTS FOR NAVIGABILITY

Federal determination of “navigability” serves many different purposes. The three most typical being: (1) to confer admiralty jurisdiction,<sup>14</sup> (2) to define Congress’s reach under the Commerce Clause,<sup>15</sup> and (3) to grant title under the Equal Footing Doctrine.<sup>16</sup> Although the tests for navigability all stem from the same seminal cases, each purpose has developed a different progeny of cases that results in differences in application. This is reiterated by the U.S. Supreme Court holding that:

among the differences in application are the following. For state title under the equal-footing doctrine, navigability is determined at the time of statehood, and based on the ‘natural and ordinary condition’ of the water. In contrast, admiralty jurisdiction extends to water routes made navigable even if not formerly so (artificial canal); and federal regulatory authority encompasses waters that only recently have become navigable, were once navigable but are no longer, or are not navigable and never have been but may become so by reasonable improvements.<sup>17</sup>

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11. Pollard v. Hagan, 44 U.S. 212, 229 (1845).

12. MONT. CODE ANN. § 70-16-201 (2015).

13. Andersen v. Monforton, 125 P.3d 614 (Mont. 2005).

14. The Robert W. Parsons, 191 U.S. 17, 51 (1903).

15. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 404 (1940); U.S. CONST. art. I, § 8, cl. 3.

16. Alaska v. United States, 563 F. Supp. 1223, 1225 n.3 (D. Alaska 1983); Utah v. United States, 403 U.S. 9, 10 (1971).

17. PPL Mont., LLC v. Montana, 565 U.S. 576, 592 (2012) (internal citations omitted).

A good example is *Minnehaha Creek Watershed District v. Hoffman*, where the United States Court of Appeals for the Eighth Circuit held that a waterway was navigable in regards to title, but not navigable in regards to the Federal Rivers and Harbors Act.<sup>18</sup> Furthermore, courts have more liberally construed the test when determining Congress's reach under the Commerce Clause.<sup>19</sup> Therefore, only cases that have determined navigability for title purposes under the Equal Footing Doctrine are included below and should be reviewed in determining title.<sup>20</sup>

Whether a waterway is navigable is a question of federal law.<sup>21</sup> The U.S. Supreme Court held that the "basis for the equal-footing doctrine, under which a state's title to these lands was 'conferred not by Congress but by the Constitution itself.'" <sup>22</sup> The navigability test for title is set forth in *The Daniel Ball*, which holds that "[t]hose 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."<sup>23</sup>

Furthermore, the test if a waterway is navigable is at the time of statehood.<sup>24</sup> Therefore, a Montana waterway is "navigable" for title purposes if on November 8, 1889 it was either (1) used as a highway for commerce, or (2) susceptible in its ordinary condition for being used as a highway for commerce.<sup>25</sup> The State can establish title to the beds of active waterways by satisfying either condition.

The U.S. Supreme Court in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.* held that:

the determination of the initial boundary between a riverbed, which the state acquired under the equal-footing doctrine, and riparian fast lands likewise be decided as a matter of federal law rather than state law.<sup>26</sup> But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the state at

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18. *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627–28 (8th Cir. 1979).

19. *Rapanos v. United States*, 547 U.S. 715, 724 (2006).

20. *PPL Mont.*, 565 U.S. at 598.

21. *United States v. Holt State Bank*, 270 U.S. 49, 55–56 (1926).

22. *PPL Mont.*, 565 U.S. at 591 (quoting *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

23. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

24. *United States v. Oregon*, 295 U.S. 1, 14 (1935).

25. *The Daniel Ball*, 77 U.S. at 557.

26. *Corvallis Sand & Gravel Co.*, 429 U.S. at 376.

the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State.<sup>27</sup>

In *PPL Montana, LLC v. Montana*, the U.S. Supreme Court clarified this test by holding that a river or waterway will be looked at for navigability through a “segment-by-segment” approach.<sup>28</sup> Therefore, depending on the waterway, the state may have only been granted portions with waterfalls, rapids, or other unique features that eliminate the susceptibility for use as a highway for commerce in 1889. This has become important in recent years due to minerals located under certain river segments and also because of power generating facilities that have been constructed.<sup>29</sup> Royalty and lease payments are often millions of dollars a year in revenue for states.<sup>30</sup>

In order to demonstrate that a waterway was susceptible for use as a highway for commerce, courts will look at what could have been “conducted in the customary modes of trade and travel on water.”<sup>31</sup> Furthermore, “a river need not be susceptible of navigation at every point during the year” but “neither can that susceptibility be so brief that it is not a commercial reality.”<sup>32</sup> The navigability of a river is also unaffected by seasonal changes as the river need not “be open at all seasons of the year, or at all stages of the water.”<sup>33</sup> And finally, portaging around obstructions such as waterfalls or rapids, where such portaging interferes with the river’s usefulness for trade and travel for commerce may defeat navigability for title purposes on that segment of river.<sup>34</sup>

#### A. Steam Boat Test

The U.S. Supreme Court has consistently held that evidence of use by a steam boat in the transportation of goods and people is enough to establish a waterway as navigable.<sup>35</sup> For example, in *The Daniel Ball*, the U.S. Supreme Court held a waterway to be navigable based on the

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27. *Id.*

28. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 593 (2012).

29. *Id.* at 594–95.

30. *Id.* at 588.

31. *Id.* at 591–92.

32. *Id.* at 602–03.

33. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921); *see also Alaska v. United States*, 891 F.2d 1401 (9th Cir. 1989); *United States v. Utah*, 283 U.S. 64, 83 (1931).

34. *PPL Mont.*, 565 U.S. at 598–99.

35. *The Daniel Ball*, 77 U.S. 557, 564 (1870).

use by a steam boat that carried 123 tons of merchandise and passengers a distance of forty miles and was able to “draw only two feet of water.”<sup>36</sup> In this context, “draw” refers to “the depth of water necessary to operate the ship without grounding.”<sup>37</sup> Therefore, the Court held that although there was only two feet of water, the presence of passengers and merchandise was enough to establish navigability. This is reiterated in *United States v. Utah*, where the Court discussed extensively the use of boat trips and ferries as a basis for establishing navigability for title.<sup>38</sup>

### B. Log Floating Test

In *St. Anthony Falls Water-Power Co. v. Board of Water Commissioners of City of St. Paul, Minnesota*, the U.S. Supreme Court held that to be navigable “it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream.”<sup>39</sup> In that case, the Court found a stretch of the Mississippi River navigable. Although not traversable by all boats, “it was always used for logs with shuts [sic]” and the rapids were used “for the purpose of running shallow boats and for floating logs.”<sup>40</sup> Furthermore, the Court in *United States v. State of Utah*, used evidence that lumber and lumber rafts were transported along a section, as a basis for concluding that the stretch of river was navigable.<sup>41</sup>

The Montana Supreme Court has approved the log-floating test in *Montana Coalition for Stream Access, Inc. v. Curran*, holding that “[n]avigability in fact under federal law can be determined by the log-floating test.”<sup>42</sup> In that case, the Montana Supreme Court found the Dearborn River to be navigable based on approximately 100,000 railroad ties that were floated down prior to statehood and about 700,000 board feet floated down just after statehood.<sup>43</sup>

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36. *Id.*

37. The Dictionary of English Nautical Language Database: search results, SEA TALK NAUTICAL DICTIONARY (Mar. 6, 2017), <http://www.seatalk.info/cgi-bin/nautical-marine-sailing-dictionary>.

38. *Utah*, 283 U.S. at 82–83.

39. *Saint Anthony Falls Water-Power Co. v. Bd. of Water Comm'rs of City of Saint Paul, Minn.*, 168 U.S. 349, 359 (1897).

40. *Id.*

41. *Utah*, 283 U.S. at 79.

42. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 166 (Mont. 1984).

43. *Id.*

Among others, the log-floating test has been utilized to establish navigability for title by the Oregon Court of Appeals,<sup>44</sup> Michigan Supreme Court,<sup>45</sup> the Washington Supreme Court,<sup>46</sup> United States Court of Appeals for the Second Circuit,<sup>47</sup> United States Court of Appeals for the Seventh Circuit,<sup>48</sup> United States Court of Appeals for the District of Columbia Circuit,<sup>49</sup> and the United States Court of Appeals for the Ninth Circuit.<sup>50</sup>

### C. Recreational Use Test

Evidence of recreational use today may be relevant to establish that a waterway was navigable at the time of statehood.<sup>51</sup> However, the U.S. Supreme Court held that “[a]t a minimum . . . the party seeking to use present-day evidence for title purposes must show: (1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river’s poststatehood condition is not materially different from its physical condition at statehood.”<sup>52</sup>

For example in *United States v. Appalachian Electric Power Co.*, the U.S. Supreme Court held that “personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”<sup>53</sup> Further, in *Hardy v. State Land Board*, the Oregon Court of Appeals reiterated that “recreational boating and fishing use on the upper portion of the river is properly considered under the federal ‘susceptibility’ test.”<sup>54</sup>

44. *Hardy v. State Land Bd.*, 360 P.3d 647, 661 (Or. Ct. App. 2015), *review denied*, 368 P.3d 25 (Or. 2016).

45. *Rushton ex rel. Hoffmaster v. Taggart*, 11 N.W.2d 193, 197 (Mich. 1943).

46. *Monroe Mill Co. v. Menzel*, 77 P. 813, 815 (Wash. 1904).

47. *Conn. Light & Power Co. v. Fed. Power Comm’n*, 557 F.2d 349, 356 (2d Cir. 1977).

48. *Wisconsin v. Fed. Power Comm’n*, 214 F.2d 334 (7th Cir. 1954).

49. *Mont. Power Co. v. Fed. Power Comm’n*, 185 F.2d 491, 494 (D.C. Cir. 1950).

50. *Or. By & Through Div. of State Lands v. Riverfront Prot. Ass’n*, 672 F.2d 792, 795 (9th Cir. 1982); *Conn. Light & Power Co.*, 557 F.2d 349; *North Dakota v. Andrus*, 671 F.2d 271 (8th Cir. 1982).

51. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 600–01 (2012).

52. *Id.*

53. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940); *United States v. Utah*, 283 U.S. 64, 82 (1931).

54. *Hardy v. State Land Bd.*, 360 P.3d 647, 660 (Or. Ct. App. 2015), *review denied*, 368 P.3d 25 (Or. 2016); *see also* *Alaska v. United States*, 662 F. Supp. 455, 468 (D. Alaska 1987), *aff’d*, *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th



*D. American Indians, Fur Traders, and Trappers*

The U.S. Supreme Court has also discussed use by American Indians, fur traders, and trappers in determining if a waterway was navigable for title purposes. In *The Montello*, the Court discussed the historical use of a waterway by American Indians,<sup>55</sup> trappers, and fur traders.<sup>56</sup> Another good example of this is *Alaska v. United States*, in which the United States District Court for the District of Alaska held a river to be navigable based largely on the historical use by Alaska Natives who traded fur on the waterway.<sup>57</sup>

*E. Hydroelectric Generation Test*

The hydroelectric generation test has not been utilized by the courts, but is the opinion of the author. In recent years, multiple hydroelectric plants have been involved in litigation concerning the navigability of waterways.<sup>58</sup> The navigability of a waterway often results in millions of dollars a year in lease payments to the state in which the dam is located.<sup>59</sup>

The U.S. Supreme Court has held that for title purposes “evidence must be confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood.”<sup>60</sup> The Court has also held that “the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce.”<sup>61</sup> Furthermore, the Court has held that “[e]vidence of present-day use may be considered to the extent it informs the historical determination whether the river

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Cir. 1989); *S. Idaho Fish & Game Ass’n v. Picabo Livestock*, 528 P.2d 1295 (Idaho 1974); *State ex rel. Brown v. Newport Concrete Co.*, 336 N.E.2d 453, 475 (Ohio Ct. App. 1975); *Meunch v. Pub. Serv. Comm’n*, 53 N.W.2d 514 (Wis. 1952).

55. *The Montello*, 87 U.S. 430, 438 (1874).

56. *Id.* at 432.

57. *Alaska*, 662 F. Supp. at 467; *see also Utah*, 283 U.S. at 81 (Used by early explorers to establish a waterway’s navigability for title purposes.).

58. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 600 (2012); *Bingenheimer v. Diamond Iron Mining Co.*, 54 N.W.2d 912 (Minn. 1952); *Muckleshoot Indian Tribe v. Fed. Energy Regulatory Comm’n*, 993 F.2d 1428 (9th Cir. 1993); *FPL Energy Me. Hydro LLC v. Fed. Energy Regulatory Comm’n*, 287 F.3d 1151 (D.C. Cir. 2002); *City of Centralia, Wash. v. Fed. Energy Regulatory Comm’n*, 851 F.2d 278 (9th Cir. 1988).

59. *PPL Mont.*, 565 U.S. at 581.

60. *Id.* at 600.

61. *Utah*, 283 U.S. at 86.

segment was susceptible of use for commercial navigation at the time of statehood.”<sup>62</sup>

The generation and transition of electrical energy is undisputed commerce, which is one of the reasons title to the navigable waterways were granted to the States. The Court has repeatedly held that “[t]here is no question that the interstate transmission of electric energy is subject to the commerce powers of Congress.”<sup>63</sup>

In 1886, approximately 45 hydroelectric power stations existed in the United States and Canada.<sup>64</sup> By 1889, there were approximately 200 hydroelectric power stations in the United States alone.<sup>65</sup> Hydroelectric power generation was widely available and used when Montana became a state, and it is an undisputed type of commerce.<sup>66</sup> If a hydroelectric power generation facility was built in a location, it is often the case that it could have been built in that location at statehood. Therefore, in the opinion of the author, a hydroelectric facility built on a section of river is prominent evidence that the portion of river was susceptible for commerce at statehood. Since the flow of water necessary to produce hydroelectric power is the best evidence in and of itself to show navigability for title purposes.

#### IV. LAKES

Due to their inherent nature, lakes have developed a slightly different test for navigability than rivers. The U.S. Supreme Court has determined navigability by reviewing either whether the lake was connected by rivers such that it was “treated as a public highway”<sup>67</sup> or if the lake itself was sufficient to support commerce.<sup>68</sup>

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62. *PPL Mont.*, 565 U.S. at 600.

63. *Fed. Power Comm’n v. Union Elec. Co.*, 381 U.S. 90, 94 (1965).

64. Nat’l Hydropower Ass’n, *History of Hydro*, HYDRO.ORG, <http://www.hydro.org/tech-and-policy/history-of-hydro/> (last visited Nov. 17, 2016).

65. *Id.*

66. *Fed. Power Comm’n*, 381 U.S. at 94.

67. *The Montello*, 87 U.S. 430, 441 (1874); *see also* *State v. Adams*, 89 N.W.2d 661, 677 (Minn. 1957) (The lakes in question were nonnavigable because they had “not been used for commerce and do not provide practical routes for commerce, and no lake connects points between which they would be useful as a practical route for navigation.”); *Ryals v. Pigott*, 580 So. 2d 1140, 1151 (Miss. 1990) (A waterway is navigable based in part on fishing being conducted in the area and “streams, large lakes[,] and small lakes with outlets into other waters.”).

68. *Utah v. United States*, 403 U.S. 9, 10 (1971); *see also* *Alaska v. United States*, 563 F. Supp. 1223, 1226 (D. Alaska 1983), *aff’d*, 754 F.2d 851 (9th Cir. 1985) (Floatplanes to and from an isolated lake is insufficient to establish

## V. ISLANDS

The State of Montana holds title to all islands that emerged after statehood from below the low-water marks of a navigable waterway by vertical accretion.<sup>69</sup> These islands are held for the financial benefit of the common public schools.<sup>70</sup> This proposition is set forth in Montana Code Annotated § 70-18-203, requiring that “[i]slands and accumulations of land formed in the beds of streams which are navigable belong to the [S]tate.”<sup>71</sup>

Furthermore, the State continues to hold title to the islands, even if the landform later attaches to the bank.<sup>72</sup> This is set forth in Montana Code Annotated § 77-1-102, which declares that “[t]he following lands belong to the [S]tate of Montana . . . all lands that at any time in the past constituted an island or part of an island.”<sup>73</sup> Furthermore, similar to riparian ownership, the State holds title to all accretions to the islands.<sup>74</sup> The Montana Supreme Court has established that the last medial line of water flowing between the island and the bank as the boundary for title purposes.<sup>75</sup>

In contrast, islands that have formed by vertical accretion in navigable waterways prior to statehood are held by the federal government.<sup>76</sup> The U.S. Supreme Court in *Texas v. Louisiana*, held that:

[i]t is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. But the rule does not reach islands or fast lands located within

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navigability for title.); *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130 (Tex. Civ. App. 1935) (Lake was unnavigable since it was “not wide enough or long enough to provide a practical route for the transportation of commodities in any direction and does not connect any points between which it would be useful as a practical route for navigation.”).

69. MONT. CODE ANN. §§ 70-18-203, 77-1-102 (2015); *Edwards v. Severin*, 785 P.2d 1022, 1023 (Mont. 1990); *Mont. Dep’t of Natural Res. & Conservation v. Abbco Invs., LLC*, 285 P.3d 532, 536 (Mont. 2012).

70. *Abbco*, 285 P.3d at 536.

71. MONT. CODE ANN. § 70-18-203.

72. *Id.* § 77-1-102.

73. *Id.*; *see also Edwards*, 785 P.2d at 1024 (holding that title remains with the State although an island is “no longer surrounded entirely by water”).

74. *Mont. Dep’t of State Lands v. Armstrong*, 824 P.2d 255 (Mont. 1992).

75. *Id.*

76. *Texas v. Louisiana*, 410 U.S. 702, 713 (1973).

such waters. Title to islands remains in the United States, unless expressly granted along with the stream bed or otherwise.<sup>77</sup>

## VI. THE PUBLIC TRUST DOCTRINE AND ADMINISTRATION OF THE MONTANA STATE LANDS

The Montana Constitution granted the Board of Land Commissioners the authority to manage and administer submerged lands of the State.<sup>78</sup> By statute, the Department of Natural Resources and Conservation (“DNRC”) manages and administers the lands under the direction and guidance of the Board of Land Commissioners.<sup>79</sup> The Montana Legislature and the Montana Constitution require that the Board of Land Commissioners, by and through the DNRC, “take all proper proceedings for the purpose of determining the title to the beds of lakes and other bodies of water.”<sup>80</sup>

The State of Montana holds title to all real property located between the low-water mark of navigable waterways in trust for the public.<sup>81</sup> However, islands that have emerged from between the low-water marks after statehood by vertical accretion within navigable waterways are held in trust for the financial benefit of the common public schools.<sup>82</sup>

The seminal case establishing and discussing the public trust doctrine is *Illinois Central Railroad Co. v. Illinois*, which held that the title to navigable waterways is “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”<sup>83</sup>

Under the Equal Footing Doctrine, “the State’s title to the riverbed vests absolutely as of the time of its admission and is not subject

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77. *Id.* (internal citations omitted); *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997).

78. MONT. CONST. art. X, § 11.

79. MONT. CODE ANN. § 77-1-301 (2015).

80. MONT. CODE ANN. § 77-1-105; MONT. CONST. art. X, § 11.

81. MONT. CONST. art. X, § 11; MONT. CODE ANN. § 77-1-102; *see also* *Pollard v. Hagan*, 44 U.S. 212, 212 (1845); *see also* *Mont. Dep’t of Natural Res. & Conservation v. Abbco Invs., LLC*, 285 P.3d 532, 536 (Mont. 2012) (holding that the low-water mark is that which is covered by the lowest tenth percentile of water flow).

82. MONT. CODE ANN. §§ 77-1-102(1), 70-18-203; *Abbco*, 285 P.3d at 536; *Edwards v. Severin*, 785 P.2d 1022, 1023 (Mont. 1990).

83. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

to later defeasance by operation of any doctrine of federal common law.”<sup>84</sup> When states are vested with title through the Equal Footing Doctrine, title to the beds of navigable waterways are subject to state law including the Public Trust Doctrine.<sup>85</sup>

The Montana Supreme Court explained this distinction in *Montana Department of Natural Resources and Conservation v. Abbco Investments, LLC*, holding that:

[w]hile equal footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the [United States] Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine [at the time of statehood].<sup>86</sup>

Therefore “[o]nce the State obtains sovereignty over navigable riverbeds, the United States has ceded all its title and thus the public trust doctrine governing the State’s disposition of such lands ‘remains a matter of state law.’”<sup>87</sup>

The public trust doctrine is codified at Montana Code Annotated § 77-1-102 and declares that the “State-owned riverbeds are public lands of the [S]tate that are held in trust for the people as provided in Article X, section 11, of the Montana [C]onstitution.”<sup>88</sup> Under the Public Trust Doctrine, the State is required to retain ownership and generally may not convey title to private individuals.<sup>89</sup>

In *Curran*, the Montana Supreme Court held that “the State can no more abdicate its trust over property in which the whole people are

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84. *Abbco*, 285 P.3d at 536 (quoting *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370–371 (1977)).

85. *Id.*; *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012).

86. *Abbco*, 285 P.3d at 536 (discussing *PPL Mont., LLC v. State*, 229 P.3d 421, 450-451, *rev'd*, 565 U.S. 576 (2012) (internal citation omitted)); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Corvallis Sand & Gravel Co.*, 429 U.S. at 376; Federal Submerged Land Act of 1953, Pub. L. No. 31, § 3, 67 Stat. 30 (codified at 43 U.S.C. § 1311(a) (2012)).

87. *Juliana v. United States*, 6:15-CV-1517, 2016 WL 1442435, at \*10–11 (D. Or. Apr. 8, 2016) (quoting *PPL Mont.*, 565 U.S. at 603).

88. MONT. CODE ANN. § 77-1-102 (2015).

89. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 157–68 (Mont. 1984).

interested, like navigable waterways and the soils under them, so as to leave them entirely under the use and control of private parties.”<sup>90</sup> Specific exceptions are carved out for improvements used for navigation, such as wharves or piers, or when a parcel may be disposed of “without impairment of the public interest in what remains.”<sup>91</sup> Therefore, the active beds of all navigable waterways are “public lands of the state that are held in trust for the people.”<sup>92</sup> The Montana Legislature has directed that income derived from the use of these beds are deposited in the State School Facility and Technology Account.<sup>93</sup>

However, islands that emerge from between the low-water marks after statehood by vertical accretion within navigable waterways are held in trust for the financial benefit of the common public schools.<sup>94</sup> This idea is set forth in Montana Code Annotated § 77-1-102(1), which declares that “[t]he following lands belong to the [S]tate of Montana to be held in trust for the benefit of the public schools of the [S]tate . . . all islands existing in the navigable streams or lakes in this [S]tate.”<sup>95</sup> The Montana Supreme Court has reiterated this in *Abbco*, holding that the “islands in question belong to the State to be held in trust for the benefit of the public schools of the state.”<sup>96</sup> However, as the authority determining title to islands is statutory and not constitutional this allows the legislature to impose certain restrictions that would be unconstitutional if imposed on other Trust lands.<sup>97</sup>

Lands held by the State for the benefit of the common public schools are trust lands.<sup>98</sup> Acting on behalf of the Board of Land Commissioners, the DNRC has a constitutional and fiduciary duty to “secure the largest measure of legitimate and reasonable advantage to the [S]tate” with regard “for the long-term financial support of education.”<sup>99</sup> Furthermore, in regard to the trust lands, the State holds these lands for

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90. *Id.* at 168 (quoting *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)).

91. *Id.*

92. MONT. CODE ANN. § 77-1-102(3); *see also PPL Montana, LLC*, 355 Mont. at 444, *cert. granted in part*, 131 U.S. 3019 (2011), *rev'd and remanded on other grounds*, 132 U.S. 1215 (2012).

93. MONT. CODE ANN. §§ 77-1-103(4), 17-3-1003(5), 20-9-516(2)(b).

94. MONT. CODE ANN. §§ 77-1-102(1), 70-18-203; *Mont. Dep't of Natural Res. & Conservation v. Abbco Invs., LLC*, 285 P.3d 532, 536 (Mont. 2012); *Edwards v. Severin*, 785 P.2d 1022, 1023 (Mont. 1990).

95. MONT. CODE ANN. § 77-1-102(1).

96. *Abbco*, 285 P.3d at 536 (internal citations omitted).

97. MONT. CODE ANN. § 77-1-405.

98. *Id.* § 77-1-101(9).

99. *Id.* § 77-1-202.

the financial benefit of the State schools.<sup>100</sup> Courts have held that for the school trust lands the “beneficiaries do not include the general public, other governmental institutions, nor the general welfare of this state. Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people.”<sup>101</sup>

## VII. RIPARIAN BOUNDARY FOR TITLE PURPOSES

At statehood, Congress granted to the states title to the active beds of navigable waters within their boundaries under the Equal Footing Doctrine.<sup>102</sup> Congress granted each state title to the navigable waterways up to the high water mark.<sup>103</sup>

In *Gibson v. Kelly*, the Montana Supreme Court held that the riparian land owners own the surface to the low-water mark, subject to certain limitations.<sup>104</sup> This has been codified at Montana Code Annotated § 70-16-201.<sup>105</sup> However, the State of Montana has retained an easement for the public use between the low-water mark and the high-water mark of navigable waterways.<sup>106</sup> This is commonly referred to as the “angler’s easement.”

The distinction is discussed in *Curran*, holding that:

[w]hile section 70–16–201, MCA, provides for private ownership of the adjacent lands to the low-water mark, the “angling statute,” section 87–2–305, MCA, recognizes a public right to access for fishing purposes to the high water mark. Further, in *Gibson v. Kelly* . . . this Court recognized a public right to access for fishing and navigational purposes to the point of the high water mark. Therefore, we hold that the public has a right to

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100. *Id.*

101. *Kanaly v. State By & Through Janklow*, 368 N.W.2d 819, 824 (S.D. 1985) (internal quotations omitted) (quoting partially *United States v. Ervien*, 246 F. 277, 280 (8th Cir. 1917), *aff’d*, 251 U.S. 41 (1919)).

102. *Mont. Dep’t of Natural Res. & Conservation v. Abbco Invs., LLC*, 285 P.3d 532, 536 (Mont. 2012).

103. *Rapanos v. United States*, 547 U.S. 715, 725 (2006); 33 C.F.R. § 328.3 (2016); *United States v. Gossett*, 277 F. Supp. 11 (C.D. Cal. 1967); 43 U.S.C. § 1301 (2012).

104. *Gibson v. Kelly*, 39 P. 517, 520 (Mont. 1895); *see also Herrin v. Sutherland*, 241 P. 328, 330 (Mont. 1925).

105. MONT. CODE ANN. § 70-16-201.

106. *Id.* § 87-2-305.

use the state-owned waters to the point of the high water mark except to the extent of barriers in the waters. In case of barriers, the public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights.<sup>107</sup>

As set forth above, the riparian owner does not have an unencumbered fee simple ownership of the surface rights between the low-water mark and the high-water mark. Furthermore, the mineral ownership between the low-water mark and the high-water mark has not been litigated in Montana.

Recently, in *Reep v. State*, the North Dakota Supreme Court held that under a statute similar to Montana's statute, the State owns the minerals up to the high water mark based on the North Dakota's constitutional anti-gifting clause.<sup>108</sup> The North Dakota Supreme Court reaffirmed that:

[b]efore North Dakota was admitted to the Union, the United States held the beds of navigable waters in the Dakota Territory from high watermark to high watermark in trust for the future [S]tate. Upon admission to the Union, North Dakota was entitled to sovereign ownership of the beds of navigable waters from high watermark to high watermark under the equal footing doctrine. Upon entering the Union on equal footing with the established States, the 'rights of riparian or littoral proprietors in the soil below high water mark of navigable waters [were] governed by the local laws.' Under those principles, North Dakota could 'resign to the riparian proprietor rights which properly belong to [it] in [its] sovereign capacity,' and was free to allocate property interests in the beds of navigable waters below the ordinary high watermark. However, North Dakota could not totally abdicate its interest to private parties because it held that interest, by virtue of its sovereignty, in trust for the public.<sup>109</sup>

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107. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984).

108. *Reep v. State*, 841 N.W.2d 664, 667 (N.D. 2013).

109. *Id.* at 669–70 (quoting *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 542 (N.D. 1994) (internal citations omitted)).



The North Dakota Supreme Court went on to distinguish previous holdings and statutes by holding that “[t]hose cases and authorities from other low-watermark states do not control the issue about ownership of mineral interests in the shore zone in North Dakota because they do not involve an analysis under an anti-gift clause like N.D. Const. [A]rt. X, § 18.”<sup>110</sup>

Similar to the North Dakota’s constitutional anti-gift clause the Montana Constitution demands that “[n]o such land or any estate or interest therein shall ever be disposed of . . . until the full market value of the estate or interest disposed of . . . has been paid or safely secured to the [S]tate.”<sup>111</sup> Furthermore, the 1889 Montana Constitution has almost identical language as North Dakota’s Supreme Court quoted as the anti-gifting provision.<sup>112</sup> However, as of the date of this publication, this issue has not been brought before the Montana Supreme Court.

### VIII. ACCRETION, EROSION, AND AVULSION

Riparian land owners lose land through the natural process of erosion and gain land through accretion.<sup>113</sup> Accretion and erosion are generally defined when a river “gradually and imperceptibly changes its course over a period of time, resulting in sedimentary deposits on one bank along the water line.”<sup>114</sup> A river that changes course by imperceptible degrees, or a grain by grain movement of particles, is described as erosion or accretion.<sup>115</sup> Erosion removes all remnants of the former landform, whereas accretion results in a completely new landform. In *Harding v. Savoy*, the Montana Supreme Court held that “the property boundary shifts with the water line.”<sup>116</sup>

Although the riparian landowners may gain or lose land through accretion and erosion, the State of Montana at all times continues to hold title to the active riverbeds of navigable rivers despite river movement, including the minerals thereunder.<sup>117</sup> In *Jackson v. Burlington Northern*

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110. *Id.* at 675.

111. MONT. CONST. art. X, § 11; MONT. CONST. of 1889 art. XVII, § 1.

112. Compare MONT. CONST. of 1889, art. XIII, § I, with N.D. CONST. art. X, § 18.

113. *Harding v. Savoy*, 100 P.3d 976, 985 (Mont. 2004).

114. *Id.*

115. *Jackson v. Burlington N. Inc.*, 667 P.2d 406, 407 (Mont. 1983).

116. *Id.*

117. MONT. CONST. art. X, § 11; MONT. CODE ANN. § 70-18-201 (2015); *Jackson*, 667 P.2d 406; see generally *Pollard v. Hagan*, 44 U.S. 212 (1845).

*Inc.*, the Montana Supreme Court specifically held that even severed mineral estates are subject to the doctrine of accretion and erosion and that the current location and acreage of the active riverbed controls.<sup>118</sup>

Avulsion, on the other hand, generally occurs “when a river suddenly changes its channel to form a new one.”<sup>119</sup> Accretion and erosion result in a change in ownership, avulsion generally does not.<sup>120</sup> Title to real property does not change if the parcel remains “identifiable” before and after an avulsive event.<sup>121</sup> With avulsion, remnants of the old landform are distinct and identifiable before and after the event occurs. Without evidence to the contrary, courts have held that “it is presumed that changes in river banks are due to accretion rather than avulsion.”<sup>122</sup>

The correct inquiry is not the rate of change, but the process by which the change occurred.<sup>123</sup> Although the location of the river may change, the riparian land owners gain land by accretion and lose land by erosion.<sup>124</sup> No “abandoned channel” exists as the river moved over time. However, if a river has changed locations by a sudden and violent process and establishes a new channel, this is described as avulsion.<sup>125</sup> An avulsive event will create an abandoned channel.<sup>126</sup> This “abandoned channel,” often described as the “old channel” no longer lies under the active river bed.

Generally, the State of Montana holds title to the abandoned channels of navigable rivers located within the United States surveyed meandered lines where the avulsive event occurred between February 19, 1937 (the date of enactment of Montana Code Annotated § 77-1-102) and April 14, 2013 (when it was repealed). For an avulsive event that causes an abandoned channel after April 15, 2013, Montana Code Annotated § 77-18-206 sets forth the process in which the riparian land owners may claim the newly formed abandoned channel.

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118. *Jackson*, 667 P.2d at 409.

119. *Harding*, 100 P.3d at 985.

120. MONT. CODE ANN. § 70-18-206; *Harding*, 100 P.3d at 985; *McCafferty v. Young*, 397 P.2d 96, 99 (Mont. 1964).

121. *Mont. Dep’t of State Lands v. Armstrong*, 824 P.2d 255, 257 (Mont. 1992); *McCafferty*, 397 P.2d at 99.

122. *McCafferty*, 397 P.2d at 99.

123. *See, e.g., id.* at 96; *Mont. Dep’t of State Lands*, 824 P.2d 255.

124. *McCafferty*, 397 P.2d at 99; *Mont. Dep’t of State Lands*, 824 P.2d at 258-59.

125. *McCafferty*, 397 P.2d at 99.

126. *Id.*

## IX. CONCLUSION

It is essential to determine the exact location of property boundaries. However, due to the ephemeral nature of riparian boundaries, an additional body of law has developed specific to riparian rights. In this context, Montana's water boundaries, are influenced by the Equal Footing Doctrine and Navigability Tests: steam boat, log floating, recreational use, use by American Indians, fur trappers, and traders, and hydroelectric generation. Additionally, lakes and islands encompass their own rules. Deeper reflection on these boundary issues allows for future clarity in protecting Montana's public trust lands and defining the ever changing riparian boundaries in Montana.